IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
(HOUSTON DIVISION)

United States Courts
Southern District of Texas
FILED

JUL 3 1 2003

Michael N. Milby, Clerk

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| In re ENRON CORPORATION SECURITIES LITIGATION | |
| This Document Relates To:<br><br>MARK NEWBY, *et al.*, Individually and On Behalf of All Others Similarly Situated,<br><br>Plaintiffs,<br><br>-v.-<br><br>ENRON CORP., *et al.*,<br><br>Defendants. | Civil Action No. H-01-3624<br>(Consolidated) |


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# REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION OF DEFENDANTS CITIGROUP INC., CITIBANK N.A., SALOMON SMITH BARNEY INC. AND SALOMON BROTHERS INTERNATIONAL LIMITED TO DISMISS CERTAIN CLAIMS ASSERTED IN PLAINTIFFS' FIRST AMENDED CONSOLIDATED COMPLAINT

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TO THE HONORABLE MELINDA HARMON, UNITED STATES DISTRICT JUDGE:

Defendants Citigroup Inc., Citibank N.A. ("Citibank"), Salomon Smith Barney Inc. (now called Citigroup Global Markets Inc.) ("SSB") and Salomon Brothers International Limited ("SBIL") (collectively, "Citigroup") submit this reply memorandum of law in support of their motion, pursuant to Federal Rules of Civil Procedure 12(b)(6), to dismiss the First Amended Consolidated Complaint for Violation of the Securities Laws (the "Amended Complaint"; cited herein as "Am. Cplt.").[1]

## PRELIMINARY STATEMENT

Plaintiffs' Opposition to the Bank Defendants' Motion to Dismiss the First Amended Consolidated Complaint ("Opposition," cited herein as "Pl. Opp.") is a scattershot effort to avoid dismissal. But the Amended Complaint itself, and the documents it cites, show conclusively that the claims at issue on this motion should be dismissed.

*First*, we showed in our moving papers that plaintiffs lack standing to assert their claims relating to the Foreign Debt Securities because not one named plaintiff has purchased any of those securities. Plaintiffs do not dispute that they did not purchase those securities, or that, for that reason, they lack standing to sue with respect to them. Instead, they argue that the Court should defer ruling on this issue until the class certification stage so that plaintiffs' counsel can round up another plaintiff that does have standing. But fifteen months after the First Consolidated Complaint was filed, and two-

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[1] In addition to the arguments herein, Citigroup adopts and incorporates by reference the arguments in the other Bank Defendants' reply memoranda to the extent applicable to Citigroup.

and-one-half months after the Amended Complaint was filed, plaintiffs' assertion that some new plaintiff that allegedly purchased *one* of the nine Foreign Debt Securities is "preparing" a motion to intervene cannot preclude dismissal for lack of standing. As the courts have repeatedly held, standing is a threshold issue that should be decided at the outset of the case. Given the vast resources all sides are already devoting to this complex litigation, arguing the merits of additional complex claims with non-existent plaintiffs is a waste of time, energy, and money.

*Second*, we showed in our moving papers that plaintiffs' claims under Section 12(a)(2) of the 1933 Act with respect to the Foreign Debt Securities should also be dismissed on the independent ground that those securities were not sold in a public offering pursuant to a prospectus, which, as the Supreme Court held in *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995), is a prerequisite to a claim under that section.[2] Plaintiffs assert in response that whether the offerings were public is a disputed issue of fact, precluding dismissal. But plaintiffs allege no facts showing that these are public offerings, rather than, as shown on the face of the offering memoranda, private offerings under SEC Rule 144A. And the mere fact that the securities were offered to foreign purchasers under SEC Regulation S likewise does not satisfy *Gustafson*, because Regulation S contains an express exemption from the requirement of a prospectus.

*Finally*, we showed in our moving papers that plaintiffs' claims against Citigroup Inc.'s subsidiaries are barred by the applicable statute of limitations. Plaintiffs argue in response that their claims are timely because they were brought within the time

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[2] Of course, any Section 15 claims based on the underlying Section 12(a)(2) claims should also be dismissed.

permitted under the Sarbanes-Oxley Act, and that, in any event, their request to amend the First Consolidated Complaint in January 2003 tolled the statute of limitations. But, as this Court has already held, the Sarbanes-Oxley Act by its terms does not apply to this case, which was commenced before the Act became law. And, as we show below, plaintiffs' claims against Citigroup Inc.'s subsidiaries were time-barred even before the January 14 letter was sent. Finally, plaintiffs' contention that their claims against those defendants relate back to the filing of the Consolidated Complaint under Fed. R. Civ. P. 15(c) (on the theory that plaintiffs' failure to name those defendants initially was allegedly the result of a "mistake") is specious, because the Consolidated Complaint, the documents it cites, and other documents in the public record all clearly disclose the roles of those defendants.

For these reasons, as discussed in detail below, Citigroup's motion to dismiss should be granted.

## ARGUMENT

## I.

## PLAINTIFFS LACK STANDING TO ASSERT CLAIMS REGARDING THE FOREIGN DEBT SECURITIES BECAUSE THEY DO NOT ALLEGE THAT THEY PURCHASED THOSE SECURITIES

We showed in our moving papers that plaintiffs' claims against Citigroup based upon purchases of the Foreign Debt Securities should be dismissed for lack of standing because none of the named plaintiffs is alleged to have purchased any of those securities. (Citi. Mem. at 6-9.) That is so because, to satisfy the standing requirements under both Section 10(b) and Section 12(a)(2), a plaintiff must have purchased the security in question, and (with respect to Section 12(a)(2)) must have done so in the public offering and from the defendant. The non-purchasing named plaintiffs cannot establish standing by purporting to sue on behalf of a class, because a named plaintiff must have individual standing before being permitted to sue as a class representative. *See* cases cited in Citi. Mem. at 8-9; *see also Matte v. Sunshine Mobile Homes, Inc.*, 2003 WL 21645339, at *11 (W.D. La. June 9, 2003) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)) ("That a suit may be a class action ... adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.")

In response to this showing, plaintiffs do not dispute either that (i) as a matter of law, a plaintiff that did not purchase the securities at issue lacks standing to sue under the securities laws with respect to those securities; or (ii) as a matter of fact, none of the named plaintiffs in this case purchased any of the Foreign Debt Securities. Nor do plaintiffs contend that, even though they did not purchase these securities, they would be competent representatives of a class of such purchasers. (Pl. Opp. at 46-48.)

Instead, plaintiffs' principal response is to argue that the Court should delay ruling on this fundamental standing issue until the class certification stage, when, plaintiffs presumably hope, they can finally round up a plaintiff with standing to pursue these claims. In a barely-veiled admission that none of the current named plaintiffs has standing to sue either on its own behalf or as a representative a class of Foreign Debt Securities purchasers, plaintiffs advise the Court that an alleged investor in Marlin notes is purportedly "preparing a motion to intervene" as a § 12(a)(2) "representative" of purchasers of Foreign Debt Securities, (*id.* at 47), and that plaintiffs "will move to intervene" a Yosemite notes purchaser. (*Id.* at 46 n. 38).[3]

Plaintiffs' effort to delay a resolution of this issue should be rejected. "The standing doctrine defines and limits the role of the judiciary and is a threshold inquiry to adjudication." *McClure v. Ashcroft*, No. 02-30357, 2003 WL 21418097, at *3 (5th Cir. June 20, 2003). Thus, as the Fifth Circuit has held:

> If the plaintiff has no standing individually, no case or controversy arises. This constitutional threshold must be met before any consideration of the typicality of claims or commonality of issues required for procedural reasons by Fed. R. Civ. P. 23.

*Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. 1981). Plaintiffs' lack of standing to pursue claims relating to the Foreign Debt Securities should, therefore, be resolved at the outset, not after months of additional litigation. *See also Chevron USA, Inc. v. Vermilion Parish School Bd.*, 215 F.R.D. 511, 515, 518 (W.D. La. 2003) (rejecting plaintiffs' contention that the court should defer statutory standing inquiry until hearing on class certification, and granting defendants' motion for partial summary judgment for lack of standing).

Moreover, as a practical matter, further delay before resolving this issue would only add additional time and expense to the litigation of this already complex case. Contrary to plaintiffs' assertion, dismissal would narrow, not "splinter," this case; if and when a hypothetical future plaintiff with standing seeks to assert claims based upon

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3 Plaintiffs assert (Pl. Opp. at 46 n.38) that the current named plaintiffs may represent a class of purchasers of Foreign Debt Securities for purposes of pursuing claims under Section 10(b) and Rule 10b-5. The cases they cite in support of this proposition, however, show, at most, that in some circumstances purchasers of one type of security may represent a class including purchasers of the same issuer. Those cases do not apply where, as here, plaintiffs seek to represent purchasers of securities of a *different issuer*.

purchases of Foreign Debt Securities, this Court (or the MDL Panel) can determine whether to consolidate that case with this one.

Plaintiffs' reliance on this Court's August 7, 2002 Order and the Fifth Circuit's opinion in *Brown* (Pl. Opp. at 47) is misplaced. The relevant provisions of the Court's August 7 Order address groups of plaintiffs that "do not fit into the class definition of the Consolidated Complaint," Order at 6, but who *themselves* had standing to assert claims—not, as here, plaintiffs who completely lack standing to sue.

Likewise, *Brown* does not support delaying a determination of plaintiffs' standing. Indeed, as noted, the court in *Brown* made clear that standing is a threshold determination that should be decided at the outset of the case. *Brown*, 650 F.2d at 771. And the court there specifically stated that "it need not decide" whether the district court has discretion to delay addressing standing even in a complex case involving potential sub-classes. *Id.* The court's ultimate disposition—"that named plaintiffs lacked standing to bring both their individual and the class claims of discrimination . . . since they were unable to make even the threshold showing that they were involved with or excluded from programs or activities [at issue]," *id.* at 772—underscores the flaw in plaintiffs' own claims regarding the Foreign Debt Securities: the absence of any allegation that any named plaintiffs actually purchased any of the securities in question.[4]

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[4] Plaintiffs' reliance on *Aronson v. Mckesson HBOC, Inc.*, 79 F. Supp. 2d 1146, 1151 (N.D. Cal. 1999), and *In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 451 (S.D. Tex. 2002), for the proposition that lead plaintiffs may pursue "*all* available causes of action against *all* possible defendants under *all* available legal theories" (Pl. Opp. at 46 (quoting *Aronson*, 79 F. Supp. 2d at 1151) (emphasis in original)), is also misplaced. Those cases address a class representative's obligations to the class to vigorously pursue the claims available to it; they do not purport to authorize class representatives to pursue claims as to which they lack standing.

Plaintiffs' claims based on the Foreign Debt Securities should accordingly be dismissed for lack of standing.

## II.

## PLAINTIFFS' CLAIMS UNDER SECTIONS 12(a)(2) AND 15 BASED ON THE FOREIGN DEBT SECURITIES SHOULD BE DISMISSED BECAUSE SECTION 12(a)(2) DOES NOT APPLY TO PRIVATE PLACEMENTS

Citigroup also showed in our moving papers that—separate and apart from the question of standing—plaintiffs' claims under Section 12(a)(2) of the 1933 Act with respect to the Foreign Debt Securities should be dismissed because those securities were not sold in a public offering pursuant to a prospectus, and thus as a matter of law do not give rise to a claim under that section. (Citi Mem. at 9-14 (citing, *inter alia*, *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995)).)

Plaintiffs do not dispute that Section 12(a)(2) applies only to public offerings by means of a prospectus. (Pl. Opp. at 40.) Nor do they cite any allegation in the Amended Complaint—as they cannot—that the Foreign Debt Securities were sold in public offerings. Instead, as the relevant offering memoranda reflect, they were sold in private offerings to qualified institutional purchasers pursuant to SEC Rule 144A.

Plaintiffs argue that the private nature of the Foreign Debt Securities offerings is a question of fact, and that "the size of the offering and the number of the offerees" is relevant to determining whether an offering is public or private. (*Id.* at 41 (quoting *Lewis v. Fresne*, 252 F.3d 352, 358 (5th Cir. 2001)).) But the Amended Complaint nowhere alleges, even in conclusory terms, the number of offerees of the Foreign Debt Securities offerings, and the mere dollar value of an offering, standing alone, cannot transform it into a public offering. *Cf. In re Hayes Lemmerz Int'l, Inc.*

*Equity Sec. Litig.*, No. 01 Civ. 73433, 2003 WL 21692102, at *15-17 (E.D. Mich. July 21, 2003) (noting the application of a multi-factor test under *Gustafson*, but dismissing 12(a)(2) claims because plaintiffs had "failed to allege that the bonds were offered to anyone other than QIBs"). Simply put, "there is no warrant for superimposing a quantity limitation on private offerings as a matter of statutory interpretation," *SEC v. Ralston-Purina Co.*, 346 U.S. 119, 125 (1953); and plaintiffs do not cite a single case—and we are aware of none—holding that the dollar amount of an offering, or any other single factor, is by itself sufficient to establish that an offering is a public one.

The courts have consistently rejected efforts by plaintiffs to assert claims under Section 12(a)(2) based upon offerings made, like those of the Foreign Debt Securities, under Rule 144A. In *Hayes*, for example, the court dismissed the plaintiffs' claims under Section 12(a)(2) based upon their purchase of securities in an offering (like the ones here) under Rule 144A, on the ground that the offering was a private one. The court rejected the plaintiffs' argument that the issue of whether the offering was public or private was one of fact not capable of being decided on a motion to dismiss. 2003 WL at *15-17. In particular, the court noted that, although plaintiffs asserted that the securities were offered to "hundreds if not thousands of purchasers," *id.* at *15, the complaint failed to allege that the bonds were offered to anyone other than qualified institutional buyers under Rule 144A. *Id.* at *16. Thus, the court held, "Plaintiffs have failed to demonstrate a factual question regarding whether the Offering Memorandum was a *bona fide* private offering." *Id.* at *17. *See also In re Safety-Kleen Corp. Bondholders Litig.*, C/A. No. 3:00-1145-17 (slip op.) (D.S.C. Mar. 27, 2002) (Rosen Dec., Ex. A) (dismissing Section

12(a)(2) claims based upon Rule 144A offering where plaintiffs did not allege that the securities were sold to anyone other than qualified institutional buyers).

Plaintiffs' contention that the Foreign Debt Securities offerings were public, and therefore support a claim under Section 12(a)(2), because the securities were sold to foreign purchasers under SEC Regulation S (Pl. Opp. at 41-42), is equally misplaced. Regulation S exempts certain offshore transactions from the registration requirements of the 1933 Act, and by its terms does not require the transactions to be accompanied by a prospectus. 17 C.F.R. § 230.901 *et seq.* Thus, under *Gustafson*, a bona fide offering subject to Regulation S does not give rise to a claim under Section 12(a)(2), because it is not a sale made "by means of a prospectus." *Gustafson*, 513 U.S. at 567-68 (quoting 15 U.S.C. § 77*l*(a)(2)).

The cases on which plaintiffs rely are inapposite. In *Lewis v. Fresne*, 252 F.3d 352, 357-58 (5th Cir. 2001), the Court *affirmed* the dismissal of the plaintiff's claims under Section 12 where the evidence showed that the transaction was a private one. And in *Sloane Overseas Fund, Ltd. v. Sapiens Int'l Corp., N.V.*, 941 F. Supp. 1369 (S.D.N.Y. 1996), the defendants did not contend that the offerings were private, and the court held that "the wide distribution of the Offering Circular" rendered the offering public. *Id.* at 1376 n.11. Here, as noted, there are no allegations in the Amended Complaint regarding the distribution of the Foreign Debt Securities offering memoranda.[5]

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[5] To the extent that the court in *Sloane* suggested that an offering under Regulation S, made without a prospectus, is subject to a claim under Section 12(a)(2), it is inconsistent with the plain language of the statute and the holding of *Gustafson* for the reasons discussed in our opening brief and in the text above. Plaintiffs' other cases are equally inapposite. In *Fink v. Super Annuities, Inc.*, relied upon by the plaintiffs (Pl. Opp. at 43), the plaintiff made detailed allegations to the effect that "a shareholder list made available to him show[ed] over one hundred holders, some with holdings as small as 2,500

Because the Foreign Debt Securities were not sold pursuant to a prospectus, plaintiffs' claims under Section 12(a)(2) with respect to those securities should be dismissed.[6]

## III.

## PLAINTIFFS' CLAIMS AGAINST CITIBANK, N.A., SALOMON SMITH BARNEY INC. AND SALOMON BROTHERS INTERNATIONAL LIMITED ARE TIME BARRED

In our motion to dismiss, we showed that plaintiffs' claims against Citigroup Inc.'s subsidiaries are time barred because they were first asserted more than a year from the time the alleged misconduct was or should have been discovered. Plaintiffs have responded with a plethora of excuses including: (i) the statute of limitations was tolled by plaintiffs' January 14, 2003 letter to the Court requesting leave to file an amended complaint, and the subsidiaries are equitably estopped from making this

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shares, circumstances suggesting to him that the offering was not limited to the sort of investors" to which the private placement exemption applied. 927 F. Supp. 718, 730 (S.D.N.Y. 1996). The complaint here contains no similar allegations. In *UBS Asset Management (N.Y.) Inc. v. Woody Gundy Corp.*, 914 F. Supp. 66 (S.D.N.Y. 1996), relied upon by the plaintiffs (Pl. Opp. at 41), the defendant could not establish from the face of the complaint that the sales of stock constituted a private placement. *Id.* at 69. Here, however, the Complaint incorporates the relevant offering memoranda by reference, which make amply clear that the Foreign Debt Securities were only to be offered to qualified purchasers, and not to the public at large. (Citi. Mem. at 11-12, nn. 6-8.) According to the Court in *Flake v. Hoskins*, 55 F. Supp. 2d 1196 (D. Kan. 1999), relied upon by the plaintiffs (Pl. Opp. at 41), the plaintiff survived a motion to dismiss on this issue because the plaintiff had alleged "that [defendant's] proxy constituted a prospectus for purposes of Section 12(2) . . . that the proxy served as a registration statement . . . [and] that [defendant] filed a registration statement" regarding the transaction at issue. *Id.* at 1229. *Flake* simply highlights the paucity of the plaintiffs' own allegations regarding the Foreign Debt securities: the Complaint does not plead a single fact showing the allegedly public nature of the offerings.

[6] For the reasons set forth in the 12(a)(2) section of the Reply Memorandum of Law in Further Support of Banc of America Corporation and Banc of America Securities LLC's Motion to Dismiss the First Amended Consolidated Complaint, the plaintiffs are simply wrong when they assert that Rule 144A(c) does not apply here because Citigroup was an "underwriter/initial purchaser," as opposed to a "dealer" of the relevant Foreign Debt securities. (Pl. Opp. at 43).

argument because it took three months for Citigroup to file a summary judgment motion; (ii) the statute of limitations for new parties was extended by the Sarbanes Oxley Act (the "Act"); and (iii) the claims against Citigroup's subsidiaries relate back to the filing of the Consolidated Complaint.

As we now show, none of these assertions has merit.

### A. **Plaintiffs' Claims Are Barred Under The One-Year Pre-Sarbanes Oxley Statute Of Limitations**

Plaintiffs first argue that their claims against the subsidiaries are not time-barred, despite the obligation to file such claims within one year after discovery of the fraud, because the one-year statute of limitations was tolled by plaintiffs' January 14, 2003 letter to the Court seeking permission to file an amended complaint ("plaintiffs' letter"). (Pl. Opp. at 4-5.) This argument is without merit because, even if plaintiffs' letter tolled the statute of limitations on January 14, 2003, the one-year statute of limitations as to Citigroup's subsidiaries *had already lapsed* by the date of plaintiffs' letter.

Plaintiffs assert that, under the pre-Sarbanes Oxley statute of limitations, "[l]itigation... must be commenced within one year after the discovery of the facts constituting the violation." (Pl. Opp. at 14.) However, "[d]iscovery occurs when a potential plaintiff has *inquiry* or actual notice of a violation." *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 670 (7th Cir. 1998) (citation omitted) (emphasis added), *cert. denied*, 525 U.S. 1114 (1999). "Inquiry notice is the term used for knowledge of facts that would lead a reasonable person to *begin investigating* the possibility that his legal rights had been infringed." *Id.* (quotation omitted) (emphasis added). "[I]nquiry notice is triggered by evidence of *the possibility of fraud, not by complete exposure of the alleged scam.*" *Martinez Tapia v. Chase Manhattan Bank, N.A.*, 149 F.3d 404, 410 (5th Cir. 1998) (emphasis added) (quoting *Brumbaugh v. Princeton Partners*, 985 F.2d 157, 162 (4th Cir. 1993)); *see also Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 350 (2d Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994) ("storm warnings" are sufficient to put a plaintiff on inquiry notice). "The plaintiff need only possess a low level of awareness; he need not fully learn of the alleged wrongdoing. Knowledge of *all* facts is not required to set off the prescriptive clock. Thus, the clock begins to tick when a plaintiff senses storm warnings, not when he hears thunder and sees lightning." *Jensen v. Snellings*, 636 F. Supp. 1305, 1309 (E.D. La. 1986) (quotation omitted). As the Tenth Circuit recently explained, "Plaintiff need not . . . have fully discovered the nature and extent of the fraud before [he is] on notice that something may have been amiss. Inquiry notice is triggered by evidence of the possibility of fraud, not full exposition of the scam itself." *Sterlin v. Biomune Systems*, 154 F.3d 1191, 1203 (10th Cir. 1998) (quotation omitted).

Based on this standard, plaintiffs were on inquiry notice of potential claims against Citigroup Inc.'s subsidiaries more than a year before plaintiffs' letter. *First*, the First Consolidated Complaint ("Consolidated Complaint," cited herein as "Consol. Cplt.") itself reflects plaintiffs' knowledge that Citigroup Inc. acted through its subsidiaries. (Consol. Cplt. ¶ 101 (describing Citigroup Inc. as "a large integrated financial services institution that *through subsidiaries and divisions (such as Salomon Smith Barney* (collectively 'Citigroup')) provides commercial and investment banking services . . . .") (emphasis added). Thus, in the Consolidated Complaint itself, plaintiffs admit that Citigroup Inc. acts through its subsidiaries.[7] Moreover, plaintiffs actually admit that "***[f]rom the beginning of this case, Lead Plaintiff has argued that the subsidiaries and parent corporations acting in concert were involved in the massive Enron fraud.***" (Pl. Opp. at 19). Thus, by their own admission, plaintiffs had discovered the involvement of the subsidiaries in the alleged fraud long before plaintiffs' letter.

Moreover, the Consolidated Complaint itself quotes an Enron press release from November 11, 2001, ***over a year before*** the date of plaintiffs' letter, that made clear that Citigroup Inc. acts through its subsidiaries. (Consol. Cplt. ¶ 383). The press release, as quoted in the Consolidated Complaint, stated:

> Enron Corp announced today that J.P. Morgan (the investment banking arm of JP Morgan & Co.) and *Salomon Smith Barney Inc. (the investment banking arm of Citigroup Inc.)* as co-arrangers have executed commitment letters to provide $1 billion of secured credit lines [to Enron]

*Id.* (emphasis added). Despite the fact that plaintiffs unquestionably knew from this release which Citigroup entity arranged the $1 billion of secured credit, plaintiffs chose not to name SSB as a defendant but nonetheless included allegations in the Consolidated Complaint about this same $1 billion of secured "loan" attributed, not to SSB, but to Citigroup:

> [D]uring the class period, *Citigroup* was one of the principal lending banks to Enron, acting with JP Morgan as lead bank on Enron's main credit facilities, loaning hundreds of millions of dollars to Enron itself and helping

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7 In addition to naming SSB in the Consolidated Complaint, in their opposition to Citigroup's original motion to dismiss, plaintiffs also identified two Citigroup Inc. subsidiaries, "Citicorp" and "Travelers," as investors in LJM2. (Memorandum of Points and Authorities in Opposition to Citigroup Motion to Dismiss, June 10, 2002, at 52 n.33)

> to syndicate over $4 billion in bank loans to Enron. *For instance…11/01 $1 billion secured loan to Enron.*

(*Id.* ¶ 680.) (emphasis added).

*Second*, documents specifically cited in the Consolidated Complaint and in the public domain made clear that the relevant entities were Citigroup Inc.'s subsidiaries, not Citigroup Inc. itself. For instance, plaintiffs allege that "Citigroup acted as an underwriter for [15] Enron securities" and for one "Enron-related" security. (Consol. Cplt. ¶¶ 677-678). Each of these securities were sold pursuant to a prospectus or offering memorandum, each of which specifically indicated the role of each Citigroup Inc. subsidiary in the offering. (*See* Declaration of Richard A. Rosen ("Rosen Dec."), Ex. B (discussed in Consol. Cplt. ¶ 677) (stating that Salomon Smith Barney was an underwriter of common stock), Ex. C (discussed in Consol. Cplt. ¶ 685) (stating that Salomon Smith Barney was an underwriter of the 7% Exchangeable Notes due July 31, 2002).) Likewise, the Consolidated Complaint cites numerous SSB analysts' reports that bear the SSB logo and SSB's name. (*E.g.*, Consol. Cplt. ¶¶ 133, 163, 166, 169, 186, 227, 244, 249, 267, 308, 327, 335, 370, 375; Rosen Dec., Ex. D (discussed in Consol. Cplt. ¶ 163), Ex. E (discussed in Consol. Cplt. ¶ 186), Ex. F (discussed in Consol. Cplt. ¶ 249).) This is sufficient to place plaintiffs on inquiry notice. *See Menowitz v. Brown*, 991 F.2d 36, 41 (2d Cir. 1993) (plaintiffs placed on inquiry notice by "the very SEC-mandated disclosure documents they rely upon in their complaints").

Furthermore, well over one year before plaintiffs' letter, the popular press as well as trade publications publicly named *the specific Citigroup subsidiaries* that were involved in the various other acts alleged in the Consolidated Complaint.[8] Therefore, plaintiffs were on notice that the allegations of their complaint related to specific Citigroup subsidiaries and not to Citigroup Inc. itself.[9]

Finally, over one year before plaintiffs' letter, at least one plaintiff had already filed a suit in this Court against Salomon Smith Barney. *See Pulsifer & Assoc.* v. *Lay*, No. 01 Civ. 4356 (S.D. Tex.), filed December 14, 2001. Plaintiffs were aware of the *Pulsifer* complaint but made the conscious choice not to name Salomon Smith Barney as a defendant in the Consolidated Complaint.

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[8] *See e.g.*, Germana Canzi, *Chasing power deals*, Project Finance, July 1, 1999, at 26 (discussing Citibank involvement in "Elektro" transaction mentioned at Consol. Cplt. ¶¶ 496, 605-606); Jeffrey Keegan, *Citi's LEOs spin bank debt into synthetic bonds*, Investment Dealers Digest, December 6, 1999 (discussing Citibank involvement in "Yosemite" transaction mentioned at Consol. Cplt. ¶¶ 49, 678); John Hintze, *$1 Billion Secured Credit Hasn't Calmed Fears About Enron*, Bank Loan Report, November 19, 2001 (discussing Citibank and SSB involvement in credit facilities and "Dabhol" and "Yosemite" transactions mentioned at Consol. Cplt. ¶¶ 49, 678, 680); *Credit appeal powers Enron's rapid divestment vehicle*, Euroweek, September 29, 2000, at 4 (discussing SSB and Citibank involvement in "Yosemite" transaction mentioned at Consol. Cplt. ¶¶ 49, 678); *Pride takes a fall as banks watch Enron myth unravel*, Euroweek, November 30, 2001, at 1 (discussing Citibank involvement in "Dabhol" transaction mentioned at Consol. Cplt. ¶ 680); Claire Poole, *Woes may hurt Enron asset sales*, Daily Deal, November 29, 2001 (same); *Enron to complete 1,624-MW plant in India in 2001*, Megawatt Daily, May 1, 1999 (same). All of the cited documents are available at LEXIS, News Library, News Group File, All.

[9] Additionally, Citigroup's Form 10-K for the year ended December 31, 2000, filed on March 14, 2001, and every previous Citigroup Form 10-K was also available ***well over one year*** before the date of plaintiffs' letter. (*See* Rosen Dec., Ex. G.) Citigroup's Form 10-K indicates that "Citigroup Inc....is a diversified financial holding company." *Id.* at 1. The 10-K also states that it is Salomon Smith Barney that "delivers investment banking services that encompass a full range of global capital markets activities, including the underwriting and distribution of fixed income and equity securities for United States and foreign corporations .... SSB also provides capital raising, advisory, research and other brokerage services to its customers, acts as a market-maker and executes securities and commodities futures brokerage transactions," and Citibank that "offers project finance, fixed-income issuance and trading ... loan syndication and derivatives services." *Id.* at 2.

Therefore, regardless of whether plaintiffs' letter tolled the statute of limitations, plaintiffs were on inquiry notice and the claims against the subsidiaries were already barred by January 14, 2003.[10] It was plaintiffs' choice to "argue that the subsidiaries...were involved in the massive Enron fraud" from the beginning but not to name them in the Consolidated Complaint. Plaintiffs made their choice and they must now live with the consequence that their claims against Citigroup Inc.'s subsidiaries are time barred.

**B. The Sarbanes Oxley Act Does Not Extend The Time Period For Suits That Were Pending At The Time Of Enactment**

Plaintiffs' alternative argument that their claims are timely under the Sarbanes-Oxley Act is equally without merit. Section 804(b) of the Act provides that the extended limitations period "shall apply to all proceedings addressed by this section that are commenced on or *after* the date of enactment of this Act." *See* Pub. L. No. 107-204, § 804(b), 116 Stat. 745, 801 (July 30, 2002) (herein cited as "Sarbanes-Oxley Act"). Because this case commenced *before* the date of enactment of the Act, the Act does not apply.

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[10] For this same reason, it is also irrelevant how much time it took Citigroup to prepare its summary judgment motion. Plaintiffs' claims were barred before Citigroup was ever asked to file such a motion. Thus, plaintiffs' equitable estoppel argument is misplaced. Plaintiffs also fail to identify any misrepresentation on which they reasonably could have relied, which is necessary to plead equitable estoppel. *See Friedman v. Wheat First Sec., Inc.*, 64 F. Supp. 2d 338, 346 (S.D.N.Y. 1999). Additionally, plaintiffs act as though they did not know Citigroup's position on the real party in interest issue until its summary judgment motion was filed. However, one month after plaintiffs filed their First Consolidated Complaint, Citigroup specifically informed plaintiffs that "any business dealings with Enron were those of Citigroup's subsidiaries, *including Citibank N.A., and Salomon Smith Barney, Inc.*" Memorandum in Support of Motion to Dismiss by Citigroup, filed May 8, 2002, at p. 10 n.3 (emphasis added).

Plaintiffs argue that the relevant date for determining whether § 804 applies is the date the subsidiaries were named as defendants, not the date the case was commenced, and that their claims against the subsidiaries are therefore timely under the Act. (Pl. Opp. at 7-10.) This argument ignores that fact that § 804 applies to "*proceedings* . . . commenced on or after the date of enactment," not to defendants added to already-commenced proceedings after the date of enactment. *See* § 804(b), 116 Stat. at 801 (emphasis added); *see also Legislative History of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002,* 148 Cong. Rec. S7418-01, S7418 (daily ed. July 26, 2002) ("[Section 804] by its plain terms, applies to any and all *cases* filed after the effective date of the Act") (emphasis added); *De La Fuente v. DCI Telecom., Inc.*, No. 01 Civ. 3365, (CM) 2003 WL 832009, at *6 n.5, *8-12 (S.D.N.Y. Mar. 4, 2003) (dismissing complaint filed before July 30, 2002 because "the statute of limitations established by the Sarbanes-Oxley Act applies only to *proceedings* commenced on or after July 30, 2002") (emphasis added).

In recognition of this fact, this Court has already held that the extended statute of the Act does *not* apply to *Newby*. *See In re Enron Corp. Sec., Deriv. & ERISA Litig.*, 258 F. Supp. 2d 576, 601 n.20 (S.D. Tex. 2003) (noting that the Act applies "for suits commenced on or after July 30, 2002" and concluding that "[t]his amended limitations period does *not* apply to *Newby*") (emphasis added).

The Second Circuit's recent decision in *Gerber v. MTC Elec. Tech. Co.*, 329 F.3d 297, 309-10 (2d Cir. 2003), is instructive. In that case, the court addressed the applicability of a similar "effective date" provision in the Public Securities Litigation Reform Act ("PSLRA"), which provides that the PSLRA does not apply "to any private action . . . commenced before and pending on" the date of enactment of the statute. As in this case, the initial complaint in *Gerber* had been filed before the enactment date, but the parties at issue were added after the enactment date. The Second Circuit rejected the same type of argument plaintiffs make here – that the PSLRA applies to new parties or claims added after the enactment date – and held that the PSLRA does not apply to the case because the initial complaint was filed before the effective date. The reasoning of the Second Circuit in *Gerber* applies with equal force to this case, and strongly militates in favor of dismissal of the plaintiffs' claims as time-barred.

Plaintiffs provide no plausible explanation for the arbitrary and confusing results that would follow from their reading of § 804. Under the position urged by plaintiffs, two different statutes of limitations would apply to a single claim in a single case: *i.e.*, those defendants named before July 30, 2002 would be subject to a three year statute of limitations, while those defendants named on or after July 30, 2002 would be subject to a five year statute of limitations. Thus, Citigroup Inc. would be subject to a three year statute of limitations, while its subsidiaries, which were added over a year later, would be subject to a five year statue of limitations. There is no legal or logical support for this position. *See Gerber*, 329 F.3d at 310 ("In the absence of any indication to the contrary, we doubt that Congress intended that courts would apply different sets of substantive and procedural rules to groups of plaintiffs asserting identical claims in a single action, depending on when those plaintiffs were added to the complaint.").

Plaintiffs rely exclusively on a recent decision from the Western District of Wisconsin. *See Friedman v. Rayovac Corp.*, No. 02-C-308-C, slip op., at 20-23 (W.D. Wis. May 29, 2003) (Pl. Opp., Ex. 2). We respectfully submit that *Friedman* was wrongly decided, in part because it grounded its holding on an erroneous assumption: that plaintiffs in that case "could have filed a separate action against [the newly added defendants] in January 2003, in which case there could be no dispute over the application of the new statute of limitations." *Id.* at 23. Based on this assumption, for which the court provided *no* support, the court surmised that "[i]t would make little sense to create a rule encouraging judicial inefficiency by requiring separate lawsuits." *Id.* However, the key assumption of *Friedman* is incorrect: neither the plaintiffs in *Friedman*, nor plaintiffs here, can simply file a new case to bring new parties into this consolidated action if they would not be permitted to amend their original complaint to include such parties.

The courts have repeatedly held that a plaintiff with a pending case cannot file a new complaint to accomplish that which it could not do by amending its pending complaint. Thus, "Plaintiffs may not file duplicative complaints in order to expand their legal rights." *Curtis v. Citibank, N.A.*, 226 F.3d 133, 140 (2d Cir. 2000) (affirming district court's dismissal of a second suit based on an amendment which plaintiff feared the court would not allow in his first suit); *Walton v. Eaton Corp.*, 563 F.2d 66, 71 (3d Cir. 1977) (filing of a second complaint would not be allowed to result in a greater right to trial by jury, where plaintiff filed the second complaint to evade waiver of jury trial in her first complaint); *Oliney v. Gardner*, 771 F.2d 856 (5th Cir. 1985) (affirming dismissal of second suit in which plaintiff sought nothing more than to amend allegations in the initial action relating to diversity jurisdiction); *Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223-224 (7th Cir. 1993) (finding no abuse of discretion in dismissal of a second complaint despite the possibility that the first would be dismissed for untimely service.)

More specifically, the Supreme Court has made it clear that a plaintiff with a case pending cannot simply file a new case to take advantage of a change in the law, where Congress has made it clear that the new law was not intended to apply to pending cases. *See Central Trust Co. v. Official Creditors' Comm. of Geiger Enter., Inc.*, 454 U.S. 354 (1982). In *Central Trust*, a debtor filed a Chapter 11 petition under the Bankruptcy Act of 1898 and a few weeks later the Bankruptcy Act of 1978 (the "New Code") was passed. The language of the New Code made it clear that it did not apply to pending cases. After the New Code became law, the debtor voluntarily dismissed his previously-filed petition and brought a "new" one. Nonetheless, the Supreme Court found that because the debtor's case was already pending and because the new act applied only to actions commenced after the date of enactment, he could not simply refile it in order to benefit from the changes in the act. *Id.* at 359-60 n.2 ("the dismissal was entered solely to permit [the debtor] to file under the New Code, that is, to permit it to avoid the prohibition of § 403(a) [which stated that the New Code did not apply to pending cases]").

These cases directly contradict the basic assumption of the *Friedman* court. Plaintiffs in this case could not simply refile *Newby* on behalf of the same plaintiffs, against the subsidiaries of the *Newby* defendants and suddenly get the benefit of the Act. Therefore the basic premise underlying *Friedman* is flawed, and the holding of that case should not be adopted by this Court.[11] The proceedings here were

[11] Even if the court were to embrace the reasoning of *Friedman*, the case is distinguishable from the facts here. The Court in *Friedman* analyzed the meaning of the word "proceeding" by analogizing it to the relation back doctrine of Fed. R. Civ. P. 15. *See Friedman*, slip op., at 22-23. Under that doctrine, "the plaintiff must show that the amended complaint 'relates back' to the initial complaint, as if the

commenced when the first complaint was filed in the current action. This date precedes the effective date of the Act. As a result, the extended limitations periods do not apply to the claims against the Citigroup Inc. subsidiaries and they are barred by the pre-Sarbanes Oxley limitations period.

### C. Plaintiffs' Section 11 Claims Must Be Dismissed Because The Extended Limitations Period Under The Act Applies Only To Fraud Claims

Even if the Court were to find that the extended limitations period of the Act applies to the newly added subsidiaries, plaintiffs' § 11 claims must still be dismissed because the limitations period under the Act applies only to fraud claims.

Section 804 of the Act by its terms expands the limitations period for securities claims involving *"fraud, deceit, manipulation, or contrivance...."* Sarbanes-Oxley Act § 804(a)(2), 116 Stat. at 801) (emphasis added). This statutory language, under the title "Statute of Limitations for Securities *Fraud*," could not more plainly state that the new limitations periods apply only to fraud claims.[12] *See* § 804, 116 Stat. at 801;

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new party had been in the case all along." *Id.* This "relation back" requirement was *not* met in *Friedman*, because they newly added defendant, Thomas H. Lee Partners, an outside shareholder that held 26% of the defendant corporation's outstanding common stock in 2001, was not otherwise related to the defendant, and could not have been said to have "been in the case all along" as required by *Friedman*. *Id.* at 4, 23. Therefore, the court found that the action against Partners represented a "new proceeding." *Id.* at 23. To the contrary, in the present case, plaintiffs argue that defendants' subsidiaries do "relate back" to the initial complaint, and defendants do not deny that if plaintiffs had not made the conscious choice to exclude the subsidiaries, they would properly "relate back." It seems unlikely that the *Friedman* court would have found that the addition of new parties represented a "new proceeding" where, but for a conscious choice of plaintiffs to omit them, they would "relate back" to the initial complaint.

[12] The plain language of the statute is further buttressed by a review of the legislative history. The legislative history is replete with examples of Congress's intent to narrow the application of the expanded statute of limitations periods to causes of action involving fraud. *See* 148 Cong. Rec. S7418-01, S7419 (daily ed. July 26, 2002) (statement of Sen. Leahy) ("[s]ection 804 protects victims by extending the statute of limitations in private securities *fraud* cases ...") (emphasis added); Senate Comm. on the Judiciary, The Corporate and Criminal Fraud Accountability Act of 2002, Report

*see also INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text").

It is equally clear that a § 11 claim does not require the plaintiffs to establish "fraud, deceit, manipulation or contrivance." Even "innocent misstatements" can trigger liability under § 11. *In re Enron Corp. Sec. Deriv. & ERISA Litig.,* 235 F. Supp. 2d 549, 596 (S.D. Tex. 2002); *see also Herman & MacLean v. Huddleston,* 459 U.S. 375, 382-83 (1983); *In re Initial Public Offering Securities Litigation*, 241 F. Supp. 2d 281, 338-39 (S.D.N.Y. 2003) ("no need to prove fraud in a Section 11 claim").

Faced with this unambiguous language, plaintiffs argue that the extended limitations period of § 804 applies here because § 804 contains the term "securities laws," which is defined in Section 3(a)(47) of the Securities Exchange Act of 1934 to include both the Securities Act of 1933 and the Securities Exchange Act of 1934. (Pl. Opp. at 6-7). This argument misses the point. Section 804 is inapplicable to claims under § 11 because this cause of action does not require a showing of "fraud, deceit, manipulation or contrivance," not because it does not arise under the securities laws. If Congress had intended all claims under the securities law to be modified by § 804, those words would have been superfluous.

Several courts have addressed this issue and each has found that the extended limitations of the Act does not apply to § 11 claims. In *In re Merrill Lynch &*

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Together with Additional Views, S. Rep. No. 107-146, at 17 (May 6, 2002) (amendment would "set the statute of limitations in private securities *fraud* cases...") (emphasis added). Moreover, the language of the Sarbanes-Oxley amendment is identical to that used in Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder, both of which are limited to fraud. Sarbanes-Oxley Act § 804(a); *cf* Securities Exchange Act of 1934 § 10(b), 15 U.S.C. 78j(b).

*Co., Inc. Research Reports Sec. Litig.*, -- F. Supp. 2d --, No. 02 MDL 1484, 2003 WL 21518833, at *19 (S.D.N.Y. July 2, 2003), Judge Pollack held that claims under §§ 11 or 12 of the 1933 Act must be brought within one year of discovery, but that for claims arising under § 10(b) of the 1934 Act "brought after the enactment of the Sarbanes-Oxley Act, the applicable statute of limitations is two years" from discovery. Similarly, when faced with a procedural situation nearly identical to that presented here, the Western District of Wisconsin dismissed plaintiffs' § 11 claims and reasoned that "[t]he longer statute of limitations does not apply to *all* securities laws, it applies to securities laws 'that involv[e] a claim of fraud, deceit, manipulation, or contrivance.'" *Friedman* v. *Rayovac Corp.*, No. 02-C-308-C, slip op., at 3 (W.D. Wis. June 20, 2003).[13]

Finally, even if the Court were to find that § 804 was intended to apply to fraud claims, it is still clear that it was not intended to modify § 11. This is because the legislative history of the Act indicates clearly that:

> [The Sarbanes-Oxley statute of limitations provision] is not intended to conflict with existing limitations periods for any express private rights of action under the federal securities laws.

Senate Comm. on the Judiciary, The Corporate and Criminal Fraud Accountability Act of 2002, Report Together with Additional Views, S. Rep. No. 107-146, at 29 (May 6, 2002).

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[13] Plaintiffs' citation to *In re Gibbons*, 289 B.R. 588, 592 (Bankr. S.D.N.Y. 2003), (Pl. Opp. at 7, 11), is misplaced. *Gibbons* does not address the statute of limitations section of Sarbanes Oxley but a completely different section--§ 803. Section 803, unlike § 804, expressly indicates that it is applicable to "violations of any of the Federal securities laws (as that term is defined in Section 3(a)(47) of the Securities Exchange Act of 1934)." This is in stark contrast to the language of § 804 which refers only to "claim[s] of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in Section 3(a)(47)...."

Congress thus did not intend the Act's amendments to impact the existing limitations periods for express private rights of action under the securities laws. The Act's time periods set forth in 28 U.S.C. § 1658(b) are intended to provide default limitations periods for private securities fraud actions that are not otherwise subject to an express statute of limitations (e.g. § 10(b) of the 1934 Act). Section 11 actions, however are governed by their own express statute of limitations provision: Section 13, 15 U.S.C. § 77m. Had Congress intended to expand the statute of limitations for § 11 claims as part of the wide-ranging statutory amendments contained in the Act, Congress certainly could have done so. It chose, however, to leave Section 13 intact. As a result, Section 13's one year limitations period applies to plaintiffs' Section 11 claims against Citigroup Inc.[14]

Because plaintiffs' Section 11 claims do not get the benefit of the extended statute of limitations of the Act, and because they are brought more than a year after discovery of the fraud, they are time barred and must be dismissed.[15]

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[14] Section 13's one year statute of limitations applies on its face to claims based on Section 12(a)(2). 15 U.S.C. § 77m.

[15] Plaintiffs also argue that the Court cannot grant Citigroup's motion to dismiss because there is a factual question as to whether plaintiffs' § 11 claims are "grounded in fraud." (Pl. Opp. at 13). However, plaintiffs are judicially estopped from arguing that their § 11 claims are grounded in fraud, because they expressly disclaimed any allegations of fraud in relation to their § 11 claim in the Consolidated Complaint. (Consol. Cplt.¶ 1005). ("For purposes of this [§§ 11 & 15] claim, plaintiffs expressly exclude and disclaim any allegation that could be construed as alleging fraud or intentional or reckless misconduct, as this claim is based solely on claims of strict liability and/or negligence under the 1933 Act."); *see also In re Enron*, 235 F. Supp. 2d at 597, n.36 ("where [a plaintiff] disavows and disclaims any allegations of fraud in its strict liability 1933 Securities Act claims, its claims do not sound in fraud and they cannot be dismissed for failure to satisfy Rule 9(b)...Lead Plaintiff has made such disclaimers in the consolidated complaint regarding its § 11 claims" (quotation omitted)); id. at *265*. Plaintiffs cannot argue that their claim is not grounded in fraud to avoid the requirements of Rule 9(b), and then later argue that there is a factual question whether their claim is grounded in fraud in order to avoid this motion to dismiss on timeliness grounds. *See Jett v. Zink*, 474 F.2d 149, 155 (5th Cir. 1973) ("Sterling Oil has argued one position before this court and now, after obtaining the benefit of that position, has advanced an admittedly inconsistent position in hopes of prevailing again. We hold that it

## D. The Act Does Not Revive Claims That Were Time-Barred Before Its Enactment

Plaintiffs also include in their argument cases and legislative history which supports a position seemingly irrelevant in Newby – that the Act applies retroactively. (Pl. Opp. at 8-10.) By its terms, however, the Act applies only to "proceedings" commenced after the effective date of the Act. Because, as shown *supra*, this is not such a case, the retroactivity of the Act is irrelevant. Thus, while Citigroup *does* contest that the Act revives claims which have already lapsed under the pre-Sarbanes Oxley statute of limitations, this issue does not arise in the context of *Newby*, and will be fully briefed in the banks' motion to dismiss the *Washington* complaint. Nonetheless, out of an abundance of caution, Citigroup will explain here why the Act does not revive time-barred claims.

The Fifth Circuit has made it clear that a statute extending a period of limitations will not be deemed to revive claims that were time-barred before the statute was enacted unless the statute expressly states an intent to revive such claims. *See Resolution Trust Corp. v. Seale*, 13 F.3d 850, 853 (5th Cir. 1994); *FDIC v. Belli*, 981

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is precluded from utilizing such a tactic."); *Texas Co. v. Gulf Refining Co.*, 26 F.2d 394, 397 (5th Cir. 1928) ("a party who, for the purpose of maintaining his position in litigation, has deliberately represented a thing in one respect, is estopped to contradict his own representation by giving the same thing another aspect in litigation with the same adversary as to the same subject-matter."); *Continental Illinois Nat Bank and Trust Co. of Chicago v. Windham*, 668 F. Supp. 578, 581 (E.D. Tex. 1987). Moreover, plaintiffs' argument relies upon the unsupported assumption that § 11 claims which are "grounded in fraud" get the benefit of the extended statute of limitations period of the Act. However, no court has so interpreted the Act. Besides being in conflict with the language of the statute and relevant case law, plaintiffs' interpretation would lead to the odd result that defendants would rarely be able to get § 11 claims dismissed on statute of limitation grounds because the issue of whether the Act applied would always be a question of fact. Surely, this is not the result Congress intended.

F.2d 838, 842 (5th Cir. 1993); *Trizec Properties, Inc. v. United States Mineral Products Co.*, 974 F.2d 602, 606-08 (5th Cir. 1992).

Section 804(b) of the Act does not come close to the "clear statement" required by the Fifth Circuit before a newly-extended limitations period will be held to revive formerly time-barred claims. On the contrary, the statute says nothing whatsoever about reviving time-barred claims. Had Congress intended to revive time-barred claims, it could readily have done so, as it has done in other federal statues. *See Nehme v. INS*, 252 F.3d 415, 432 (5th Cir. 2001) ("In contrast to § 104, the effective date provisions contained in Title II explicitly provide that the amendments related to voting apply to past conduct and shall be effective as if they had been enacted in 1996. Had Congress intended that the amendments to § 320 of the INA have the broad retroactive effect Nehme advocates, it would have used similar retroactive language in § 104."); *Resolution Trust Corp. v. Artley*, 28 F.3d 1099, 1103 n.6 (11th Cir. 1994) ("Congress is clearly aware of its ability to revive stale claims; and, if it wished, Congress could have provided a lengthy limitations period which explicitly revived stale claims...")

Moreover, plaintiffs' reading would mandate the absurd result that a four-year old claim asserted on July 29, 2002 (the day before the Act was enacted) would be time barred, while the same claim, filed by a more dilatory plaintiff one day *later*, would be deemed timely. This irrational result is readily avoided by enforcing the plain language of the Act, so that it *extends* the limitations period, but does not *revive* claims that were already time-barred when the Act was signed by President Bush. Under this construction, claims that were time-barred under the statute would still be time-barred, and all plaintiffs with claims that were still timely when the Act was enacted would benefit equally from the extension of the limitations period. *See Atchison v. Collins*, 288 F.3d 177, 181 (5th Cir. 2002) (statutes should be construed to avoid irrational consequences).

Additionally, the plain language of the Sarbanes-Oxley Act makes clear that Congress did *not* intend for the Act to revive claims that already had expired under the one year/three year statute of limitations. The Act states that the new limitations period "shall apply to all proceedings . . . that are commenced on or after the date of enactment of this Act." Sarbanes-Oxley Act at § 804(b), 116 Stat. at 801. However, the section goes on to state that '[n]othing in this [statute of limitations] section shall create a new, private right to action." *Id.* at § 804(c), 116 Stat. at 801. To apply the Act retroactively to revive previously time-barred claims would do exactly that which the Act prohibits – create a new, private right of action.

Consistent with the language of the statute, the legislative history contains nothing to suggest that Congress intended to revive claims that were already time-barred—much less the requisite unambiguous directive. Nowhere in the Act's legislative history can one find any form of the word "retroactive," "retrospective," or "revival," or any statement whatsoever that the new statute of limitations would revive time-barred claims. This fact alone is dispositive, because, as noted, for the Act to revive time-barred claims, Congress must not just vaguely imply such an intent; it must state so expressly. *See Vela v. City of Houston*, 276 F.3d 659, 674 (5th Cir. 2001).

Indeed, the legislative history expresses Congress' recognition that, even after the Act became law, previously time-barred claims would still be time-barred. For instance, Senator Patrick Leahy (a sponsor of the amendment to the Act that added

Section 804(b), and the Chairman of the Senate Judiciary Committee) stated in a Capital Hill hearing held six days before the Act was signed by President Bush, "[In the Act] we extend the statute of limitations in security-fraud cases—something that *would've helped* so many people who were defrauded by Enron and others." Federal News Service, *Conference Report on Corporate Responsibility Legislation*, July 24, 2002, available at LEXIS, News Library, Federal News Service file (emphasis added). Senator Leahy also stated that "In Washington State alone, the short statute of limitations may cost [investors]... nearly $50 million in lost Enron investments *which they can never recover*." Sarbanes-Oxley Leg. Hist., 148 Cong. Rec. S7418-01, S7420 (emphasis added), 148 Cong. Rec. 7418 (2002) (emphasis added). These statements reflect the clear understanding that the Act *will not* revive these expired claims.

Neither the language nor the legislative history of the Act permits the conclusion that the statute "unambiguously directs" the result plaintiffs here seek. Plaintiffs cite *Roberts v. Dean Witter Reynolds, Inc.*, No. 02-CV-2115, 2003 WL 1936116 (M.D. Fla. March 14, 2003).[16] (Pl. Opp. at 8, 10-12.) Neither the statutory language nor the legislative history on which the *Roberts* court relied in finding that Section 804 revives time-barred claims expresses the requisite unambiguous Congressional intent to do so. The *Roberts* court relied heavily on statutory language stating that the extended statute of limitations period "shall apply to all proceedings addressed by this Section that are commenced on or after the enactment of this Act." *Roberts*, 2003 WL at *1. The court reasoned:

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[16] *Roberts*, of course, is not binding precedent on this Court. Moreover, the defendants in that case are currently pursuing an interlocutory appeal pursuant to 28 U.S.C. § 1292. (Rosen Dec. Ex. H.)

> [T]he effective date...hinges on the date that proceedings commence or commenced rather than on the date the violation occurred. This language, standing alone, seems to presume that the Act affords redress for violations that had already occurred before July 30, 2002.

*Id.* at *2 (quotation omitted).

The quoted language, however, simply means that the statute applies to causes of action that accrued prior to the effective date of the statute, and does not further provide that time-barred claims are revived. The *Roberts* court's reliance on language that does not explicitly revive lapsed claims, and which is completely consistent with construing the statute in a way that does *not* revive lapsed claims, is fundamentally incompatible with the long-standing presumption *against* retroactivity. Put another way, the *Roberts* court erred by finding that the absence of language *forbidding* retroactivity is equivalent to an affirmative congressional determination that the statute revives lapsed claims. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994).

Moreover, the two fragments of legislative history on which the *Roberts* court relied are ambiguous, at best, and certainly do not overcome the strong presumption against retroactivity. The first snippet of legislative history is the statement that "[t]he section, by its plain terms, applies to any and all cases filed after the effective date of the Act, *regardless of when the underlying conduct occurred.*" *Roberts*, 2003 WL at *3 (emphasis in original). However, this quotation indicates only that the section applies regardless of whether the underlying conduct occurred *before or after the effective date* of the Act--*i.e.*, it applies even to cases that are filed where the underlying conduct occurred before the effective date of the statute. It does not, as the *Roberts* court suggests, imply that Congress intended to revive claims based on conduct occurring before the effective date of the statute where such claims were already barred at the time of the Act's passage. The statement does not even address the issue of revival of lapsed claims. In any event, an argument based on this language proves too much, because if filing a complaint after the statutory enactment date were the sole criterion for determining timelines, it could follow that 200 year old claims would be permitted to proceed, so long as a complaint is filed after the effective date of the Act.

The only other portion of legislative history that the *Roberts* court considered is from a floor speech by Senator Leahy on July 10, 2002. The speech, however, is ambiguous as to whether Senator Leahy thought Congress was extending the statute of limitations to help those defrauded by Enron, or whether those defrauded by Enron were merely the inspiration for protecting people from securities fraud generally. For instance, the Senator says, in part of the speech quoted by the *Roberts* court, "[t]hese are people who would like, *in these kinds of cases*, at least to have a statute of limitations such that we can go after them." *Roberts* at *3. This language suggests that Senator Leahy's concern was not necessarily with Enron's victims, but the victims of securities fraud generally.

Finally, even if Senator Leahy thought that the Act revived barred claims on July 10, 2002, he must have changed his mind fourteen days later when he said in another floor speech: "[In the Act] we extend the statute of limitations in security-fraud cases—something that *would've helped* so many people who were defrauded by Enron and others." *See discussion supra* at Pg. 28.

In short, the court in *Roberts* may have found some evidence that Congress intended the Act to apply to claims that accrued prior to the effective date of the statute where the claims have not yet lapsed, but it presented no basis for finding that Congress intended to revive already lapsed claims. As set forth above, however, the law is firm that a court can only find that a statute revives lapsed claims where such intent is unambiguously clear from the statute and legislative history. *See e.g., Seale*, 13 F.3d at 853. By relying on vague and ambiguous suggestions from the legislative history, *Roberts* has turned the well established presumption on its head. Therefore, we respectfully submit that *Roberts* was wrongly decided and should not be followed by this Court.

### E. Plaintiffs' Allegations Against Citigroup Inc.'s Subsidiaries Do Not "Relate Back" To The Filing Of The Amended Complaint

Finally, plaintiffs' claims against Citigroup Inc.'s subsidiaries cannot be saved by the "relation back" doctrine. Under Fed. R. Civ. P. 15(c)(3), claims against new parties relate back to the filing of the original complaint only if "the party to be brought in by amendment ... knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." Fed. R. Civ. P. 15(c)(3). Here, plaintiffs cannot show either that their failure to name these defendants in the first instance was the result of a "mistake" or that those defendants were on notice of any such alleged mistake.

#### 1. Plaintiffs Cannot Show That Their Failure To Name Citigroup Inc.'s Subsidiaries Was The Result Of A "Mistake"

An amendment changing a party's name can relate back "only if the change is the result of error." *Jacobsen v. Osborne*, 133 F.3d 315, 320 (5th Cir. 1998) (quoting *Barrow v. Wethersfield Police Dept.*, 66 F.3d 466, 469 (2d Cir. 1995), *modified by* 74 F.3d 1366 (2d Cir. 1996)). Thus, the Rule permits relation back only when plaintiffs make a mistake as to the identity of the proper party, such as "misnomer or identification." *Jacobsen*, 133 F.3d at 320. Plaintiffs bear the burden of showing that their decision not to sue the newly-added party in the first instance was a mistake. *See, e.g., Leonard v. Parry*, 219 F.3d 25, 28 (1st Cir. 2000); *Lemerich v. International Union of Operating Engineers, Locals 877 and 4*, No. Civ. 01-124-B-C, 2002 WL 655333, at *4 (D. Me. April 19, 2002).

The case law overwhelmingly demonstrates that a deliberate decision not to name a particular defendant is not a mistake permitting relation back under Rule 15(c)(3). *See, e.g., Powers v. Graff*, 148 F.3d 1223, 1226-28 (11th Cir. 1998); *In re Simon II Litigation*, 211 F.R.D. 86, 145-46 (E.D.N.Y. 2002).[17] "[E]ven the most liberal interpretation of 'mistake' cannot include a deliberate decision not to sue a party whose identity plaintiff knew from the outset." *Wells v. HBO & Co.*, 813 F. Supp. 1561, 1567 (N.D.Ga.1992); *see also Miller v. Calvin*, 647 F. Supp. 199, 202 (D. Colo. 1985) (holding that a strategic choice – naming some of the potential defendants but not others – does not qualify as a mistake under Rule 15(c)); *Morgan v. City of Calera*, No. Civ. A. 99-D-261-N, 2001 WL 799564, at *2 (M.D. Ala. July 5, 2001) ("[W]hether a plaintiff made a mistake, rather than a conscious choice, in originally omitting the relevant defendant

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[17] *See also Lemerich*, 2002 WL 655333, at *3-4; *Randolph-Rand Corp. of New York v. Tidy Handbags, Inc.*, No. 96 Civ. 1829, 2001 WL 1286989, at *8 (S.D.N.Y. Oct. 24, 2001); *In re Bennett Funding Group, Inc. Sec. Litig.*, 194 F.R.D. 98, 100 (S.D.N.Y.2000); *Nordco, A.S. v. Ledes*, No. 95 Civ. 7753, 1999 WL 1243883, at *3 (S.D.N.Y. Dec. 21, 1999); *Levy v. U.S. Gen. Acctg. Office*, No. 97 Civ. 4016, 1998 WL 193191, at *5 (S.D.N.Y. April 22, 1998), *aff'd* 175 F.3d 254 (2d Cir.1999), *cert. denied*, 528 U.S. 876 (1999); *Johnston v. Smith*, No. 1:95-CV-595-RCF, 1997 WL 584349, at *3 (N.D. Ga. June 10, 1997); *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, No. 92 Civ. 6879, 1994 WL 324018, at *3-4 (S.D.N.Y. July 6, 1994).

turns on whether the newly added defendant was known to the plaintiff before the running of the statute of limitations.") (quotation omitted).

Here, there can be no serious contention that plaintiffs' failure to name Citibank, SSB, or SBIL in the Consolidated Complaint was the result of a mistake. As noted, plaintiffs concede that "[f]rom the beginning of this case, Lead Plaintiff has argued that the subsidiaries and parent corporations acting in concert were involved in the massive Enron fraud." (Pl. Opp. at 19.) Moreover, as discussed above (pp. 13-16), the Consolidated Complaint itself, documents specifically cited therein, and information in the public domain (including the prospectuses for the securities at issue and Citigroup's own public filings) show that plaintiffs knew that Citigroup Inc.'s subsidiaries enjoyed a separate legal existence from the parent holding company, and that these entities provided the commercial and investment banking services upon which the First Consolidated Complaint's allegations rest. (*See* pp. 13-16, above.) [18]

Because plaintiffs made a deliberate decision not to name the subsidiary defendants, relation back under Rule 15(c)(3) is not permitted. For this same reason, every case plaintiffs cite regarding confusion between similar parent and subsidiary names does not apply here.[19]

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[18] Even if plaintiffs had made an error in examining the offering documents, the consequences of that error must rest with plaintiff, and relation back of the Amended Complaint would not be appropriate because it would render the statute of limitations defense unavailable to Citibank, SSB, and SBIL. *Jacobs v. McCloskey & Co.*, 40 F.R.D. 486, 489 (D.C.Pa.1966) (denying plaintiff's amendment to substitute the subsidiary of the original defendant, and emphasizing that the error in examining the title records and thereby naming the wrong defendant was plaintiff's responsibility and that the subsidiary would be prejudiced because the statute of limitations defense would be unavailable if it were added).

[19] *See, e g., Berrios v. Sprint Corp.*, No. CV-97-0081, 1997 WL 777945, at *5 (E.D.N.Y. Nov. 13, 1997) (permitting relation back where plaintiff "clearly made a mistake"); *De Coelho v. Seaboard Shipping Corp.*, 535 F. Supp. 629, 637 (D. Puerto Rico 1982) (permitting relation back where defendant "chose

Plaintiffs strenuously deny that there was any reason to exclude the subsidiaries, but the Consolidated Complaint itself demonstrates the tactical advantage to be gained. Plaintiffs may well have decided to sue only Citigroup Inc. because they wanted to elide the distinction between the holding company and its operating subsidiaries, thereby supporting their allegation that Citigroup Inc. is a "consolidated and unified entity" acting without a "Chinese Wall." (Consol. Cplt. ¶ 676.) This, in turn, might have allowed plaintiffs to argue that knowledge in any one subsidiary should be attributed to any other. Whatever plaintiffs' reason, however, Rule 15(c) does not absolve them of the consequences of their choice. *See Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, No. 92 Civ. 6879, 1994 WL 324018, at *3 (S.D.N.Y. July 6, 1994) ("[T]he rule's aim is clearly not to absolve a plaintiff of the consequences of a deliberate strategic decision to exclude a particular plaintiff or defendant.").

Plaintiffs also argue in the alternative that they made a mistake of law in not originally naming Citigroup Inc.'s subsidiaries as defendants. (Pl. Opp. at 29-32.) Plaintiffs assert that they decided not to name the subsidiaries as defendants because they

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to remain silent and take advantage of plaintiffs' mistake"); *Graham v. Gendex Medical X-Ray, Inc.*, 176 F.R.D. 288, 291 (N.D. Ill. 1997) (permitting relation back where new defendant in civil action related to ADEA claim with the EEOC "knew or should have known from being named in the EEOC complaint that the instant action would have been brought against it, but for [plaintiff's] inadvertent mistake"); *Zimmer v. United Dominion Indus., Inc.*, 193 F.R.D. 620, 623-24 (W.D. Ark. 2000) (permitting relation back and estopping defendant from relying on the limitations bar to prevent the defendant from "tak[ing] advantage of an error it helped to create"); *Aerotel, Ltd. v Sprint Corp.*, 100 F. Supp. 2d 189, 196 (S.D.N.Y 2000) (permitting relation back where "it is reasonable to assume that [defendant] knew this action would have been brought against them but for [plaintiff's] mistake in assuming that [defendant] was selling the telephone cards"). One case cited by plaintiffs, *Lynn v. JER Corp.*, 573 F. Supp. 17 (M.D. Tenn. 1983), does not concern the application of Rule 15(c)(3) at all, but the various factors for determining whether an unnamed party had adequate notice and opportunity to participate in Title VII conciliation hearings.

mistakenly assumed that Citigroup Inc. was "[a] proper enumerated defendant[] pursuant to § 11" and that corporate separateness would not "preclude[] primary liability of bank parents for the acts of bank subsidiaries." (Pl. Opp. at 29-30.)

Of course, plaintiffs cannot have made both an alleged mistake of fact and a mistake of law; either they were confused as to the identity of the parent holding company and subsidiary operating companies *or* they understood the difference, but decided not to sue the subsidiaries on the basis of an erroneous legal conclusion. If in fact plaintiffs made a mistake, they know which one it was. The fact that they assert both in the alternative signals the weakness of their relation back argument: plaintiffs made no mistake – except perhaps a strategic one. Once again, Rule 15(c)(3) does not protect plaintiffs' strategic decision not to name Citibank, SSB, and SBIL.[20]

In any event, Rule 15(c)(3) provides no relief from an alleged "legal mistake." "Rule 15(c)(3) was not designed to remedy a mistake in the selection of a legal theory." *Leonard*, 219 F.3d at 31; *see also Rendall-Speranza v. Nassim*, 107 F.3d 913, 917-18 (D.C. Cir. 1997) (rejecting the view that Rule 15(c)(3) applies where "the mistake is one of legal judgment rather than a mere misnomer"); *Wilson v. United States Government*, 23 F.3d 559, 563 (1st Cir. 1994) (holding that amended complaint adding

[20] Because plaintiffs made a strategic gamble and not a mistake, the cases they cite offer no support. *Simpson v. Borg-Warner Automotive, Inc.*, No. 97 C 1911, 1997 WL 769358, at *2 (N.D. Ill. Dec. 4, 1997) (permitting relation back where the court found "no evidence that [plaintiff's] choice was tactical, and no explanation for what advantage she would gain," and thus the decision to name the parent and not the subsidiary did not appear to be "an intentional, strategic choice" ); *Woods v. Indiana University-Purdue University at Indianapolis*, 996 F.2d 880, 887 (7th Cir. 1993) (permitting relation back where the plaintiff actually made the mistake of suing a party enjoying sovereign immunity); *Gaspard v. Highlands Insurance Co.*, Civ. A. No. 89-3385, 1991 WL 34963, at *2 (E.D. La. 1991) (finding plaintiff made a mistake concerning identity).

United States as defendant does not relate back where plaintiff learned after limitation period had run that United States, not his employer, owned ship on which he was injured); *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 5 F.3d 431, 434 (9th Cir. 1993) ("[The plaintiff] knew who those parties were and made a mistake in who it determined it ought to sue under the circumstances. The mistake under Rule 15(c) has to be as to identity, and there was no mistake as to the identity of [the defendant]."). In circumstances like these, where plaintiffs knew the identities of the new defendants, should have known that they could be proper parties to the suit, and pleaded facts in the Consolidated Complaint that would have supported claims against the new defendants, an attempted amendment will not relate back. *See Powers*, 148 F.3d at 1227-28 (holding that amendment adding defendant's control persons would not relate back where plaintiffs knew identities of new defendants, their "potential role" in alleged wrongdoing, and included facts in original complaint that would have supported claim); *Wells*, 813 F. Supp. at 1567 (refusing relation back even where adding new defendants earlier might have risked sanctions for the plaintiffs' attorney); *see also Nordco,* 1999 WL, at *4 (denying relation back where plaintiffs knew proposed defendants' identities, but omitted them as a matter of choice).

**2. Citibank, SSB, And SBIL Were Not On Notice That Plaintiffs Would Have Named Them As Defendants But For A Mistake.**

Plaintiffs also cannot satisfy their burden of showing that Citibank, SSB, and SBIL "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." *Lemerich*, 2002 WL 655333, at *4.

Citibank, SSB, and SBIL had every reason to believe that plaintiffs made a conscious decision to sue Citigroup Inc. alone. As discussed above, plaintiffs were familiar with Citigroup's corporate structure and had claimed that the subsidiaries, including SSB, participated in the alleged fraud in concert with the parent holding company. Moreover, Citibank and SSB are among the world's largest providers of commercial and investment banking services, and among the most prominent of Citigroup Inc.'s operating subsidiaries. Finally, in its first motion to dismiss, Citigroup Inc. informed plaintiffs that it was the operating subsidiaries that had done business with Enron, and plaintiffs waited more than twelve months to amend their complaint. On this evidence, Citibank, SSB, and SBIL had every reason to conclude that they had not been named because of strategic reasons rather than as the result of a mistake. *See Kilkenny v. Arco Marine Inc.*, 800 F.2d 853, 857 (9th Cir. 1986) (refusing to relate amendments back where named defendant answered complaint stating correct defendants' identities, and plaintiff failed to amend for over two years). In any case, defendants need not speculate as to why plaintiffs decided not to name the subsidiaries. *See Miller*, 647 F. Supp. at 202 (D. Colo. 1985) ("[W]hen the plaintiff merely sues one joint tort-feasor or obligor, the missing party is under no duty to speculate as to the reason plaintiff has not pursued him.") (quotation omitted). It is more than enough that the subsidiaries did not know, nor should they have known, that the failure to name them as defendants was the product of mistaken identity.

Plaintiffs repeatedly emphasize that Citibank, SSB, and SBIL were allegedly on notice of this action. But notice of the action is irrelevant when the amendment in an amended complaint is not correcting a mistake. *See, e.g.*, *Jacobsen*, 133 F.3d at 320 (bifurcating the relation back test into a notice and a mistake inquiry); *Advanced Magnetics*, 1994 WL 324018, at *3; *Franklin v. Norfolk & Western Ry. Co.*, 694 F. Supp. 196, 198 (S.D. W.Va. 1988) (recognizing separate notice and mistake requirements). "The mistake requirement is independent from whether the purported substitute party knew that the action would be brought against it." *Arachnid, Inc. v. Valley Recreation Products, Inc.*, No. 98-C-50282, 2001 WL 1664052, at *7 (N.D. Ill. Dec. 27, 2001). Moreover, the rationale for Rule 15(c)(3) supports the conclusion that an independent mistake requirement is an integral part of the rule. *Advanced Magnetics*, 1994 WL 324018, at *4 ("The purpose of the rule would be undermined if [the court] . . . allow[ed] plaintiff to avoid the adverse statute of limitations consequences of its deliberate decision ....") As the Fifth Circuit held in *Jacobsen*, "[a]ssuming *arguendo* [plaintiff] is correct [and shared counsel can be judicially noticed under the identity of interest doctrine], the failure to clear the separate ... 'mistake' hurdle remains." *See, e.g.*, *Jacobsen*, 133 F.3d at 320.

Plaintiffs' assertion that these defendants have admitted to notice is factually incorrect as well as legally irrelevant. Plaintiffs state that "Citigroup notes in its 2002 Annual Report that 'Citigroup and, in one case, Salomon Smith Barney, Inc. (SSB) were named as defendants ... in two putative consolidated class action complaints'" filed in the Southern District of Texas. (Pl. Opp. at 23.) This is not an admission by Citibank, SSB, and SBIL that they are properly defendants in this action. It is a statement of the accurate facts that Citigroup Inc. had been named as a defendant in the Consolidated Complaint, and that SSB was a named defendant in the *Pulsifer* class action complaint. *See* Part III(A), *supra*. In fact, the statement cited from the Annual Report proves the contrary: Citigroup Inc. did not consider Citibank, SSB, and SBIL parties to the proceedings controlled by the First Consolidated Complaint.

Plaintiffs also claim that Citigroup Inc. has "sought to obscure or downplay each subsidiary's role in the fraudulent scheme." (Pl. Opp. at 36.) This is untrue as well as irrelevant. In fact, one month after plaintiffs filed their First Consolidated Complaint, Citigroup Inc. specifically informed plaintiffs that "any business dealings with Enron were those of Citigroup's subsidiaries, including Citibank, N.A., and Salomon Smith Barney, Inc." (*See* Memorandum in Support of Motion to Dismiss by Citigroup Inc., filed May 8, 2002, at p. 10 n.3). In any event, these allegations are completely irrelevant to the question of Rule 15's applicability: whatever information has come to light since the Consolidated Complaint was filed is not relevant to whether plaintiffs made a mistake. *See Leonard* 219 F.3d at 29 (noting that "evaluating the existence of a plaintiff's mistake in light of subsequently acquired knowledge is flatly inconsistent with the language of Rule 15(c)(3)").[21]

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[21] In addition to the arguments discussed above, Citigroup's moving brief demonstrated that plaintiffs' control person claims against Citigroup Inc. failed to allege particularized facts to support Citigroup Inc.'s culpable participation in the alleged fraud by its subsidiaries. (Citi. Mem. at 15 n. 11.) Although plaintiffs insist that such allegations need not be pled (Pl. Opp. at 52-56), this Court has previously held that a plaintiff must allege "particularized facts as to the controlling person's culpable participation in (exercising control over) the fraud perpetrated by the controlled person" (quotation omitted). *In re Enron Corp.*, 235 F. Supp. 2d at 598 (S.D. Tex. 2002). Plaintiffs further misrepresent (Pl. Opp. at 52), the control person liability standard this Court set forth in *In re Landry's Seafood Restaurant, Inc. Sec. Litig.*, No. H-99-1948, slip op., at 11 n.14 (S.D. Tex. Feb. 20, 2001) (Pl. Opp. Ex. 21), which likewise provided that "[t]o survive a motion to dismiss a [Section 15] claim," a plaintiff must allege the controlling person's culpable participation in the challenged conduct. The Fifth Circuit similarly has stated that the controlling person's inducement of or participation in the alleged violation is a required element of a Section 15 claim. *See Dennis v. General Imaging, Inc.*, 918 F.2d 496, 509 (5th Cir. 1990).

## CONCLUSION

For the foregoing reasons, Citigroup's motion to dismiss should be granted.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing reply Memorandum in Support of Motion to Dismiss was served on all counsel on the attached service list electronically via the *www.esl3624.com* website or as otherwise indicated in the Court's prior orders upon this 31[th] day of July, 2003.

Jacalyn D. Scott

**IN THE UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**(HOUSTON DIVISION)**

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|---|---|
| In re ENRON CORPORATION SECURITIES LITIGATION | |
| This Document Relates To:<br><br>MARK NEWBY, *et al.*, Individually and On Behalf of All Others Similarly Situated,<br><br>Plaintiffs,<br><br>-v.-<br><br>ENRON CORP., *et al.*,<br><br>Defendants. | Civil Action No. H-01-3624 (Consolidated)<br><br>**DECLARATION OF RICHARD A. ROSEN IN FURTHER SUPPORT OF CITIGROUP DEFENDANTS' MOTION TO DISMISS** |

RICHARD A. ROSEN declares pursuant to 28 U.S.C. § 1746:

1. I am a member of Paul, Weiss, Rifkind, Wharton & Garrison LLP, attorneys for defendants Citigroup Inc., Citibank N.A., Salomon Smith Barney Inc. (now called Citigroup Global Markets Inc.), and Salomon Brothers International Limited (the "Citigroup Defendants") in this action. I submit this declaration in support of the Citigroup Defendants' motion to dismiss the First Amended Consolidated Complaint.

2. A true and correct copy of the slip opinion in *In re Safety-Kleen Corporation Bondholders Litigation*, C/A. No. 3:00-1145-17 (D.S.C. Mar. 27, 2002), is attached as Exhibit A.

3. A true and correct copy of the relevant page of the Prospectus Supplement dated February 11, 1999, 12,000,000 shares of Enron Common Stock, is attached as Exhibit B.

4. A true and correct copy of the relevant page of the Prospectus dated August 10, 1999, $222,500,000 7% Exchangeable Notes due July 31, 2002, is attached as Exhibit C.

5. A true and correct copy of the Salomon Smith Barney Inc. Research Call Note, dated July 20, 1999, is attached as Exhibit D.

6. A true and correct copy of the Salomon Smith Barney Inc. Research Call Note, dated October 20, 1999, is attached as Exhibit E.

7. A true and correct copy of the Salomon Smith Barney Inc. Research Note, dated July 24, 2000, is attached as Exhibit F.

8. A true and correct copy of the relevant pages of Citigroup Inc.'s Form 10-K for the fiscal year ended December 31, 2000, filed with the Securities and Exchange Commission on March 14, 2001, is attached as Exhibit G.

9. A true and correct copy of the Order granting a Petition for Permission to Appeal an Order from the United States District Court for the Middle District of Florida, *Dean Witter Reynolds, Inc. v. Roberts*, No. 03-90014-J (11th Cir. May 20, 2003), is attached as Exhibit H.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 30, 2003 at New York, New York.

Richard A. Rosen

The Exhibit(s) May

Be Viewed in the

Office of the Clerk