

TABLE OF CONTENTS

I. STATEMENT OF FACTS1

II. ARGUMENT5

 A. HPI’s Motion To Intervene Is Not Timely6

 B. HPI’s Claims And Those Of The Newby Plaintiffs
 Do Not Raise Common Questions Of Law Or Facts10

 C. Intervention Will Unduly Prejudice The Rights
 Of the Existing Parties11

IV. CONCLUSION12

I. STATEMENT OF FACTS

On or about October 20, 2001, Newby v. Enron, (the “Newby Action”) action was filed following a series of stunning revelations concerning Enron’s unprecedented fraud. The initial complaint filed in the Newby Action alleged claims on behalf all persons who acquired Enron’s publicly traded securities. On April 8, 2002, the First Consolidated and Amended Complaint was filed in the Newby Action and again alleged claims only on behalf of all persons who acquired Enron’s publicly traded securities. Neither Newby complaint expressly alleged claims on behalf of purchasers of certain securities known as “Credit Linked Notes,” (“CLNs”)-- issued by, in the name of, and for the benefit of Citigroup.

Purchasers of Citigroup CLNs incurred more than \$2.4 billion in damages when they were defrauded by Citigroup into purchasing these notes at artificially inflated prices during the period November 4, 1999 through December 3, 2001. Citigroup CLNs were conceived of, issued in the name of, by, and for the benefit of Citigroup. Specifically, Citigroup CLNs were issued in order to enable Citigroup to shift the financial risk of loss associated with Enron from itself to unsuspecting purchasers of CLNs.

Having incurred more than \$2.4 billion in collective damages resulting from their purchases of Citigroup CLNs at artificially inflated prices, Citigroup CLNs purchasers acted promptly to protect their interests and, based on an extensive investigation conducted by their counsel, filed a class action lawsuit on behalf of purchasers of Citigroup CLNs on July 22, 2002. This class action suit, entitled Conseco Annuity Assurance Co. v. Citigroup et al.(the “Conseco Action”, is being pursued by Conseco Annuity Assurance (“Conseco”), a multi-billion dollar financial services company that purchased Citigroup CLNs at artificially inflated prices and incurred more than \$4 million in damages as a result of defendants wrongful conduct. Conseco’s Class Action

Complaint alleges claims only against Citigroup and Citigroup subsidiaries and employees for having violated Section 10b of the 1934 Act in connection with the fraudulent scheme employed by these defendants through the sale of the Citigroup CLNs. As a purchaser of Citigroup CLNs, Conseco seeks to hold Citigroup directly liable for Citigroup's own fraudulent scheme involving the issuance and sale of the Citigroup CLNs at artificially inflated prices. Unlike the Newby plaintiffs, Conseco does not seek to hold Citigroup liable for its participation in Enron's fraudulent scheme, and, as such, Conseco does not allege claims against any Enron defendants. As such, the claims of Citigroup CLNs class members are not subject to the "aiding and abetting" arguments raised by Citigroup in the Newby action. Finally, Conseco is the only representative of purchasers of Citigroup CLNs that has fully and timely complied with all of the requirements of the PSLRA, and that has been actively involved in investigating and prosecuting the multi-billion dollar claims brought exclusively on behalf of purchasers of Citigroup CLN purchasers. Conseco's activities, in this regard, have included the filing of a highly detailed 165 page Amended Complaint and attaches 75 exhibits evidencing Citigroup's fraudulent scheme and direct liability to Citigroup CLN purchasers, as well as the preparation of a highly factually particularized Mediation Statement that also attaches 57 exhibits.

Aware of these myriad factual and legal distinctions between the Newby Action and the Conseco Action, Lead Counsel in the Newby Action nonetheless surreptitiously sought to amend the Newby First Consolidated and Amended Complaint on May 14, 2003. More than 10 months after Conseco's Class claims had been timely filed on behalf of Citigroup CLN purchasers, Lead Counsel in Newby file the First Amended Consolidated Complaint that, for the first time, buried in a footnote, purported to assert claims on behalf of purchasers of Citigroup CLN.

Remarkably, however, no plaintiff listed in the First Amended Consolidated Complaint was identified as ever having purchased Citigroup CLNs. Undaunted by the clear lack of standing to assert claims on behalf of purchasers of Citigroup CLN's, and well aware that class claims on behalf of Citigroup CLN purchasers had long been vigorously pursued by Conseco, Lead Counsel in Newby nonetheless refused to yield. When questioned before this Court by counsel for Conseco during a July 2003 hearing, Newby Lead Counsel acknowledged that none of the plaintiffs he represented had purchased Citigroup CLNs and then claimed that he did not need a separate representative to represent the interests of Citigroup CLN purchasers. Soon afterward, Citigroup moved to dismiss the claims that Lead Counsel in Newby purported to assert on behalf of Citigroup CLN class members in the First Amended Consolidated Complaint. Citigroup moved to dismiss these claims on the basis that the Newby plaintiffs lacked standing, and that the claims purportedly asserted by the Newby plaintiffs, on behalf of Citigroup CLN purchasers, were time barred because they had not been timely asserted by the Newby plaintiffs before the expiration of the statute of limitations governing these claims. As Newby Lead Counsel is well aware, neither of these two defenses is available to Citigroup as against the class claims asserted by Conseco because Conseco clearly has standing as a purchaser of the Citigroup CLNs to represent the class it has alleged claims on behalf of, and the class claims asserted by Conseco were timely filed prior to the expiration of the statute of limitations.

In pursuit of his apparent desire to improperly gain control of a completely separate and distinct class action alleging claims for more than \$2.4 billion asserted only on behalf of Citigroup CLN purchasers – and only against Citigroup -- and to collect any fees that might flow from such a recovery; and despite the fact that he lacks a client with the ability to timely assert such claims, Lead Counsel in the Newby Action continues undeterred. Against this remarkable

factual backdrop – nearly 24 months after the world learned of the claims that form the basis of the allegations made on behalf of Citigroup CLN purchasers, Lead Counsel in the Newby Action now seeks to intervene an entity known as IHC Health Plans, Inc. (“HPI”) – purportedly for the purpose of representing the interests of purchasers of Citigroup CLNs.

In seeking intervention, Lead Counsel in the Newby Action ignores two things. First, HPI has not, and cannot, satisfy the requirements for permissive intervention as required by Fed. R. Civ. P. 24(b)(2). For this reason alone, HPI’s Motion To Intervene must be denied. Second, because: (i) Conseco has timely asserted class claims on behalf of purchasers of Citigroup CLNs; (ii) Conseco itself bought these securities; and (iii) Conseco has retained highly qualified counsel and has been vigorously litigating and attempting to mediate the claims of Citigroup CLN class members, such class members’ claims are well protected and intervention on the part of HPI is unnecessary. Not only is intervention by HPI unnecessary, but such intervention, if permitted by this Court, would result in extreme prejudice to Citigroup CLN class members on the grounds that Citigroup has a very strong statute of limitations defense available to it as against any claims purportedly asserted by Newby Lead Counsel on behalf of the Citigroup CLN class because such claims were not asserted by Newby Lead Counsel until several months after the applicable statute of limitations had expired. Accordingly, were the requested intervention permitted and the statute of limitations successfully asserted by Citigroup as against the claims raised in the First Amended Consolidated Complaint, Citigroup CLN class members would be completely barred from recovering any of the more than \$2.4 billion in damages.

Moreover, Lead Counsel in the Newby Action seeks to completely circumvent the requirements of the PSLRA. Conseco is the only entity that timely complied with the Lead Plaintiff motion requirements of the PSLRA. HPI has never done so and the time for doing so

has long passed. In addition, even if HPI had filed a Lead Plaintiff motion (which it did not), Conseco incurred damages nearly twice as great as those purportedly incurred by HPI – thus, Conseco clearly has the largest financial interest in representing the class of Citigroup CLN purchasers and has demonstrated its ability to do so with competence and zeal. Finally, and perhaps most remarkable, is the fact that Lead Counsel in Newby is completely aware of all of these facts and has nonetheless refused to acknowledge that the claims of Citigroup CLN class members may only be properly pursued by Conseco.

When viewed in the light of day, HPI’s Motion To Intervene must be seen for what it is, nothing more than a heavy-handed and self-interested attempt on the part of Newby Lead Counsel to aggrandize himself to a position of control over a litigation that would result in extreme prejudice to Citigroup CLN class members. Such improper conduct should not be countenanced by this Court – especially where Newby Class Counsel has otherwise here-to-date demonstrated that the Newby Action has been handled in a highly competent manner by Newby Lead Counsel on behalf of all persons who acquired Enron’s publicly traded securities.

II. ARGUMENT

Permissive intervention is governed by FRCP 24(b) which requires that a would-be intervenor satisfy three requirements. Intervention will only be permitted if: (i) the motion to intervene is timely; (ii) the intervenor’s claims and the main action have a question of law or fact in common; and (iii) none of the existing parties in the main action will be unduly prejudiced. See FRCP 24(b)(2); Taylor Comm’n Group, Inc. v. Southwestern Bell Tel. Co., 172 F. 3d 385, 389 (1999 5th Cir.).

HPI has failed to meet any of the elements required to intervene pursuant to Federal Rule of Civil Procedure 24(b)(2) (“FRCP 24(b)(2)”). In particular, HPI’s motion to intervene: (i) is not

timely; (ii) the questions of law and fact concerning Enron's fraudulent scheme that are the subject of the Newby Action are completely separate and highly distinct from the questions of law or fact that exist and concern Citigroup's fraudulent scheme that involved the creation, issuance and sale of more than \$2.4 billion of Citigroup Credit Linked Notes; and (iii) intervention by HPI will result in extreme prejudice to Citigroup CLN class members. Because HPI has failed to meet the requirements of FRCP 24(b)(2), and because HPI is already a member of the Citigroup CLN purchaser class, represented by Conseco and independently recognized by this Court, HPI's motion to intervene should be denied.

A. HPI's Motion To Intervene Is Not Timely

In order for a court to consider a motion "timely", the intervenor must meet four additional sub-factors including: (i) the length of time during which the intervenor knew or reasonably should have known of his interest in the case; (ii) the extent of prejudice to the existing parties in the litigation if the applicant for intervention would be allowed to intervene, despite such untimeliness; (iii) the extent of prejudice that the applicant would suffer if not permitted to intervene; and (iv) the existence of any unusual circumstances militating either for or against a determination that the application is timely. See Stallworth v. Monsanto Co., 558 F.2d 257, 264 (5th Cir. 1977). An analysis of these factors leads to the conclusion that HPI's motion to intervene is not timely.

First, HPI knew or reasonably should have known of its interest in a case against Citigroup as the issuer of Citigroup CLNs as early as December 2001 when Enron declared bankruptcy, which was the "event of default", as defined in the Indenture Agreements for the Citigroup CLNs. Enron's Bankruptcy caused the price of the Citigroup Credit Linked Notes to plunge,

thus putting HPI and all other Citigroup CLN purchasers on actual notice that the triggering event identified in the Indenture Agreements had occurred.

HPI received further notice of its possible claims against Citigroup in July 2002, when the United States Senate's Permanent Subcommittee on Investigations began investigating the role of financial institutions, including Citigroup, in Enron's collapse. The testimony given at these hearings demonstrated that Citigroup issued the Citigroup CLNs: (i) with full knowledge of the false and misleading nature of Enron's reported financial results, and (ii) in order to fraudulently transfer \$2.4 billion worth of its Enron credit risk from itself to third-party investors, such as HPI. Indeed, the very day before these hearings, the complaint in the Conseco action was filed – even without the benefits of the damning facts learned during the Senate hearings. Finally, HPI also received notice of its possible claims against Citigroup in September 2002 when a notice was published in accordance with the requirements of the PSLRA, announcing that a class action lawsuit had been commenced on behalf of purchasers of Citigroup CLNs. Pursuant to the PSLRA, HPI had the opportunity to move for Lead Plaintiff in the action against Citigroup, but failed to do so.

Each of these facts demonstrates that HPI knew, or reasonably should have known, of its possible claims against Citigroup for claims against Citigroup arising out of Citigroup's fraudulent CLN scheme. After nearly 24 months, from when HPI knew, or clearly had reason to know of the existence of its claims against Citigroup, HPI expects this Court to believe that HPI was unaware of its interest in these claims until now.

HPI argues that it filed its motion to intervene “within three months after the *operative* complaint.” (Intervenor's Motion at 4)(emphasis added). Such argument is completely

disingenuous because HPI was put on notice of its interest with the filing of the *original Newby* complaint, not the “*operative*” one.

Second, extreme prejudice would result to Citigroup CLN class members if this Court permitted HPI to intervene at this late juncture. As detailed in the Statement of Facts above, Conseco is the only entity to have timely asserted claims for violation of the federal securities laws against Citigroup for Citigroup’s fraudulent scheme involving the issuance and sale of the Citigroup Credit Linked Notes. The claims purportedly asserted by HPI in the First Amended Consolidated Complaint are not timely because they were asserted after the expiration of the applicable statute of limitations. This fact has not escaped Citigroup’s attention – and indeed was the subject of Citigroup’s recent motion to dismiss the claims purportedly asserted by the Newby Lead Plaintiffs in the First Amended Consolidated Complaint.

Third, HPI would not be prejudiced, in any way, should this Court deny its motion to intervene, as its interests are already being vigorously represented by Conseco. As described above, the Conseco Action, on behalf of purchasers of Citigroup CLN purchasers, was filed in July of 2002. Since that date, Conseco’s counsel has continued to conduct an extensive investigation, and Conseco has diligently and timely complied with the requirements of the PSLRA, and actively monitored and supervised all aspects of the litigation. Such actions demonstrate Conseco’s dedication and ability to protect the interests of the Citigroup CLN class. In contrast, HPI has slept on its rights for more than a year and a half and has now decided to file a motion to intervene.

Finally, unusual circumstances exist militating against a determination that HPI’s motion is timely. The proposed intervention is nothing more than an attempt by Lead Counsel in the Newby Action to improperly acquire control over a litigation that asserts entirely distinct, direct

claims against Citigroup as compared to those asserted in the Newby action. The original Newby complaint was filed on October 20, 2001. Only months after Conseco filed its complaint against Citigroup on behalf of the Citigroup CLN class, Newby filed an amended complaint, without amending the class definition, despite its knowledge of the Citigroup CLN class of purchasers. Newby again amended and for the first time, in May 2003 (10 months after the original claims were timely filed in the Conseco action on behalf of Citigroup Credit Linked Note purchasers), surreptitiously sought to change the class definition to include Citigroup Credit Linked Note purchasers. Counsel for Lead Plaintiff in the Newby Action did so knowing full well that it did not have a plaintiff with standing to represent the CLN class.

In July, 2003, after being made aware of Conseco's separate action on behalf of the Citigroup CLN class, Judge Harmon expressly ordered the Conseco action to participate in the mediation before Judge Connor. Conseco timely submitted a highly detailed Mediation Statement that reflected extensive factual investigation, detailed findings and unique arguments. This Mediation Statement contained an in-depth analysis of Citigroup's liability based upon a review of hundreds of thousands of pages of documents produced by Citigroup.

During a hearing in July 2003, counsel for Conseco raised the issue of lack of standing (based on the fact that the Newby class definition included CLN holders, without a representative). When asked about such deficiency, Lead Counsel stated that CLN holders were covered under "foreign debt" and therefore did not require a separate representative.¹

These unusual circumstances clearly demonstrate that Lead Counsel in the Newby Action desires nothing more than to acquire control over the Citigroup CLN litigation, even if it means filing an untimely motion to intervene on behalf of a client who mysteriously, and only recently,

¹ Presumably, Lead Counsel has now changed his mind. Only after Lead Counsel in the Newby Action received Conseco's Mediation Statement did it file its motion to intervene on behalf of HPI.

appeared after Lead Counsel in the Newby Action realized that it could not pursue a claim on behalf of Citigroup CLN purchasers without such a representative, despite imposing extreme prejudice on the very class that Lead Counsel in the Newby Action claims he wants to represent, because of his failure to timely file such claims.

HPI's motion to intervene is untimely and should be denied on this ground because: (i) HPI knew or reasonably should have known of its interest in a case against Citigroup since December 2001; (ii) the parties in the Newby Action (namely the existing class of Citigroup CLN purchasers) are prejudiced by intervention at this juncture; (iii) HPI's interests are extremely well represented by Conseco; (iv) and usual circumstances exists militating against a determination that HPI's motion to intervene is timely.

B. HPI's Claims And Those Of The Newby Plaintiffs Do Not Raise Common Questions Of Law Or Facts

While HPI attempts to paint a picture of total similitude between its claims (claims properly asserted against Citigroup in connection with Citigroup's fraudulent CLN scheme) and those of the plaintiffs in the Newby Action, nothing could be further from the truth, as both factual as well as legal differences between the claims abound.

Factually, plaintiffs in the Conseco Action have alleged that Citigroup, one of the world's largest and most trusted financial institutions, violated applicable federal securities laws by fraudulently transferring billions of dollars of Citigroup's own Enron credit exposure to third party investors (Citigroup CLN class members) from whom it concealed Enron's true financial condition. This type of claim is a "direct" claim against Citigroup, who manufactured its own fraudulent scheme by which it defrauded purchasers of the Citigroup CLNs.

The claims against Citigroup in the Newby Action, however, are not direct, and focus on the fraud that occurred *at Enron*, harming Enron shareholders, with the help of multiple defendants.

These claims do not focus or otherwise involve Citigroup's independent fraudulent scheme of bilking Citigroup CLN class members out of more than \$2.4 billion and are therefore clearly not the same, as HPI incorrectly suggests.

Legally, the Newby Action, in effect, asserts nothing more than an aiding and abetting claim against Citigroup for Citigroup's assistance to Enron in perpetrating the Enron scheme. In contrast, the Consecos Action asserts direct claims against Citigroup arising out of a completely independent fraudulent scheme involving the issuance of \$2.4 billion in Citigroup CLNs. Additionally, Consecos's claims were brought timely, Newby's claims that it purports to assert against Citigroup are time barred, as defendants have so argued.² Finally, Consecos has timely complied with the requirements imposed by the PSLRA, while HPI has never done so – and the time to do so has long passed. In light of these legal and factual differences, there are highly distinct questions of law or fact asserted in the actions.

C. Intervention Will Unduly Prejudice The Rights Of The Existing Parties

HPI's intervention at this late date will unduly prejudice the rights of the existing parties in several ways. First, HPI has failed to comply with the PSLRA. A PSLRA notice on behalf of purchasers of Citigroup CLNs was published on September 29, 2002. The only party to respond and comply with the PSLRA's requirements was Consecos, expressing its desire to be appointed Co-Lead Plaintiff. In contrast, HPI has only just crawled out of the woodwork. In waiting so long to assert its rights, HPI, an entity with less than one half the losses of Consecos, will now

² HPI argues that it has "adopted the First Amended Consolidated Complaint filed in Newby in its entirety" so as to demonstrate the factual and legal overlap between the parties' claims. This statement only further demonstrates Newby's willingness to compromise CLN purchasers' claims in favor of Lead Counsel's effort to control all aspects of the litigation, to the detriment of the CLN class, as plaintiffs' claims in Newby are rife with statute of limitations and aiding and abetting problems.

expose the existing parties in the Newby Action to further litigation over which party should be appointed Lead Plaintiff on behalf of CLN purchasers.³

Second, as described above, defendants in the Newby Action have already argued, in their motions to dismiss, that Newby's claims are time-barred. Intervention by HPI will no doubt expose Citigroup CLN class members to these arguments once again. HPI, has therefore, failed to satisfy the final element necessary to intervene, pursuant to FRCP 24(b)(2) and its motion to intervene should be denied.

IV. CONCLUSION

Because HPI's intervention is untimely, it does not present questions of law or fact common to the Newby action, and HPI's intervention will result in extreme prejudice to the ability of Citigroup CLN purchasers to pursue their claims against Citigroup, HPI's motion to intervene should be denied. Furthermore, because HPI's interests are already represented in the Conseco Action, denial of such intervention will, in no way, prejudice HPI.

Respectfully submitted,

By 

W. Kelly Puls
(State Bar Number 16393350)
Brant C. Martin
(State Bar Number 24002529)
Amanda F. Bell
(State Bar Number 24001715)
PULS TAYLOR & WOODSON
2600 Airport Freeway
Fort Worth, Texas, 76111
Telephone No. (817) 338-1717

³ According to Exhibit B of HPI's Motion to Intervene, HPI has only sustained \$ 2,000,000 in damage, whereas Conseco has sustained over \$4,000,000.

Paul O. Paradis
Evan J. Kaufman
Michelle Z. Hall
Abbey Gardy, LLP
212 East 39th Street
New York, NY 10016
Phone: (212) 889-3700

Edward F. Haber
Michelle H. Blauner
Theodore M. Hess-Mahan
Matthew L. Tuccillo
Shapiro Haber & Urmy, LLP
75 State Street
Boston, MA 02109
Phone: (617) 439-3939

Counsel for Lead Plaintiff Conseco Annuity
Assurance Company