UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CITIGROUP INC. SECURITIES LITIGATION	07 Civ. 9901 (SHS) ECF Case

RESPONSES OF THE CITIGROUP DEFENDANTS TO OBJECTIONS IN RESPONSE TO SUPPLEMENTAL NOTICE

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Defendants Citigroup Inc. ("Citigroup" or the "Company"), Charles Prince, Robert Rubin, Gary Crittenden, Robert Druskin, Thomas G. Maheras, Michael Stuart Klein, and David C. Bushnell (together, the "Citigroup Defendants") respectfully submit this memorandum in response to certain of the objections to the Settlement filed on or before March 15, 2013. Because none of the supplemental objections provide any basis for disapproving the Settlement, the Citigroup Defendants respectfully submit that the Court should approve the terms of the Settlement.[1]

ARGUMENT

I. FA CAP Plaintiffs' Submission Does Not Provide Any Basis for Disapproving the Settlement.

Named plaintiffs in *Brecher* v. *Citigroup Inc., et al.*, 09 Civ. 7359 (SHS) (S.D.N.Y.) ("FA CAP Plaintiffs")[2] have filed a memorandum "in further support" of their previously filed, December 21, 2012 objection to the Settlement.[3] FA CAP Plaintiffs have not argued that the consideration paid in the Settlement is inadequate. Nor have they objected to any other aspect of the Settlement insofar as it relates to the compensation slated to be conferred upon FA CAP participants who received awards in July 2007 and January 2008, whom the parties agree—and FA CAP Plaintiffs do not

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[1] Capitalized terms not otherwise defined herein shall have the meanings set forth in the Stipulation and Agreement of Settlement of Lead Plaintiffs, Named Plaintiffs and Additional Proposed Named Plaintiffs with the Citigroup Defendants, filed August 28, 2012 (the "Settlement") and in the Responses of the Citigroup Defendants to Objections to the Proposed Settlement, filed on January 18, 2013. Citations in the form of "Ex.__" refer to exhibits attached to the Declaration of Richard A. Rosen in Support of the Responses of the Citigroup Defendants to Objections to the Proposed Settlement, filed on January 18, 2013 (Dkt. No. 199).

[2] FA CAP Plaintiffs are current and former Citigroup financial advisors who acquired Citigroup common stock through the Company's voluntary Financial Advisor Capital Accumulation Program ("FA CAP" or the "Program").

[3] FA CAP Plaintiffs' submission is not properly before this Court. Although class members who received supplemental notice pursuant to the Court's January 2, 2013 Order were entitled to file objections by March 15, 2013, none of the FA CAP Plaintiffs are supplemental notice recipients eligible for that extended deadline. Nor did FA CAP Plaintiffs seek permission from the Court to file a second submission in support of their initial December 21, 2012 objection.

appear to dispute—are members of the Settlement Class. Nonetheless, FA CAP Plaintiffs ask the Court to reject the Settlement in its entirety because (i) Lead Plaintiffs purportedly did not have authority to settle the claims of FA CAP participants; (ii) the Settlement does not compensate FA CAP participants for awards made to them in July 2008; and (iii) the Settlement releases the Securities Act claims of FA CAP participants without additional consideration. As set forth in the Citigroup Defendants' prior response, dated January 18, 2013 (Dkt. No. 198) and below, none of these arguments has merit or warrants the rejection of the Settlement.

A. Lead Plaintiffs Were Authorized to Settle All Claims of Settlement Class Members.

FA CAP Plaintiffs argue that Lead Plaintiffs did not have authority to settle this action because of (i) the FA CAP Order, in which the Hon. M. James Lorenz of the United States District Court for the Southern District of California appointed lead counsel in the FA CAP Action prior to its transfer to this Court; and (ii) the case management order in this action ("CMO No. 1").

The FA CAP Order did not—and could not—deprive Lead Plaintiffs of authority to settle on behalf of the putative class identified in their consolidated amended complaint in *this* action. Nor did that order confer on FA CAP Plaintiffs or their counsel the right to participate in settlement negotiations in *this* action, let alone to exercise veto power over this settlement. Likewise, the parties in this action were under no obligation to seek a modification of the FA CAP Order for the simple reason that they were not settling the FA CAP Action. Rather, the parties settled the claims of the Settlement Class in *this* action. There is no dispute that this Settlement Class includes members of the overlapping, uncertified class in the FA CAP Action—that is, FA CAP participants who

acquired Citigroup common stock by virtue of awards granted them in July 2007 and January 2008.[4]

Ultimately, FA CAP Plaintiffs appear to be arguing that, whenever two overlapping putative classes file separate actions, lead plaintiffs in one action may not settle it (and the Court may not approve such a settlement) without the approval or participation of lead plaintiffs in the other action. FA CAP Plaintiffs cite no authority for this novel proposition; indeed, such a rule would be impossible to administer in practice. If FA CAP Plaintiffs, or other members of the uncertified class in the FA CAP Action, preferred to prosecute the claims asserted in that case, they were free to opt out here. But these plaintiffs elected not to—perhaps because the FA CAP Action has already been dismissed by this Court and a motion to dismiss substantial portions of the amended complaint in that action is fully briefed and pending before the Court. *See Brecher* v. *Citigroup Inc.*, 797 F. Supp. 2d 354 (S.D.N.Y. 2011); *Brecher* v. *Citigroup Inc.*, No. 09 Civ. 7559 (SHS) (S.D.N.Y.) (Dkt. Nos. 34–40).

Significantly, in this connection, no class has ever been certified in the FA CAP Action and to this day, four years after the original complaint was filed, FA CAP Plaintiffs have never even moved for class certification. FA CAP Plaintiffs' counsel may not object to or opt out of the Settlement on behalf of absent members of an uncertified

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[4] Similarly, the provision in CMO No. 1 requesting counsel's assistance in calling to the Court's attention any case that might properly be consolidated with this action has no bearing on the authority of Lead Plaintiffs to settle this action or on the fairness of the Settlement. Of course, the Court has not been kept in ignorance of the many similarities between the FA CAP Action and this one. To the contrary, the FA CAP Action was transferred to this Court in August 2009 as part of the multi-district litigation *In re Citigroup Inc. Securities Litigation*, MDL No. 2090, for the very reason that it is related to this action. Since that time, the Court has entertained extensive motion practice in which the similarities between the allegations and claims in the FA CAP Action and this matter have been expressly addressed. *See, e.g.*, *Brecher* v. *Citigroup Inc.*, No. 09 Civ. 7359 (SHS), 2011 WL 5525353, at *6 (S.D.N.Y. Nov. 14, 2011).

class, as they improperly attempt to do here. *See, e.g.*, *Standard Fire Ins. Co.* v. *Knowles*, No. 11-1450, -- S. Ct. --, 2013 WL 1104735, at *3 (Mar. 19, 2013) ("[A] plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified."); *Berry Petroleum Co.* v. *Adams & Peck*, 518 F.2d 402, 412 (2d Cir. 1975) ("The decision regarding which of two classes a plaintiff wishes to belong to . . . must be made by the individual . . . ."), *abrogated on other grounds as recognized by Menowitz* v. *Brown*, 991 F.2d 36, 41 (2d Cir. 1993).

B. The Proposed Settlement Does Not Release Claims Arising Out of the July 2008 FA CAP Award.

FA CAP Plaintiffs continue to insist that the Settlement releases the claims relating to Citigroup shares awarded to Program participants on July 1, 2008 without compensation. But this assertion is just not accurate. As the parties have repeatedly demonstrated to FA CAP Plaintiffs and to this Court, those claims are *not* within the scope of the Settlement Class definition and are not being released by the Settlement. (*See* Dkt. No. 198 at 9–12.) Those claims may be pursued in the FA CAP Action or in any individual action. Indeed, to the extent the Court agrees that the July 2008 award falls outside the scope of the class, FA CAP Plaintiffs do not have standing to challenge the Settlement on the basis of claims that fall outside the scope of the lawsuit being settled.

As explained in greater detail in the Citigroup Defendants' prior response, the relevant date for determining membership in the Settlement Class is when FA CAP shares were actually awarded. Until that time, the number of shares to be awarded and the price to be paid were not ascertainable, and Program participants had no ownership interest in the shares. (*Id*. at 10–11.) Because the July 2008 award date falls outside the

Settlement Class Period, FA CAP participants who received shares on July 1, 2008 are not members of the Settlement Class with respect to those transactions.

FA CAP Plaintiffs' reliance on *Vacold LLC* v. *Cerami*, 545 F.3d 114 (2d Cir. 2008) in support of their theory that month-end valuations during the Settlement Class Period for shares awarded on July 1, 2008 place portions of that award within the Settlement Class Period is misplaced. In *Vacold*, the Second Circuit stated that a "'purchase or sale' of securities within the meaning of Rule 10b-5 is to be determined at the time when the parties to the transaction are committed to one another, even if the exchange of money and shares happens at a later time." *Id.* at 122 (internal citations and quotations omitted). But unlike here, the transaction involved in *Vacold* was an agreement to purchase a specified number of shares for a specified price at a specified future date. Thus, all the relevant terms of the securities transaction were ascertainable on the earlier "purchase" date. Here, by contrast, the number of shares awarded under the Program, and their price, were not ascertainable until the day before those shares were awarded, and termination of employment would void the anticipated share award without penalty and result in an equivalent cash payment. (Dkt. No. 198 at 10–11.)

Even if the Court agrees with FA CAP Plaintiffs' contention that the month-end valuations used to price Program participants' July 2008 shares somehow constitute "purchases," then claims arising out of those valuations are by definition within the Settlement Class as already drafted. If so, the appropriate relief would be to modify the Plan of Allocation to properly account for those valuations, not to reject the Settlement.

FA CAP Plaintiffs dispute that modification of the Plan of Allocation would address their objection, on the ground that further class-wide notice would be required. This is expressly contradicted by this Court's preliminary approval order and the notice that was disseminated to the class, which advised potential class members that their recovery under the Plan of Allocation depends in part on the number of class members who choose to participate in the Settlement, and that "[t]he Court may approve [the] plan as proposed or it may modify the Plan of Allocation without further notice to the Settlement Class." (Dkt. No. 156 ¶ 6 ("The Court may . . . approve the proposed Settlement with such modifications as the Parties may agree to, if appropriate, without further notice to the Settlement Class."); Notice ¶¶ 33, 46.) The Settlement also makes clear that modifications to the Plan of Allocation do "not affect the enforceability of the Settlement . . . ." (Settlement ¶ 7.) Therefore, further notice—which only would be costly, time-consuming, and ultimately detrimental to the class—would not be required even if the Court agrees with FA CAP Plaintiffs' position regarding the July 1, 2008 FA CAP award. *See Union Asset Mgmt. Holding A.G.* v. *Dell, Inc.*, 669 F.3d 632, 640–41 (5th Cir. 2012) (holding that further notice was not required after modification to the plan of allocation where (1) settlement provided that changes to the plan would have no legal effect on the settlement itself, (2) the notice provided that the plan could be modified, and (3) the notice provided that class members would not necessarily be notified of changes to the plan).

C. The Settlement's Release of Securities Act Claims Is Not Unfair.

Finally, FA CAP Plaintiffs' claim that the Settlement is unfair because it releases the Securities Act claims of FA CAP participants without compensation is

without merit. It is well established that a release of "claims not actually pursued by a plaintiff in a class action does not render the release overbroad" or unfair. *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005) (citing *Wal-Mart Stores, Inc.* v. *Visa, U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005)). So long as the released conduct arises out of the "identical factual predicate" as the settled conduct, a class action release may—and almost always does—include other claims not presented in the litigation. *Wal-Mart Stores*, 39 F.3d at 107. No defendant would be willing to enter into a settlement of this nature if it was not able to obtain "total peace" and an end to litigation exposure over the very same facts that underpin the suit being resolved.

FA CAP Plaintiffs do not respond to the Citigroup Defendants' arguments in this regard, and instead repeat their assertion that their Securities Act claims have "value." But the alleged value of those claims is not the issue. (*See* Dkt. No. 198 at 12–13.) In any event, as Citigroup Defendants have explained, FA CAP participants received their shares at a 25% discount to market price.[5] (*See id*. at 9.) Nonetheless, FA CAP participants are eligible to receive undiscounted damages under the Settlement, yielding FA CAP participants a windfall relative to market purchasers within the Settlement Class. The notion, therefore, that FA CAP participants that participate in the Settlement will not be adequately compensated for their claims is not tenable.

[5] FA CAP Plaintiffs contend that some of the shares awarded pursuant to FA CAP were "basic" shares that were not subject to the 25% discount. This mischaracterizes the manner in which the number of shares (and the price) is calculated under FA CAP. The total number of shares awarded is calculated using the 25% discount; only then are the resulting number of shares divided into "basic" shares that are "undiscounted" and "premium" shares that are *entirely free of charge*. The combined value of the basic and premium shares reflects a 25% discount on the entire award. (Ex. 5 at 6–7.)

II. Other Supplemental Objections Do Not Warrant Disapproval of the Settlement.

Following the distribution of supplemental notice, very few additional objections to the merits of the Settlement have been filed. In total, nearly 2.5 million notice packets have been distributed to potential class members, and only nine valid objections have been filed.[6] Thus, the overwhelming majority of class members have not objected to the fairness of the Settlement.

None of the objections by supplemental notice recipients provide any basis for disapproving the Settlement. First, certain of the objections that have been filed may be disregarded because the individuals who submitted them are not members of the Settlement Class.[7] Other letters filed with the Court do not object to the Settlement or ask that it be rejected, but rather seek other relief—such as additional time to provide information in support of a proof of claim or an assurance that personal trading information will be kept confidential.[8] Although certain of these objectors have also expressed disappointment at the dollar amount of recovery they expect to recover in the Settlement as compared to their out-of-pocket loss,[9] the amount of recovery a class

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[6] This figure excludes objections that address only the attorney fee award sought by Lead Plaintiffs.

[7] *See* Postcard from James Dimeff, Jan. 10, 2013; Charles Hayden Motion to Include, Jan. 28, 2013 (Dkt. No. 201) ("Hayden Motion"); Email from Robert Shattuck to Brad Karp and Peter Linden, Mar. 10, 2013. The Hayden Motion requests that the Court include holders of Citigroup stock, in addition to purchasers, in the Settlement Class. As the Supreme Court held in 1975, however, holders of stock may not assert claims under Section 10(b) of the Securities Exchange Act of 1934 or Rule 10b-5. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975).

[8] *See* Letter from Phillip A. Jordan, Jr. to Hon. Sidney H. Stein, dated Feb. 7, 2013 (Dkt. No. 204); Letter from Sante Scardillo to Hon. Sidney H. Stein, dated Feb. 18, 2013 (Dkt. No. 203).

[9] *See* Objection of Eric Behar To Motion for Final Approval of the Proposed Settlement and Attorney's Fees and Request to Attend Settlement Hearing and Address the Court 3, Mar. 15, 2013 (Dkt. No. 221); Objections to Proposed Settlement and Motion for Attorneys' Fees Notice of Intent to Appear Through Counsel Notice of Joinder by Unnamed Class Members: St. Stephen, Inc., Smokestack Lightening Ltd., Orloff Family Trust DTD 10/3/91, Orloff Family Trust DTD 12/13/01 4, Mar. 15, 2013 (Dkt. No. 226) (the "St. Stephen Objection"). Certain of the alleged Settlement Class Members joining in the St. Stephen Objection were required to file any objection by the December 21, 2012

member will receive, by itself, is not the appropriate measure of whether a proposed settlement is fair, reasonable, and adequate. Rather, courts within the Second Circuit are required to evaluate the substantive fairness of a proposed settlement using the *Grinnell* factors. As discussed in the Citigroup Defendants' prior submission, because Lead Plaintiffs faced a substantial risk of proving liability in this action, resolution of this matter for $590 million is fair, reasonable, and adequate. (Dkt. No. 198 at 2–3.) The other *Grinnell* factors have been addressed more fully by Lead Plaintiffs in their submission in support of the Settlement.

deadline and/or have failed to provide the requisite investment data to establish their membership in the Settlement Class, and are therefore deficient.

CONCLUSION

For the foregoing reasons, the Citigroup Defendants respectfully request that the Court should approve the Stipulation and Agreement of Settlement of Lead Plaintiffs, Named Plaintiffs, and Additional Proposed Named Plaintiffs with the Citigroup Defendants.

Dated: New York, New York
March 25, 2013

Respectfully submitted,

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