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Southern District of Texas
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§ Civil Action No. H-01-3624 **(Consolidated)**
This Document Relates To:	§ CLASS ACTION
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., et al., Defendants.	§
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. KENNETH L. LAY, et al., Defendants.	§

LEAD PLAINTIFF'S OPPOSITION TO DEFENDANT CITIGROUP INC.'S SUMMARY JUDGMENT MOTION AND, ALTERNATIVELY, REQUEST FOR DENIAL OR CONTINUANCE PURSUANT TO RULE 56(f)

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I. Introduction

The motion for summary judgment filed by defendant Citigroup Inc. ("Citigroup") seeks dismissal on the basis that a reasonable jury could only conclude this case is one of mistaken identity. Filed within days of the motions for summary judgment by CIBC and Bank of America, which were recently denied by the Court, Citigroup's Motion raises the same failed grounds for dismissal as those raised by the other defendants. Lead Plaintiff respectfully submits that the Court should also dismiss Citigroup's motion.

The evidence will demonstrate Citigroup is subject to primary liability for federal securities law violations committed by Citigroup individually and through its organization. *See infra* §III. The evidence will also demonstrate Citigroup is subject to liability, as a control person for federal securities law violations, and under enterprise liability and common law agency principles. *See infra* §§III.C, IV, V. As this Court held in its Order dated May 22, 2003:

> Lead Plaintiff raises several legal theories for imposing liability against Bank of America, CIBC, and [their] subsidiaries. These theories are applicable to the federal statutes regulating the sale and purchase of securities, require fact-intensive inquiries generally inappropriate for summary judgment, and do not require piercing the corporate veil: control person liability under §15 of the 1933 Act and §20(a) of the 1934 Act; enterprise liability; and common-law agency principles. Lead Plaintiff also underlines a number of admissions by these Defendants and presents some evidence, both of which raise issues of fact about the control exerted by the parent company over the subsidiaries.

Order at 2. Citigroup is bound by the same legal principles (above) found applicable by the Court. And the admissions and the evidence posited by Lead Plaintiff here, as with Bank of America and CIBC, demonstrate genuine issues of material fact. For all the reasons stated herein, Citigroup's motion should be denied.

II. Rule 56(c) Legal Standards

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper only when "'there is no genuine issue as to any material fact' and 'the moving party is entitled to judgment as a matter of law.'" *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 500 (9th Cir. 1992) (citation omitted).[1] To support a motion for summary judgment, "the moving party [has] the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material lodged must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Not only "must there be no genuine issue as to the evidentiary facts, but there must also be no controversy regarding the inferences to be drawn from them." *Donahue v. Windsor Locks Bd.*, 834 F.2d 54, 57 (2d Cir. 1987); *accord Anderson*, 477 U.S. at 254-55.[2] Summary judgment is not appropriate "where contradictory inferences may reasonably be drawn from undisputed evidentiary facts." *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1334 (9th Cir. 1980).

Movant "bears a ***substantial*** burden in showing that it is entitled to summary judgment." *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 469 (1992). A defendant meets that burden only "when he '***conclusively show[s]*** that the facts upon which [the plaintiff] relied to support his allegation were not susceptible of the interpretation which he sought to give them.'" *Id.* at 2083 n.14. A district court "is not entitled to weigh the evidence and resolve disputed underlying factual issues." *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1161 (9th Cir. 1992). When "'direct evidence produced by the moving party conflicts with direct evidence produced by the nonmoving party, the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that

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[1] *Accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Here, as elsewhere, emphasis is added and citations and footnotes are omitted unless otherwise noted.

[2] "[W]hen intent is at issue, the court should be cautious in granting summary judgment. In such a case, the moving party bears a heavier burden of showing that there exists no genuine issue of material fact." *Admiralty Fund v. Jones*, 677 F.2d 1289, 1295 (9th Cir. 1982).

fact.'" *McLaughlin v. Liu*, 849 F.2d 1205, 1208 (9th Cir. 1988). The non-movants' "version of any disputed issue of fact thus is presumed correct." *Eastman Kodak*, 504 U.S. at 456.

Citigroup's burden is also higher than ordinary because of the issues that it seeks to resolve. As the Fifth Circuit held in *Guillory v. Domtar Indus.*, 95 F.3d 1320, 1326 (5th Cir. 1996), "summary judgment is rarely proper when an issue of ***intent*** is involved."[3] Resolving a defendant's liability for participation in a ***scheme*** is usually inappropriate and rare, and should instead depend on the facts "developed at trial." *Richardson v. MacArthur*, 451 F.2d 35, 40 (10th Cir. 1971). *See also infra* at 14. The issue of ***control*** is also a fact-intensive question more appropriate for a jury rather than for determination on a motion for summary judgment. *See, e.g., In re Executive Telecard, Ltd. Sec. Litig.*, 913 F. Supp. 280, 286 (S.D.N.Y. 1996); *infra* at 18-19. The question of ***agency*** is inherently fact specific and ordinarily an issue for the jury. *See, e.g., TransAmerica Leasing, Inc. v. La Republica de Venez.*, 200 F.3d 843, 849 (D.C. Cir. 2000); *infra* at 21. Similarly, ***veil piercing*** is "heavily fact-specific" and generally must be submitted to a jury. *United States v. Jon-T Chem., Inc.*, 768 F.2d 686, 694 (5th Cir. 1985). *See also infra* at 22.

III. The Evidence Will Demonstrate Citigroup Is Subject to Primary Liability for Securities Law Violations

Citigroup's Motion fails to appreciate the crux of the case pleaded against it and the other banks. As the Court's Orders have demonstrated, Citigroup and other bank defendants are potentially subject to liability under the entire ambit of prohibitions defined by §10(b) and Rule 10b-5. Piercing the corporate veil simply is not relevant to whether Citigroup is subject to primary or secondary liability under the securities laws. Even parsing Citigroup into discrete units as Citigroup would have the Court do, fails to rescue Citigroup from liability. Citigroup violated the securities laws through its organization, regardless of whether the underlying conduct was made in Citigroup's name or in the name or entities owned and controlled by Citigroup.

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[3] *Accord EEOC v. Home Ins. Co.*, 672 F.2d 252, 257 (2d Cir. 1982) ("summary judgment is rarely appropriate where the moving party's state of mind is a material issue").

A. Acts Committed by Citigroup and its Organization

In its Order entered December 20, 2002, this Court specifically held Citigroup could be subject to primary liability under §10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, for participating in a course of business or a device, scheme or artifice that operated as a fraud. *See In re Enron Corp. Sec.*, 235 F. Supp. 2d 549, 577-94, 701-02 (S.D. Tex. 2002). In so ruling, this Court recognized that those who "'directed' or 'contrived'" fraudulent acts are liable under §10(b), and thoroughly discussed the relevant law. *Id.* at 579; *see also id.* at 577-94. Citigroup claims that it could not have violated §10(b) because the subsidiaries and affiliates in its enterprise are distinct entities, and suggests that it is mere coincidence those entities engaged in the transactions that gave rise to Lead Plaintiff's claims.

The evidence will demonstrate this is ***not*** the case. Citigroup's table of "undisputed facts" fails to show the absence of any genuine issue as to its ownership and control of the entities that committed the acts attributed to Citigroup. *See* Motion at 3-6. Further, the affidavit submitted by Citigroup is notable for what it fails to say. The Affidavit of Kenneth S. Cohen, Assistant Secretary of Citigroup Inc., lists in summary fashion the allegations in the Consolidated Complaint prefaced by a statement that Citigroup did not do any of the things alleged. *See, e.g.*, Cohen Affidavit at 2 ("Citigroup did not administer the financial affairs of LJM2;" "Citigroup, its employees and 'top executives' did not invest in LJM2, either secretly or otherwise."). ***Critically, the Affidavit does not deny that a Citigroup entity engaged in the challenged conduct; nor does it deny that Citigroup directed the action of these entities.*** While such weakly worded denials of culpability should be particularly scrutinized by the Court at such an early stage in these proceedings, they ring particularly hollow in light of facts adduced by Congressional and court-appointed investigators.

Citigroup's involvement in the Enron fraudulent scheme was massive and Citigroup received hundreds of millions of dollars in fees and interest income alone as a result. The breadth of Citigroup's subsidiaries' involvement in the Enron fraudulent scheme would strongly support the finding of a reasonable jury that the many tentacles of this corporate octopus were coordinated by a single head – Citigroup itself. The number of Citigroup's separate subsidiaries involved in the fraudulent transactions at the heart of this fraud – coupled with documents evidencing the fact that

these subsidiaries acted as a coordinated whole – is particularly damning. The following are examples of Citigroup's participation in the scheme.

1. Citigroup, Through its Travelers and Citibank Subsidairies, Invested in LJM2

Citigroup suggests that it "did not invest in LJM2, either secretly or otherwise." Motion at 3. However, David Bushnell, the Managing Director of Global Risk Management at Citigroup, stated otherwise while providing sworn testimony to a Congressional subcommittee investigating the Enron fraud. When asked the question: "Citigroup invested bank funds – I imagine Citibank funds – in at least one of these partnerships, LJM2. Is that true?" Mr. Bushnell stated: "Yes, it is, Senator." *See* Ex. 1.[4] This investment was managed and approved by an investment group at the Citigroup level (not a subsidiary level) run by Citigroup's Todd Thompson. *Id.* at 114. Internal Citigroup documents show that that money was invested through Citigroup's Travelers and Citibank entities. *See* Ex. 2

And investors in LJM2 were privy to substantial information concerning the corporate looting and rampant conflicts of interests that resulted in Enron's collapse. *See, e.g.*, ¶¶23-28; *see also* Ex. 3 (noting fund will generate superior returns because principals, who are all senior Enron executives, are on both sides of the transactions). Indeed, an internal Citigroup memo (created by ***Citigroup***, not its subsidiaries) clearly shows that Citigroup knew LJM2 was used for fraudulent purposes: "In committing to LJM2, we understood that the Fund would be relying on Enron directly for transactions .... Additionally, ***LJM2 principals argue that Enron would make the Fund whole should it suffer losses because the vehicles that the Fund invests in are critically important to Enron's ability to manage its earnings***." *See* Ex. 4.

2. Citigroup's Analyst Reports

Citigroup contends that "Citigroup did not issue, or in way contribute to, the analyst reports attributed to Citigroup cited in the Complaint." Motion at 3. However, Citigroup's own analyst reports state otherwise. For example, the Consolidated Complaint cites an October 20, 1999 report

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[4]All exhibits are attached to the Appendix of Exhibits in Support of Lead Plaintiff's Opposition to Defendant Citigroup Inc.'s Summary Judgment Motion and, Alternatively, Request for Denial or Continuance Pursuant to Rule 56(f), filed herewith.

issued by Citigroup's subsidiary Salomon Smith Barney, Inc. ¶186. That analyst report, like others cited in the Complaint, explicitly states that the opinions expressed therein are not just the opinion of the analyst or even just the opinion of Salomon Smith Barney but represents the beliefs and opinions of Citigroup as a whole. The report states:

> Salomon Smith Barney is a U.S. registered broker-dealer. It is a member of Citigroup Inc. and is affiliated with Citibank, N.A. and its subsidiaries and branches worldwide (collectively "Citibank")....
>
> Salomon Smith Barney ***including its parent, subsidiaries and/or affiliates*** ("the Firm"), may from time to time perform investment banking or other services for, or solicit investment banking or other business from, any company mentioned in this report....
>
> ***Although the statements of facts in this report have been obtained from and are based upon sources the Firm believes to be reliable, we do not guarantee their accuracy, and any such information may be incomplete or condensed. All opinions and estimates included in this report constitute the Firm's judgment as of the date of this report and are subject to change without notice.***

Ex. 5. By itself, Citigroup's admission is enough for a reasonable jury to find that these analyst reports are attributable to Citigroup and that Citigroup is subject to primary liability for the false and misleading statements made therein. Of course, plaintiffs do not rely solely on this admission.

3. Citigroup's Fishtail, Bacchus, and Sundance Transactions Illustrate Citigroup Approved the Structuring, Funding and Execution of Enron Transactions From the Top of its Organization

Citigroup measured its risk firm wide and approved the structuring, funding and execution of Enron transactions from the top of its organization. The series of transactions known as Fishtail, Bacchus and Sundance is illustrative.

Internal Citigroup and Citigroup affiliates' documents show that Citigroup knew the Fishtail/Bacchus/Sundance transactions were fraudulent and intended to falsify Enron's reported earnings and cash flow figures. *See* Ex. 6 (Project Bacchus "represents 16.3% and 22.4% of [Enron's] operating cash flow and net income, respectively, for the 12 months ending December 31, 1999. Bachus represents 22.2% and 11.6% of cash EBITDA for nine months ended 9/30/00 and twelve months ended 12/31/00, respectively." "***Based on 1999 numbers would appear that Enron significantly dresses up its balance sheet for year end; suspect we can expect the same this year.***"); Ex 7 (e-mail by James Reilly of Salomon Smith Barney stating "***Bacchus is part of a program***

designed to ensure that Enron will meet its YE debt/cap targets ...."). As described by the U.S. Senate Permanent Subcommittee on Investigations:

> Fishtail, Bacchus, and Sundance, took place within an approximate six month period from December 2000 to June 2001.... ***[W]hen considered as a whole, the three transactions resulted in a disguised, six-month loan advanced by Citigroup to facilitate Enron's deceptive accounting***. In effect, Enron transferred its assets to a sham joint venture, Fishtail; arranged, in the Bacchus transaction, for a shell company to borrow $200 million from Citigroup to "purchase" Enron's Fishtail interest, without disclosing that Enron was guaranteeing the full purchase price; used the sham sale revenue to inflate its year-end 2000 earnings by $112 million; and then quietly returned the $200 million to Citigroup six months later via another sham joint venture, Sundance. The result was that the three transactions enabled Enron to produce misleading financial statements that made Enron's financial condition appear better than it was. ***Senior Citigroup officials strongly objected to Citigroup's participation in one of the transactions, warning: "The GAAP accounting is aggressive and a franchise risk to us if there is publicity." Citigroup nevertheless proceeded and played a key role in advancing this transaction, which could not have been completed without the funding and active support of a large financial institution.***

Ex. 8 at 3.

Dave Bushnell, who testified before Congress and identified himself as the Managing Director of Global Risk Management at Citigroup, reviewed the Sundance leg of the Bacchus/Fishtail/Sundance transactions and wrote a memo regarding the transaction on Citigroup letterhead, dated May 30, 2001. *See* Ex. 9. The "Senior Citigroup official" referenced by the Congressional report is Mr. Bushnell, who "refused to sign-off on" Sundance and stated that ***Citigroup's*** "Risk Management [Division] has not approved this transaction" because the "GAAP accounting is aggressive and a franchise risk." *Id.* Ultimately, however, Citigroup authorized the Sundance (and Bacchus and Fishtail) transactions even though Citigroup knew they were fraudulent. As such, Citigroup is primarily and directly liable under the federal securities laws.

4. Citigroup and its Subsidiaries – Citicorp, Citibank, N.A., CXC Incorporated, Salomon Smith Barney, Inc. and Salomon Brothers International Limited – Structured, Funded and Executed Prepay Transactions and Related Securities Offerings to Falsify Enron's Reported Financial Results and Provide Enron Secret Loans

Citigroup asserts the purportedly undisputed facts that "Citigroup did not enter into any prepaid swaps with Enron" and that "Citigroup did not structure or sell any Enron credit-linked notes to 'lay off economic exposure to Enron' or otherwise." Motion at 3-4. But Enron's bankruptcy

examiner, Congressional investigators, and documents released by Congressional investigators show that Citibank, Citicorp, CXC Inc., Salomon Smith Barney, Inc. ("Salomon") and Salomon Brothers International Limited ("Salomon International") worked together with and under the direction of Citigroup to create these fraudulent transactions.

In order to appreciate the extent to which Citigroup and its subsidiaries coordinated their actions in furtherance of the scheme, each transaction – while independently fraudulent – must be viewed in context of associated transactions. For instance, the connection between Projects Roosevelt, Truman and Delta/Yosemite I are illustrative.

a. Roosevelt and Truman

Roosevelt and Truman were both phony prepay transactions that closed in 1998 and 1999. Citigroup subsidiaries Citicorp, Citibank, CXC Inc., and Salomon all worked on Roosevelt and Truman. *See, e.g.*, Ex. 10. A December 1998 Citicorp loan approval memorandum in support of the Roosevelt prepay states: "The prepaid forward structure will allow Enron to raise funds without classifying the proceeds from this transaction as debt (it is accounted for as 'deferred revenue')." *Id.* However, it was debt. *See, e.g.*, Ex. 11 at 1 ("the basic transaction fails as a prepay and what remains is a loan").

Indeed, Citigroup and its subsidiaries and employees knew the Roosevelt and Truman prepays were really debt and purposefully omitted specific facts from the Roosevelt and Truman paperwork so as to avoid compliance with accounting regulations. *See, e.g.*, Ex. 12 ("altho[ugh] they have agreed to prepay by 9/30, the papers cannot stipulate that as it would require recategorizing as simple debt"); Ex. 13 ("paperwork cannot reflect their agreement to repay the $190 MM as it would unfavorably alter the accounting"). Citigroup's subsidiaries purposefully structured the fraudulent prepays, including Roosevelt and Truman, so that Enron could falsify its financial results and to make it "impossible for investors, analysts, and other financial institutions to uncover the true level of Enron's indebtedness." Ex. 11 at B-5.

b. Yosemite and Citigroup's Phony Delta Prepays

Yosemite I was structured by the Citigroup subsidiaries to pay-off Enron's obligations to Citibank under Roosevelt and Truman with proceeds raised from the capital markets *See* Ex. 14

("Citibank expects to eliminate the Enron exposure from both Truman and Roosevelt via the $1.5 billion capital markets transaction, 'Yosemite', arranged by Citibank/SSB."); Ex. 15, Annex 2 at 8. Yosemite I defeased Citigroup's risk in its massive phony Delta prepaid swaps through Salomon's issuance of $750 million 8.25% Series 1999-A Linked Enron Obligations (otherwise known as Credit Linked Notes). *Id.* at 4, 10.

Citigroup asserts that: "Citigroup did not enter into any prepaid swaps with Enron using Delta Energy Corp. ('Delta'). Moreover, Citigroup does not ***directly or indirectly*** own, or have any interest in, Delta." Motion at 3. Internal Citigroup (not its subsidiaries) documents say otherwise. One document, noting that the "SEC has initiated a formal investigation into the dealings of Enron" that could focus on "Enron's treatment for off balance sheet debt and revenue recognition" notes that "***Citigroup [has] Franchise Issues***" stemming from the fact that "***Citigroup has originated Enron structured transactions that provide off balance sheet and/or non debt categorized financings" including $2.4 billion in "Prepays underwritten/placed into public markets***." Ex. 2.

Whether or not Citigroup indirectly owns Delta (a matter of dispute), there is no dispute that Citigroup indirectly ***controls*** Delta. Concerning Delta, the Enron bankruptcy examiner found that "Citibank effectively controlled it" and that Delta "'had no employees, no office, and no independent business operations'" and that "Citibank 'provided the legal advice, paperwork, and financial support for [Delta] to participate in the trades.'" Ex. 15, Annex 2 at 38-39. Furthermore, in sworn testimony before a Senate subcommittee investigating the Enron fraud, Richard Caplan, representing Citigroup, stated Citibank formed Delta for the purpose of acting as a shell for Citibank prepay transactions and that Citibank "put in place" certain "control mechanisms" to prevent Delta from "go[ing] off and do[ing] business with other parties." *See* Ex. 1 at 105-10. That Citigroup indirectly controls Delta through its Citibank subsidiary is enough to demonstrate the accounting treatment of the Enron/Citigroup prepays was improper. *See, e.g.*, Ex. 11 at A-7-8 (accounting standards require "independence of the third party from the bank" and noting that the "'purchaser of the gas must have an ordinary business reason for purchasing the gas, not in-substance be a special purpose entity'").

Consequently, "***as a result of Yosemite I, Enron understated its debt at December 31, 1999 by $800 million***." Ex. 15, Annex 2 at 1. Yosemite I was structured by Citibank and Salomon. *See,*

e.g., Ex. 16 (November 3, 1999 e-mails concerning Yosemite among Salomon and Citibank employees asking, among other things, "if we have structured a transaction to help a client avoid consolidation, how can we turn around and take the position that they should be consolidating?"). Three later Yosemite transactions worked similarly, with Citigroup subsidiaries coordinating efforts to provide Enron with more and more cash to falsify its financial disclosures through a fraudulent prepay and its associated public offering of Credit Linked Notes. *See* Ex. 15, Annex 3, 4, and 5 (discussing Yosemite II, Yosemite III, and Yosemite IV).[5]

The Yosemite transactions were clearly created by Citigroup and structured by Citigroup to falsify publicly reported financial results. Indeed, a Citibank, N.A. and Salomon-created presentation titled "Credit-Linked Notes" proudly boasts about the Yosemite deals and Enron Credit Linked Notes issued by Citigroup and declares that "***Citigroup has developed and executed a Credit Linked Notes (CLNs) structure that" "offer[s] significant accountant rating agency benefits" and that has the benefits of "[e]liminat[ing] the need for Capital Market disclosure, keeping structure mechanics private***." *See* Ex. 18 (specifically listing numerous Enron transactions as indicative of Citigroup's abilities). The presentation also recognizes that the CLNs enable ***Citigroup*** to preserve its own liquidity and allows the corporate borrower to "improve cash flows from operations." *Id.*

Finally, Citigroup and its subsidiaries knew or recklessly disregarded that these transactions were meant to hide Enron's true debt level and/or falsify its cash flows from operations. *See, e.g.*, Ex. 11 at D-10 (citing internal correspondence); Ex. 15, Annex 2 at 26, 30 (citing internal documents and concluding Citigroup entities knew Yosemite transactions were loans and were structured specifically so as to not be accounted for as such). Indeed, when Salomon assessed the Yosemite I transaction in October 1999 it believed that Enron's true debt to capitalization ratio – defined as publicly reported GAAP debt plus off-balance sheet debt known to Moody's plus debt known to Salomon – was 65% even though Enron's publicly reported GAAP Debt/Capitalization ratio was only 49% and the Moody's reported level was 56%. *See* Ex. 19.

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[5]Salomon International's role in the prepays included selling Credit Linked Notes to fund these later Yosemite transactions. *See, e.g.*, Ex. 17.

A similar assessment made in connection with a Yosemite CLN offering – which analysis was delivered to Rona Pocker, a senior executive in Citigroup's Audit Risk & Credit Review Department – found Enron's debt to capitalization ratio to be approximately 62.6% versus a publicly reported GAAP debt level of only 44.5%. *See* Ex. 20; *see also* Ex. 21 (report on Yosemite II transaction provided to Citigroup's Tom Doyle and noting that Enron's prepays and other off balance sheet transactions should be considered in assessing Enron's capitalization to debt ratio). Thus, there is certainly a triable issue of fact as to whether Citigroup knew or recklessly disregarded that its actions and those it directed its subsidiaries to perform were furthering the Enron fraudulent scheme and worked to deceive and defraud investors. Further, through their work on the Yosemite transactions, it is clear that the Citigroup entities learned material non-public information concerning Enron's true debt levels, which they did not disclose prior to selling Enron securities or issuing analyst reports urging investors to buy Enron publicly traded securities.

5. Citigroup Structured, Funded and Executed "Minority Interest Transactions" to Falsify Enron's Reported Financial Results Through its Subsidiaries Citibank, N.A., Citibank North America, Inc., Citicorp North America, Inc., and CXC Inc.

Citigroup's participation in three minority interest transactions,[6] projects Rawhide, Nighthawk and Nahanni, demonstrate that the fraudulent Enron scheme was carried out by, among others, many Citigroup entities working together at the direction of Citigroup. Each of these transactions was purposefully structured to secretly provide Enron with cash to prop up its house of cards, and each failed to comply with GAAP.

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[6]A minority interest financing is a transaction in which a financed amount (*i.e.,* the loan from Citigroup and/or its subsidiary) is reflected on the sponsor's (*i.e,*. Enron's) balance sheet as a minority interest in a consolidated subsidiary rather than as debt. To elaborate, the transactions worked like this: 1) Enron contributed assets to a subsidiary, but maintained *de facto* control of the assets and the assets remained on Enron's consolidated financial statements because the subsidiary was owned by Enron; 2) A minority shareholder (which is not consolidated on Enron's books) in that Enron subsidiary contributed money to the Enron subsidiary – the minority shareholder borrowed the money from Citigroup and/or its subsidiary and Enron secretly guaranteed Citigroup and/or its subsidiary that this minority shareholder would pay back the loan; and 3) The subsidiary then lent the money to Enron, but since this was an intra-company loan it was considered a wash on Enron's financial statements. The result: a loan to Enron from Citigroup that did not appear as debt on Enron's financial statements.

"Enron's quality of earnings problem – the gap between net income and funds flow from operations – was apparently a serious problem by the end of 1999. With the help of Citibank, in December 1999, Enron closed a slightly modified minority interest financing known as Project Nahanni, that appears to have been ***designed solely to permit Enron to record $500 million in cash flow from operating activities*** ...." Ex. 22 at 27. "[T]hrough Project Nahanni, Enron borrowed $500 million, bought Treasury securities with it, sold the Treasury securities, recognized $500 million of operating cash flow, and repaid the loan – all within 30 days straddling its 1999 year end – and without reflecting the loan as debt on its financial statements." *Id.* at 28. "***The Nahanni transaction was one of Enron's clearest violations of GAAP***." *Id.* at n.74. Citigroup knew that this transaction served no business purpose and was created for the sole purpose of falsifying Enron's reported financial results. A Citigroup presentation on Citigroup's exposure to Enron loans stated that the transaction was "'for year-end window dressing.'" Ex. 23, Annex 3 at 2. Citigroup knew Enron was using Nahanni to boost its free cash flow from operations. *See id.* at 16-17 (quoting internal documents). While Citigroup knew Enron was "dressing up" its financial statements, at least three separate Citigroup subsidiaries worked ***together*** on Project Nahanni, including: Citibank, N.A., Citicorp North America, Inc., and CXC Inc. *See id.*, Annex 3 at 6 n.31.

Project Nighthawk was an earlier version of Project Nahanni. "Project Nighthawk enabled Enron to raise over $500 million to repay Enron corporate debt .... The result was a 9% improvement in Enron's debt-to-equity ratio at year-end 1997." *Id.*, Annex 1 at 2. "The Examiner conclude[d] that Nighthawk should have been consolidated with Enron and its indebtedness included in Enron's consolidated financial statements, and that Enron's failure to do so did not comply with GAAP." *Id.* at 13. At least three separate Citigroup subsidiaries worked ***together*** on Project Nighthawk, including: Citibank, N.A., Citicorp North America, Inc., and CXC Inc. *Id.* Project Nighthawk also ties Citigroup to the fraudulent scheme because $485 million loaned by Citigroup's CXC affiliate to Nighthawk was used to fund Whitewing. *Id.* at 3, 5. The Complaint alleges, and the evidence will show, that Whitewing was central to the defendants' fraud. *See* ¶¶28(a), 28(d), 469, 497, 499, 502, 505, 607, 855.

Project Rawhide closed in December 1998 and raised $750 million for Enron without including this debt on Enron's consolidated financial statements. Ex. 23, Appendix I at 7. Project Rawhide did not comply with GAAP; "Rawhide should have been consolidated in Enron's financial statements" during the Class Period. *Id.* at 59-60. At least four separate Citigroup subsidiaries worked ***together*** on Project Rawhide, including: Citibank, N.A., Citibank North America, Inc., Citicorp North America, Inc., and CXC Inc. *Id.* at 23 n.75 and 28. Notably, Citigroup internal documents (not those of its subsidiaries) assessing Citigroup's exposure to its Enron loans recognize that Rawhide is closely connected with the LJM2 and JEDI I – two entities at the heart of plaintiffs' Complaint and central to the defendants' fraudulent scheme. *See* Ex. 2.

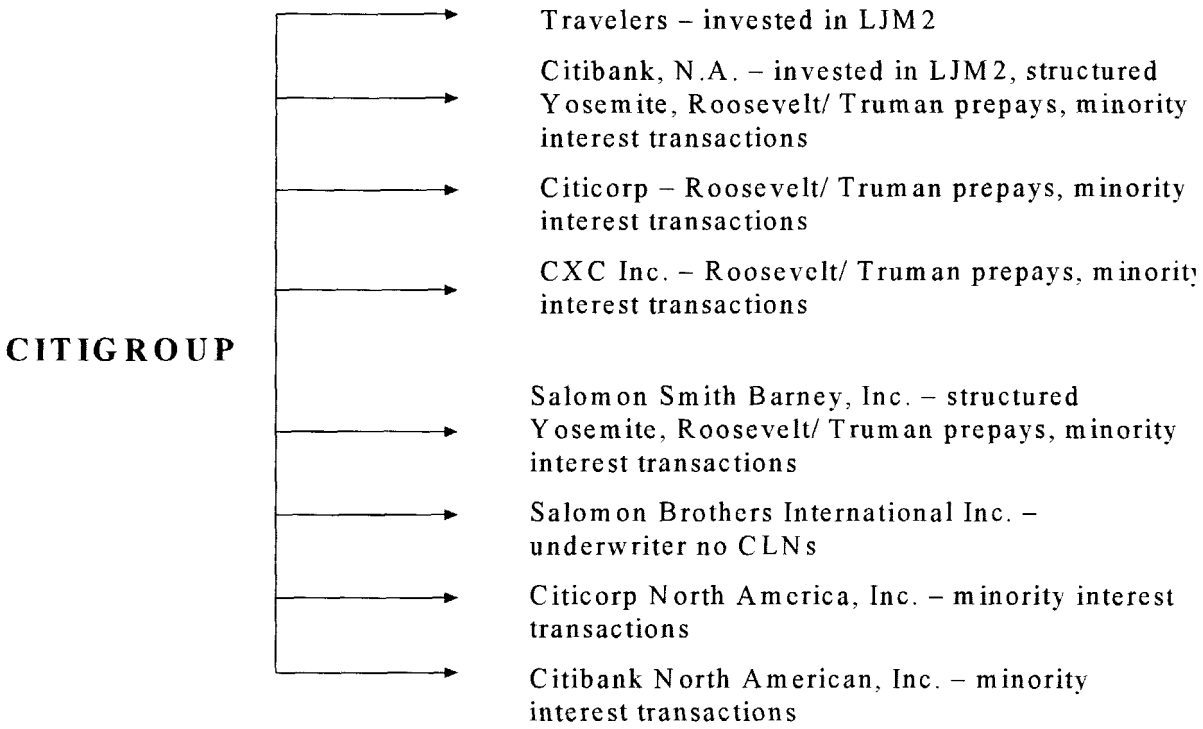
6. Citigroup's Involvement in Enron's Proposed Merger With Dynegy

Additionally, Citigroup contends that: "Citigroup had ***no role*** in the arrangement of Enron's proposed merger with Dynegy." Motion at 5. Internal Citigroup (not subsidiary) documents contradict this representation. One such document states that in order to "enhance Enron's short-term liquidity" and in hopes that the "announcement of the [Dynegy] merger [will] have a strong positive impact in re-establishing [the] market's confidence in Enron," Citigroup executives determined, "***Citigroup*** will deliver its fairness opinion with regard to the merger on November 7." *See* Ex. 2. Perusal of this document strongly supports the inference that Citigroup was pushing through the Dynegy merger to prevent Enron from defaulting on the secret loans it owed Citigroup. *See, e.g., id.* (Citigroup exposure to Enron in excess of $1.5 billion).

B. Citigroup Is the Common Link in the Broad and Significant Involvement of its Entities

From the above examples of Citigroup's involvement in the fraudulent scheme, plaintiffs have provided more than sufficient evidence to defeat Citigroup's Motion. The breadth of Citigroup's entities involved in the Enron fraud and the coordination with which they were able to work in furtherance of the defendants' fraudulent scheme supports the inference, which a reasonable jury could make, that Citigroup itself was directing these subsidiaries' actions and is therefore liable for primary participation in the fraudulent scheme. Citigroup says that because its different named entities had various roles alleged by Lead Plaintiff, a jury could thus only find Citigroup did not participate in the

fraud. But a reasonable jury could easily draw a contradictory inference from those facts, namely that Citigroup extensively participated in the Enron fraud or otherwise violated securities laws through those entities. Indeed, it was not merely coincidence that at least eight purportedly independent Citigroup subsidiaries were all acting as a coordinated whole.



It is up to a jury to decide if the broad involvement of Citigroup's entities is a coincidence or ***participation*** by Citigroup. Indeed, Citigroup offers no evidence whatsoever to explain ***how*** or ***why*** its entities got involved in the Enron fraud. Citigroup should not be entitled to summary judgment on any of Lead Plaintiff's claims until, at a minimum, the evidence answering those questions demonstrates there is no genuine issue of material fact. But the evidence will not lead to that result.

In addition, resolving a scheme actor's liability on a motion for summary judgment is particularly inappropriate and rare because of the breadth of conduct proscribed by §10(b) and Rule 10b-5, which does not "specify what forms of deception are prohibited; rather, all fraudulent schemes in connection with the purchase and sale of securities are prohibited." *Richardson*, 451 F.2d at 40. Because participation in a scheme is such a highly factual inquiry, federal appellate courts have held

that whether a defendant's conduct amounts to a manipulative or deceptive act "depends upon the facts and circumstances developed at trial." *Id.* (citing *A.T. Brod. & Co. v. Perlow*, 375 F.2d 393 (2d Cir. 1967)). Citigroup clearly does ***not*** present the unusual circumstance where summary adjudication of scheme liability could be warranted.

C. Citigroup Is Liable as an Enterprise

Citigroup is attempting to exploit the multiple entities in its organization. Its finger pointing resembles a "shell game," with Citigroup's scienter under the shell. This is no wonder, for Citigroup organized its enterprise with a view to reducing potential liability under the securities laws. But, as Judge Posner stated in *Papa v. Katy Indus.*, 166 F.3d 937, 941 (7th Cir. 1999), "[t]he privilege of separate incorporation is not intended to allow enterprises to duck their statutory duties."

Treating a holding company and its affiliated subsidiaries as one entity for the purposes of assessing liability consistent with the intent of Congress, sometimes referred to as "enterprise liability," is well-accepted. *See, e.g., Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 763 (5th Cir. 1997) (noting that in "civil rights actions, 'superficially distinct entities may be exposed to liability upon a finding they represent a single, integrated enterprise'"). Indeed, the Supreme Court recognized the validity of enterprise liability when it refused to acknowledge the legal separation of a ***bank holding company and its subsidiary*** even though the separate legal entities were "organized in good faith and [were] not a sham." *Anderson v. Abbott*, 321 U.S. 349, 356 (1944). The Court went on to state:

> [T]here are occasions when the limited liability sought to be obtained through the corporation will be qualified or denied. Mr. Justice Cardozo stated that a surrender of that principle of limited liability would be made "when the sacrifice is essential to the end that some accepted public policy may be defended or upheld." The cases of fraud make up part of that exception. But they do not exhaust it.... ***It has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement. The Court stated in <u>Chicago, M. & St. P. Ry. Co. v. Minneapolis Civic & Commerce Assn.</u>, that "the courts will not permit themselves to be blinded or deceived by mere forms or law" but will deal "with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require." We are dealing here with a principle of liability which is concerned with realities not forms.***

Id. at 361-63.

The principles espoused by the Supreme Court in 1944 are very much effective today. As articulated by one esteemed commentator:

> In the last decade and one half, the Supreme Court has had to resolve, in a series of major cases, controversies presenting a fundamental jurisprudential choice between enterprise law and traditional corporate entity law. Enterprise law would determine the legal rights and obligations of the parties by focusing on the corporate group as a unit and traditional corporate entity law by treating the various constituent corporations as separate juridical entities, each with its separate rights and obligations.
>
> In each of these cases, the Court embraced enterprise principles firmly in order to implement the underlying objectives of the law in the area and rejected application of the traditional corporate doctrines .... In some of these cases, the Court accompanied its rejection of entity law by pointing out the lack of utility of "piercing the veil jurisprudence" in contributing a solution to the jurisprudential problems involved.

Phillip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 Conn. L. Rev. 295 (1996). As made clear by Blumberg, enterprise liability is a crucial component of the laws governing the banking industry. "***American banking law, federal and state, is committed firmly to enterprise law***." *Id.* Enterprise principles also "play a major role" in the federal securities laws. *Id.*

Citigroup violated securities laws, regardless of whether it was in Citigroup's name, or in the name of its subsidiaries or affiliates. Lead Plaintiff respectfully submits that Citigroup should not be allowed to circumnavigate securities laws by hiding behind the maze of subsidiaries and affiliated entities that it engineered.

IV. The Evidence Will Demonstrate Citigroup Is Subject to Control Person Liability for Federal Securities Law Violations Committed by its Subsidiaries and Affiliates

In addition to being subject to primary liability for securities law violations, Citigroup is also subject to secondary liability for being a control person under federal securities laws.[7]

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[7]Citigroup asserts that its motion to dismiss claims against it under §20(a) of the 1934 Act is still pending. Motion at 7 n.2. The Court denied Citigroup's motion to dismiss when it lifted the discovery stay in this action on April 23, 2003. *See* April 23, 2003 Memorandum and Order on Remaining Enron Insider Defendants at 47. ("The Court further ORDERS that the discovery stay under the PSLRA is hereby LIFTED.") *See also* Memorandum and Order re: Secondary Actors' Motions to Dismiss at 64-67 (providing extensive discussion regarding control person liability.) In any event, should the Court determine the motion regarding control person liability is still pending, Lead Plaintiff requests that the issue be decided based on the arguments and evidence submitted herein or, alternatively, order supplemental briefing on the issue).

Section 20(a) is remedial in nature and should be construed liberally. *See, e.g.*, *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 877, 880-81 (7th Cir. 1992) (cited favorably in *In re Enron Corp. Sec.*, No. H-01-3624, 2003 U.S. Dist. LEXIS 1668, at *36 (S.D. Tex. Jun. 28, 2003)); *Myzel v. Fields*, 386 F.2d 718, 738 (8th Cir. 1967). "Although worded in different ways, the control person liability provisions of §15 of the 1933 Securities Act and §20(a) of the 1934 Exchange Act are interpreted the same way." *Enron*, 235 F. Supp. 2d at 594. Thus, to state a valid claim under §§15 or 20(a), a plaintiff need only allege: (i) a violation of the securities laws; and (ii) the defendant was a controlling person with respect to the violation within the meaning of §§15 and 20(a). *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 867 n.17 (S.D. Tex. 2001).

This Court recently stated:

> In the absence of a statutory definition of "control," the SEC has defined the word as "the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ***ownership of voting securities, by contract, or otherwise***." 17 C.F.R. §240.12b-2(f), quoted in *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 957 (5th Cir. 1981). Furthermore, the legislative history of the controlling person provision indicates control can be shown by ***ownership of stock, agency***, a lease or a ***contract***, and that the concept of control should be broadly construed with sufficient flexibility to cover many situations, not necessarily only those foreseen at the time of enactment.

Enron, 2003 U.S. Dist. LEXIS 1668, at *33.[8] Similarly:

> Section 20(a) could also allow plaintiffs to reach defendants that control wrongdoers through ***holding companies***, by family connections, ***or in other nonagency ways. Controlling shareholders could be reached in situations where piercing the corporate veil was not available*** .... In other words ... the controlling person liability provisions of the 1933 and 1934 Acts were aimed primarily at situations of control over firms (and others) by behind-the-scene actors. ***To repeat, enactment of the controlling provisions of the 1933 and 1934 Acts "was motivated by the fear that traditional theories of secondary liability, such as agency, would not prove adequate, in every case, to extend liability to those who were 'really responsible' for violations of the securities laws***.

Id. at *44 n.22.

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[8]*See also* Loftus C. Carson, II, *The Liability of Controlling Persons Under the Federal Securities Acts*, 72 Notre Dame L. Rev. 263, 314 (1997) (cited in *Enron*, 2003 U.S. Dist. LEXIS 1668, at *33, *65-*69). *See also* Dana M. Muir and Cindy A. Schipani, *The Intersection of State Corporation Law and Employee Compensation Programs: Is It Curtains for Veil Piercing?*, 1996 U. Ill. L. Rev. 1059, 1093 (1996) (noting "because of the direct liability of controlling persons under the [securities] statutes, courts generally do not need to decide whether to pierce the corporate veil .... Rather, those persons and entities who might be held accountable under a veil piercing analysis are instead held directly liable under the terms of the statutes").

This Court has repeatedly observed that "the Fifth Circuit has rejected the requirement that a plaintiff must show that the controlling person actually participated in the underlying violation, and appears to insist that a plaintiff need only demonstrate that the controlling person possessed 'the power to control [the primary violator], [but] not the exercise of the power to control.'" *Enron*, 2003 U.S. Dist. LEXIS 1668, at *41-*42 (citing 235 F. Supp. 2d at 594); *see also BMC Software*, 183 F. Supp. 2d at 869 n.17.[9] As this Court noted,

> control can be established by demonstrating that the defendant possessed the power to direct or cause the direction of the management and policies of a person through ***ownership of voting securities***, by contract, ***business relationships, interlocking directors, family relationships, and the power to influence and control the activities of another***.

235 F. Supp. 2d at 598. Thus, courts will generally find control person liability if plaintiffs make a *prima facie* showing defendants had the abstract, indirect power, whether exercised or not, to control a primary violator – and such power was possessed via business relationships, directorships, or even the power to "influence" the activities of another. *See Abbott*, 2 F.3d at 620; *BMC Software*, 183 F. Supp. 2d at 869 n.17; *Ellison v. Am. Image Motor Co.*, 36 F. Supp. 2d 628, 638 (S.D.N.Y. 1999).

Citigroup contends it "did not engage in any of the conduct alleged by plaintiffs" and therefore, is not a proper party to this action. Motion at 3. Similarly, Citigroup argues it can only be liable for the conduct of its subsidiaries if the corporate form may be ignored. *Id.* at 8-9. These arguments are meritless. *See Enron*, 2003 U.S. Dist. LEXIS 1668, at *44 n.22 (***under §20(a) "[c]ontrolling shareholders could be reached in situations where piercing the corporate veil was not available"***). There is more than enough evidence for a reasonable jury to conclude Citigroup controls its subsidiaries. Citigroup, either directly or indirectly, owns each of the subsidiaries listed in §III.A.

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[9] *See also Abbott v. Equity Group*, 2 F.3d 613, 620 (5th Cir. 1993) (actual participation in the underlying §10(b) violations is not required; whether effective day-to-day control of the general operations and affairs of the company is necessary to impose controlling person liability is uncertain); *Enron*, 2003 U.S. Dist. LEXIS 1668, at *67 ("'[t]he decisional actors within formal organizational hierarchies with authority to ratify, manage and monitor are ***majority shareholders, boards of directors***, and executive officers'") (quoting Carson, *supra*, 72 Notre Dame L. Rev. at 281-83).

Even if this were not enough to demonstrate Citigroup's control of its subsidiaries (it is), the issue of control could not be determined at this time. Control is a fact-intensive question appropriate for determination by a jury. *See, e.g.*, *Executive Telecard*, 913 F. Supp. at 286 (issue of controlling person liability "is necessarily fact-intensive" and a question for a jury); *In re Oxford Health Plans, Inc. Sec. Litig.*, 187 F.R.D. 133, 143 (S.D.N.Y. 1999) ("fact-intensive" question for a jury); *In re Paracelsus Corp.*, 6 F. Supp. 2d 626, 633 (S.D. Tex. 1998) (question of control "is generally a fact intensive question"); *Klapmeier v. Telecheck Int'l, Inc.*, 315 F. Supp. 1360, 1361 (D. Minn. 1970) ("complex fact question"); *In re Unicapital Corp. Sec. Litig.*, 149 F. Supp. 2d 1353, 1368 (S.D. Fla. 2001) (fact-intensive issue). The evidence demonstrates Citigroup had the power to control its subsidiaries and the determination of control should now be left to the jury.

V. The Evidence Will Demonstrate Citigroup Is Subject to Liability for Acts of its Agents

Noticeably absent from Citigroup's Motion is any attempt to address the issue of Citigroup's liability based upon the fraudulent actions of its agents. Lead Plaintiff's Complaint clearly alleges Citigroup is liable not only for the actions it performed directly but also for those actions performed by its subsidiaries acting as agents of the parent corporation – actions which were conducted at the direction of Citigroup. *See* ¶¶101(a)-(d), 674-692, 992-997, 1005-1008. Fifth Circuit precedent leaves no ambiguity as to the viability of plaintiffs' theory of liability:

> ***[C]ommon law agency principles, including the doctrine of respondeat superior, remain viable in actions brought under the Securities Exchange Act and provide a means of imposing secondary liability for violations of the Act independent of §20(a).***
>
> * * *
>
> Limiting secondary liability under the 1934 Act to that liability provided by §20(a) would contradict the pervasive application of agency principles in nearly all other areas of the law.

Paul F. Newton & Co. v. Texas Commerce Bank, 630 F.2d 1111, 1118 (5th Cir. 1980); *see also Tranchina v. Howard, Weil, Labouisse, Friedrichs*, No. 95-2886, 1997 U.S. Dist. LEXIS 12361, at *14-*15 (E.D. La. Aug. 18, 1997) (acknowledging continued force of *respondeat superior* after *Central Bank*).

The simple fact that the principle-agent relationship alleged by Lead Plaintiff is that of a parent company and its wholly owned subsidiary does not diminish Citigroup's potential liability. "***[T]he relationship between a corporation and its subsidiary is analyzed with the same agency principles that apply to natural persons or otherwise unrelated corporations***." *United States v. Tianello*, 860 F. Supp. 1521, 1525 (M.D. Fla. 1994); *see also Phoenix Canada Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1477 (3d Cir. 1988); *Restatement (Second) of Agency* §14M (1958). Thus:

> It is an accepted principle of agency that the term "agent" includes both natural persons and corporations. Likewise, a "principal" may be either human or a corporation. Further, the terms "master" and "servant" denoting a particular kind of principal-agent relation can properly be applied to corporations notwithstanding the anthropomorphic sound of the titles. It follows that a corporation can be an agent for another corporation. It also follows that a corporation may be liable as a master for torts committed by its servants including torts committed by the servants of a corporation which is its servant....
>
> A special situation arises when two corporations have a permanent connection with each other through ownership by one of a controlling stock interest in the other or through ownership of a controlling interest in both corporations by one person or corporation. Where such a situation exists the stock control gives the parent a power to convert the relation into one of agency.

Reporters Notes to *Restatement (Second) of Agency* §14M (1958).

Citigroup apparently suggests Lead Plaintiff's claims can only succeed upon a ruling to pierce the corporate veil. This is wrong, and agency theory is distinct from veil piercing.

> ***Suing a parent corporation on an agency theory is quite different from attempting to pierce the corporate veil.*** In the first instance, the claim against the parent is premised on the view that the subsidiary had authority to act, and was in fact acting, on the parent's behalf – that is, in the name of the parent.... In the latter situation, the putative plaintiff does not dispute that the underlying obligation belongs to the corporate subsidiary; however, he seeks to hold the parent liable on the theory that the parent fraudulently induced the subsidiary to incur the obligation.
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> * * *
>
> [J]ust as one corporation can hire another to act as its agent, a parent can commission its subsidiary to do the same. ***If such an agency arrangement is alleged, then the plaintiff should not have to also allege domination and intent to defraud for the claim to survive***. The parent-principal should not be allowed to escape liability simply because it owns stock in the subsidiary-agent. Rather, as in any agency case, the issue should be one of authority: did the subsidiary have authority, actual or apparent, to act on behalf of the parent?
>
> * * *
>
> [T]his rule will not undermine jealously safeguarded notions of corporate separateness. The theory behind any such agency claim is that the subsidiary's acts

were, in both form and substance, those of the parent. ***Thus, there is no veil to pierce – the parent is the only party in interest.***

Royal Indus. v. Kraft Foods, 926 F. Supp. 407, 412-13 (S.D.N.Y. 1996); *see also TransAmerica Leasing*, 200 F.3d at 849; *Expediters Int'l v. Direct Line Cargo Mgmt. Servs.*, 995 F. Supp. 468, 481 (D.N.J. 1998); *National Council on Compensation Ins. v. Hopkins*, No. 1:92-CV-082, 1995 U.S. Dist. LEXIS 21030, at *80 (E.D. Tenn. Dec. 19, 1995) ("The principal corporation can be held liable for the acts of its agent within the scope of the agent's authority. The agency theory is distinguishable from the usual 'piercing of the corporate veil' and 'alter-ego' doctrines.").

The question "how much control is required before parent and subsidiary may be deemed principal and agent ... defies resolution by 'mechanical formulae,' for the inquiry is inherently fact-specific" and, thus, warrants denial of Citigroup's Motion. *TransAmerica Leasing*, 200 F.3d at 849; *see also National Council*, 1995 U.S. Dist. LEXIS 21030, at *80 ("ordinarily an issue of fact for the jury"). In any event, the demonstrated significant control that Citigroup has over its subsidiaries is sufficient for a reasonable jury to conclude there is an agency relationship between Citigroup and its investment bankers and analysts. *See supra* at §§A.1., A.4., A.5., B.

VI. Veil Piercing Is Irrelevant to this Case, and, in any Event, Premature at this Stage in the Litigation

Citigroup asserts that Lead Plaintiff has not alleged facts showing the corporate veil should be pierced. Motion at 8-9 and n.3. This is a red herring. As shown herein, Citigroup has failed to refute that it can be subject to primary liability, for participating in the Enron fraud, and secondary liability, for the fraudulent acts of its subsidiaries and affiliates.

Even if veil piercing were relevant to Citigroup's liability in this action, the cases Citigroup cites do ***not*** support Citigroup's position that the case against it must be dismissed. In *United States v. Bestfoods*, 524 U.S. 51, 62 (1998), the Supreme Court held that the "corporate veil" may be "pierced" when it is "misused" to avoid liability, as can be demonstrated here. In *Abbell Credit Corp. v. Bank of America Corp.*, No. 01-C-2227, 2002 WL 335320, at *4 (N.D. Ill. Mar. 1, 2002) and *Zishka v. American Pad & Paper Co.*, No. 3:98-CV-0660-M, 2000 U.S. Dist. LEXIS 13300, at *13-*14 (N.D. Tex. Sept. 13, 2000), plaintiffs had not argued or alleged facts to support the argument that corporate formalities should be disregarded. Here there is an evidentiary basis to pierce Citigroup's

purported veil and Lead Plaintiff asserts piercing the veil would be appropriate if the issue were relevant to Citigroup's liability.

Citigroup does not (and cannot) cite any authority which states the "corporate veil" must be "pierced" in order for liability to attach to a violator of the securities laws. Even if this were a relevant issue, it would be premature for resolution now. As the Fifth Circuit held in *Jon-T Chem.*, 768 F.2d at 694, resolution of whether a parent corporation is responsible for acts of its subsidiaries is "heavily fact-specific." Specifically, "whether it is a defendant who seeks to preserve a corporate shield over him, or a plaintiff who is attempting to pierce the corporate veil, corporate disregard often raises genuine issues of material fact, thus making summary judgment inappropriate." *American Mgmt. Corp. v. Dunlap*, 784 F. Supp. 1245, 1248 (N.D. Miss. 1992).[10] The cases Citigroup cites also support the proposition that veil piercing cannot occur before there has been a fully-developed factual record.[11]

VII. Alternatively, Lead Plaintiff Requests that the Court Deny or Continue Citigroup's Motion, Pursuant to Rule 56(f)

Citigroup's Motion should be denied for failing to demonstrate there is no genuine issue of material fact as to its liability. However, if this Court decides that Citigroup's Motion is, instead, premature, Citigroup's Motion should be denied or continued pursuant to Rule 56(f). The discovery stay in this action was lifted on April 23, 2003. *See* April 23, 2003 Memorandum and Order re

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[10]*See also In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 837 F. Supp. 1129, 1133 (N.D. Ala. 1993) ("Given the fact-intensive nature of the veil-piercing analysis, the determination is typically one to be resolved at trial ...."), *vacated in part on other grounds*, 887 F. Supp. 1455 (N.D. Ala. 1995); *Carte Blanche PTE., Ltd. v. Diners Club Int'l, Inc.*, 758 F. Supp. 908, 914 (S.D.N.Y. 1991) ("fact-intensive issue that generally must be submitted to the jury").

[11]*See Gardemal v. Westin Hotel Co.*, 186 F.3d 588, 593-94 (5th Cir. 1999)(explaining that parent corporation could be held liable for the acts of its subsidiary but granting parent corporation's summary judgment motion after reviewing extensive evidence); *Alberto v. Diversified Group*, 55 F.3d 201, 204-05 (5th Cir. 1995)(observing that summary judgment is appropriate only "'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law'"); *Stevens v. Citigroup, Inc.*, No. 00-3815, 2000 U S. Dist. LEXIS 18201, at *13 (E.D. Pa. Dec. 15, 2000)(granting defendant's motion where plaintiff did not respond to this portion of defendant's motion); *Abeles v. CityTrust*, No. 91 CIV 0314 (LBS), 1991 U.S. Dist. LEXIS 10848, at *8 (S.D.N.Y. Aug. 7, 1991) (in ruling on a motion to dismiss, the court held that a "single conclusory allegation" in a complaint is insufficient to "pierce a corporate veil").

Remaining Enron Insider Defendants. Only days later, on May 6, 2003, defendant Citigroup moved for summary judgment. However, "Summary judgment assumes ***some*** discovery." *Brown v. Miss. Valley State Univ.*, 311 F.3d 328, 333 (5th Cir. 2002); *see also F.D.I.C. v. Shrader & York*, 991 F.2d 216, 220 (5th Cir. 1993) ("Summary judgment is appropriate if, ***after discovery***, there is no genuine dispute over any material fact."); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) ("Rule 56 mandates the entry of summary judgment, ***after adequate time for discovery***."); *Anderson*, 477 U.S. at 257 (summary judgment may be entered against a plaintiff "***as long as the plaintiff has had a full opportunity to conduct discovery***"). Here, assuming Lead Plaintiff were required to move forward with further evidence in response to Citigroup's Motion, it would be appropriate to deny Citigroup's motion and proceed with discovery.

A. Rule 56(f) Legal Standards for Denial or Continuance

Rule 56(f) provides, in relevant part:

> Should it appear from the affidavits of a party opposing [a summary judgment] motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f).

Federal Rule of Civil Procedure 56(f) is an alternative to opposing summary judgment by affidavit and "'is designed to safeguard against a premature or improvident grant of summary judgment.'" *Brown*, 311 F.3d at 333 n.5; *see also* 10A Charles Alan Wright et al., *Federal Practice and Procedure, Civil 3d* §2740 (1998). The Fifth Circuit has stated that Rule 56(f) "motions are generally favored, and should be liberally granted." 311 F.3d at 333 n.5. Furthermore, "[w]here the evidence that the non-moving party contends will create a genuine issue for trial is in the exclusive possession of the moving party, ""a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course."""" *Id.*; *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991) (same); *see also Snook v. Trust Co.*, 859 F.2d 865, 871 (11th Cir. 1988) ("the interests of justice will sometimes ***require*** a district court to postpone its ruling on a motion for summary judgment").

In the Fifth Circuit, "[a] party opposing summary judgment under Rule 56(f) must demonstrate (1) why additional discovery is needed and (2) how the additional discovery will likely create a genuine issue of material fact." *Brown*, 311 F.3d at 333 n.5; *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 535 (5th Cir. 1999). As set forth below and in the Affidavit of Helen J. Hodges herewith, Lead Plaintiff has satisfied the requirements of Rule 56(f) and alternatively requests denial or continuance of Citigroup's Motion, if necessary.

B. Lead Plaintiff Has Satisfied the Requirements of Rule 56(f)

Given that discovery is now in its very early stages, Lead Plaintiff's alternative request under Rule 56(f) is compelling. This not-so small fact is completely ignored by Citigroup in its Motion as it repeatedly asserts "the undisputed facts" show Citigroup did not engage in the conduct alleged to be in violation of the securities laws. *See* Motion *passim*. If Lead Plaintiff were required to respond to Citigroup's Motion with further evidence, there is no question additional discovery would be needed, for no production whatsoever has been made by Citigroup to plaintiffs. This is significant because the evidence that will further demonstrate Citigroup's scienter and participation in the scheme is almost entirely within Citigroup's control.

It would be inequitable for plaintiffs to be compelled to reveal an entire discovery plan at this early stage of the litigation. Nevertheless, should this Court decide to continue Citigroup's Motion rather than deny it, Lead Plaintiff can identify the following discovery needs which are representative of an overall discovery plan that will be conducted to prove Citigroup's liability.

Lead Plaintiff seeks discovery that would further evidence the other fraudulent acts Citigroup directed and contrived in furtherance of the scheme, and its knowledge of the false statements made by its analysts and investment bankers, as alleged in the Consolidated Complaint. *See, e.g.*, ¶¶123, 133, 163, 166, 169, 186, 227, 244, 249, 259, 267, 304, 308, 326, 327, 335, 370, 375, 686.[12] Citigroup does no more than admit it has subsidiaries while categorically denying any involvement in any transaction with Enron. Motion at 3-5. Apparently Citigroup suggests this absolves it of scienter.

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[12]Specifically, Lead Plaintiff is entitled to discovery concerning Citigroup's and its subsidiaries' involvement within such nefarious transactions as, among others, the Yosemite, Truman, Roosevelt, Rawhide, Nahanni, Nighthawk, Bacchus, Destech, Nixon, Powerball, Slapshot, Sundance, and Whitewing.

According to Citigroup, this entitles it to summary judgment, but such evidence does not establish the absence of a genuine issue under the theories of liability available to Lead Plaintiff. If Lead Plaintiff were required to present additional evidence, it should be entitled to relevant discovery. *See* Hodges Aff., ¶¶4-5, 8, 11-14 (*for example*, Document Request No. 52. Documents concerning research reports on Enron; No. 55. Communications between any Citigroup investment banker and any research analyst concerning Enron; No. 62. "Pitch books" or other presentation documents which Citigroup presented to Enron concerning marketing or execution of any transaction or service; No. 63. Documents concerning any offering of Enron securities, including due diligence files; No. 71. Documents concerning investment into Enron or LJM Partnerships of any Citigroup Fund or Citigroup investment vehicle or any Citigroup executive or employee).

Lead Plaintiff also seeks discovery that would further evidence Citigroup is a single organization composed of Citigroup and the subsidiaries and affiliates it owns and controls. This discovery would further demonstrate (among other things) Citigroup and its subsidiaries are one organization, Citigroup's control, agency, and the basis for enterprise liability. *See* Hodges Aff., ¶¶4-5, 8, 14. For example, Lead Plaintiff is entitled to discovery regarding the corporate structures within Citigroup's organization, including such matters as the common officers, executives and directors, contracts defining the business relationship between the entities, and management of responsibility for the Enron relationship. *See id.*, ¶¶4-5, 8, 14. Lead Plaintiff is also entitled to have these defendants produce all documents regarding the corporate structures of the allegedly separate organizations.

Finally, Citigroup has submitted the affidavit of Kenneth S. Cohen to support its Motion. Lead Plaintiff should be entitled to depose Mr. Cohen to determine if, concerning the transactions at issue, he has personal knowledge beyond simply denying that Citigroup as an entity was involved.

VIII. Conclusion

Lead Plaintiff respectfully requests the Court deny Citigroup's Motion because Citigroup has not met its burden under Rule 56(c), or, alternatively, deny or continue Citigroup's Motion pursuant to Rule 56(f).

DATED: June 11, 2003

Respectfully submitted,

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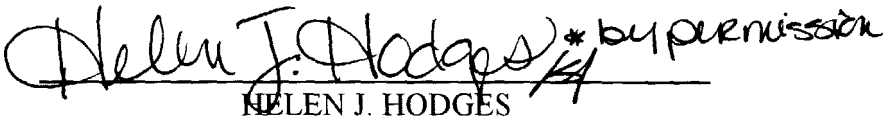

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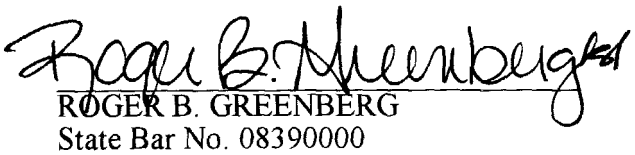

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO DEFENDANT CITIGROUP INC.'S SUMMARY JUDGMENT MOTION AND, ALTERNATIVELY, REQUEST FOR DENIAL OR CONTINUANCE PURSUANT TO RULE 56(f) has been served by sending a copy via electronic mail to serve@ESL3624.com on this 11th day of June, 2003.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO DEFENDANT CITIGROUP INC.'S SUMMARY JUDGMENT MOTION AND, ALTERNATIVELY, REQUEST FOR DENIAL OR CONTINUANCE PURSUANT TO RULE 56(f) has been served via overnight mail on the following parties, who do not accept service by electronic mail on this 11th day of June, 2003.

Carolyn S. Schwartz
United States Trustee, Region 2
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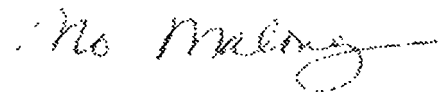
New York, NY 10004



Mo Maloney