PORTIONS REDACTED PURSUANT TO THE SEPTEMBER 30, 2010 PROTECTIVE ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CITIGROUP INC. BOND LITIGATION	Master File No. 08 Civ. 9522 (SHS) **ECF Case**

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

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PRELIMINARY STATEMENT

In their opening brief, Plaintiffs established that this case is ideally suited for class certification. Plaintiffs' claims, which arise under Section 11 of the Securities Act of 1933 (the "Securities Act"), focus on a core group of materially false and misleading statements made by Citigroup Inc. ("Citigroup") in the registration statements pursuant to which $67 billion worth of debt and preferred securities were sold between May 2006 and August 2008 (the "Offerings Period"). *See In re Citigroup Inc. Bond Litig.*, 723 F. Supp. 2d 568, 584 (S.D.N.Y. 2010) (misstatements are "alleged to be common to all purchasers"). The Second Circuit recently reaffirmed that Section 11 places a "minimal burden on a plaintiff," explaining that, "so long as a plaintiff establishes [a material misrepresentation or omission in a registration statement,] then, in a Section 11 case, the general rule is that *an issuer's liability ... is absolute.*" *Litwin v. Blackstone Group, L.P.*, 634 F.3d 706, 715-16 (2d Cir. 2011) (emphasis added). Given the straightforward legal nature of Plaintiffs' claims, and their common factual underpinnings, this Action easily satisfies the requirements for class certification – indeed, it is the type of securities class action that is routinely certified by courts nationwide.

In response, Defendants assert a host of premature merits arguments that ask the Court to decide disputed factual issues in their favor at the class certification stage. For example, without citing a single supporting fact, Defendants have belatedly concocted an implausible explanation for Citigroup's near collapse. According to Defendants, it was not Citigroup's exposure to toxic mortgage-related assets that nearly led to the bank's demise. Rather, Citigroup was pushed to the brink of liquidation and had to be rescued by a $326 billion taxpayer bailout only because the Federal Deposit Insurance Corporation ("FDIC") withdrew its support for Citigroup's bid to acquire another troubled bank, Wachovia, Inc. ("Wachovia"), which then triggered a conspiracy among unidentified "short sellers" who, in turn, created a "market misperception" that nearly led to Citigroup's collapse. *See* Mem. Of Law In Supp. Of Def. Opp. To Pl. Mot. For Class Cert. ("Def. Mem.") at 1-2; 17-18; 8-20. This argument is not only irrelevant to Rule 23 but, as discussed below, even the limited discovery adduced

to date demonstrates that it is wrong. Defendants' other fact-based arguments – that Citigroup accurately disclosed its exposure to collateralized debt obligations ("CDOs") and that Plaintiffs are alleging falsity by "hindsight" (Def. Mem. at 1-2, 8-20) – were already rejected by the Court on the motion to dismiss, and class certification does not provide Defendants with yet another opportunity to move for reconsideration of that decision.

In addition to arguing the merits of this Action, Defendants' principal contention is that, because this case involves different debt securities and a number of Offerings conducted over approximately two and a half years, it is simply too "massive" to be certified. *See* Def. Mem. at 1-8; 46-48. This argument has no merit. Courts routinely certify cases far more complex than this one, involving disparate claims and multiple securities issued over time periods longer than the one at issue here. *See, e.g.*, *In re Enron Corp. Sec. Litig.*, 529 F. Supp. 2d 644, 653-54 (S.D. Tex. 2006) (certifying Section 10(b) *and* Section 11 class on behalf of purchasers of common stock, call and put options, six different preferred securities, and 23 bonds, where plaintiffs alleged "more than eighty-five nonuniform, allegedly material misrepresentations on different subjects" as well as "many separate fraudulent schemes in at least seven distinct time periods"). As Judge Cote held in *WorldCom*, in certifying a class of common stock purchasers asserting Section 10(b) claims and bond purchasers asserting Section 11 claims in connection with multiple offerings conducted over a three-year period, "[a]lthough this is a massive case, the issues it presents are far from novel." *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 279, n.17 (S.D.N.Y. 2003). The same is true here. This Securities Act case, although large, asserts straightforward claims that present no unique or novel class certification issues.

Defendants advance five arguments contending that this case does not meet the requirements of Rule 23. These arguments ignore the record, have been repeatedly rejected by courts, and are, in most instances, unsupported by even a single cited authority.

First, Defendants argue that Plaintiffs have not established "commonality," even though it is "a low hurdle easily surmounted." *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 2009 WL 5178546, at

*9 (S.D.N.Y. Dec. 23, 2009). According to Defendants, Rule 23(a)(2)'s commonality requirement is not met because Citigroup's alleged misstatements concerning its CDOs, loan loss reserves and mortgage-related assets supposedly "changed dramatically over time." Def. Mem. at 24; 3-4; 22-25. No court has ever interpreted Rule 23 this way, and courts routinely certify securities class actions involving numerous different alleged misrepresentations over extended time periods. *See, e.g.*, *Enron*, 529 F. Supp. 2d at 653-54; *WorldCom*, 219 F.R.D. at 276. Moreover, contrary to Defendants' assertion that Plaintiffs' claims are "fundamentally different" (Def. Mem. at 4; 24), in reality, Plaintiffs allege that Citigroup made related misrepresentations regarding its financial condition – including misstatements concerning loss reserves, net income, Tier 1 capital adequacy, and compliance with GAAP – for *each and every Offering* at issue. Such allegations readily satisfy the commonality requirement. *See, e.g.*, *In re Deutsche Telekom AG Sec. Litig.*, 229 F. Supp. 2d 277, 281 (S.D.N.Y. 2002) (Stein, J.) (commonality met because all claims turned on whether there were "material misrepresentations and omissions … in the registration statements"); *see also infra* pp. 8-14.

Second, Defendants argue that typicality has not been established because: (i) the debt securities did not trade exactly alike during the relevant period; (ii) the class representatives did not purchase Citigroup securities during "all of the relevant periods" in this litigation; and (iii) investors who sold their securities prior to the announcement of the government bailout on November 23, 2008, will be subject to a "unique" affirmative defense of "negative causation." Def. Mem. at 4-6; 28-35. Each of these arguments is without merit. As the Court is aware, securities class actions typically encompass multiple securities, and courts have never required a plaintiff to prove that every security reacted in the same manner to the same disclosure to obtain certification. *See In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 445, 446 (S.D. Tex. 2002) ("When plaintiffs have alleged such a common course of conduct, courts consistently have found no bar to class certification even though members of a class may have purchased different types of securities[.]"). That is especially true here, given that Plaintiffs' claims arise solely under the Securities Act, where damages are determined by

Section 11(e) and loss causation is not even an element of the claim. Moreover, as set forth below, the Citigroup securities at issue traded in substantially similar patterns. *See infra* pp. 14-18.

With respect to their second typicality argument, while Defendants do not define what their purportedly "relevant periods" are, Defendants essentially argue that typicality can exist only if, for each security at issue, a class representative purchased *before, during and after* every period in which there was an alleged partial disclosure. *See* Def. Mem. at 4-6; 30-32. No court has ever refused to certify a class on this ground, and it is black-letter law that the "timing" of a plaintiff's purchase has no impact on typicality, as long as the plaintiff purchased "during the class period." *See, e.g.*, *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 92 (S.D.N.Y. 1998); *Deutsche Telekom AG Sec. Litig.*, 229 F. Supp. 2d at 281. Moreover, in reality, the class representatives did purchase securities issued pursuant to each registration statement throughout the relevant period, including in 2006, 2007, and 2008.

Finally, as for Defendants' arguments relating to the supposed issues raised by their "negative causation" defense, no court has ever held that a "negative causation" affirmative defense can preclude class certification. *See In re Metropolitan Sec. Litig.*, 2008 WL 5102303, at *2 (E.D. Wash. Nov. 25, 2008) ("independent research has failed to uncover[] a Section 11 case in which a court has ruled that the existence of a loss causation defense precludes certification under Rule 23(b)(3)"). That is because negative causation – *i.e.*, whether and how market factors impacted the prices of the relevant securities – is by definition a common issue that is well-suited for class-wide treatment. *See In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 785 (3d Cir. 2009) ("[a]ny affirmative defense on this ground [negative causation] would present a *common* issue – not an individual one").

Third, Defendants argue that Rule 23(b)(3)'s predominance requirement is not satisfied because "critical individual questions of knowledge, damages, reliance and causation predominate." Def. Mem. at 6; 35-41. However, Defendants' "knowledge" argument is based solely on references to Citigroup's own *public* disclosures and *publicly-available* news and analyst reports. The notion that *publicly-available* information can create a "unique knowledge" defense contradicts the most basic precepts of

Rule 23, and the decisions of this Court. *See, e.g.*, *Saddle Rock Partners v. Hiatt*, 2000 WL 1182793, at *5 (S.D.N.Y. Aug. 21, 2000) (Stein, J.) (rejecting unique knowledge argument because plaintiff was not "privy to any insider information"). Finally, while Defendants repeat the same damage and causation arguments that they raised in connection with "typicality," those arguments fare no better when characterized as attacks on "predominance." Def. Mem. at 41-43. Indeed, it is well-established that individualized issues relating to damages do not predominate over common issues – and this is especially true in a Section 11 case, where damages are determined by a statutory formula that applies to the entire class. *WorldCom*, 219 F.R.D. at 302-03.

Fourth, Defendants challenge the "adequacy" of a handful (five out of ten) of the proposed class representatives, contending that they are not "appropriate stewards to represent the interests of absent class members." Def. Mem. at 7; 45-46. This argument has no merit. The class representatives singled out by Defendants include three sophisticated institutions (Miami Beach, Arkansas Teacher Retirement System, and the City of Philadelphia), and an individual, Phillip Ruffin, who lost *more than $20 million* as a result of his purchases of Citigroup preferred stock. As discussed below, each of these Plaintiffs has actively participated in this litigation and is fully committed to prosecuting this Action for the benefit of all class members. *See infra* pp. 31-34.

Fifth, Defendants argue that a class action is not the "superior method for adjudicating this controversy because Plaintiffs have made no showing that they seek to represent a class of people who have suffered any harm." Def. Mem. at 47; 1-3; 5; 8. This argument ignores not only the statutory damages framework of Section 11(e), but also the fact that the individual Plaintiffs have collectively suffered tens of millions of dollars in losses as a result of their investment in Citigroup securities. In any event, there can be no reasonable dispute that thousands of investors purchased the Citigroup securities at issue in this case, and a single class action is by far the superior method for litigating their claims. *See, e.g.*, *Deutsche Telekom*, 229 F. Supp. 2d at 282; *see also infra* pp. 34-35.

In sum, as set forth in Plaintiffs' opening papers and as further detailed below, Plaintiffs

respectfully request that the Court grant their motion for class certification.

ARGUMENT

I. DEFENDANTS' MERITS-BASED ARGUMENTS ARE PREMATURE AND PROVIDE NO BASIS FOR DENYING CLASS CERTIFICATION

Defendants' principal argument is that the Court should rule as a matter of law at this stage of the litigation that Citigroup – one of the largest financial institutions in the world and the recipient of the largest public bailout in history – collapsed because it was the innocent victim of unforeseeable market forces and unfair attacks by various market participants. Def. Mem. at 1-2; 8-20. According to Defendants, these "attacks" on Citigroup came in various forms – ranging from market disruptions to rating agency actions to a decision by the FDIC to endorse a rival's bid to purchase Wachovia, which purportedly spawned a "panicked market's misperception that Citigroup was under duress." *Id.*

Defendants also expend fifteen pages of their opposition setting out what purports to be "[a] complete chronology of the financial crisis" and, without citing any evidence, claim that Citigroup's near-demise was caused by unforeseen market events completely unrelated to Citigroup's own travails. Def. Mem. at 12; 1-2; 8-20. These events supposedly include the Lehman Brothers' bankruptcy, fluctuations in the "interbank lending rate," and actions taken by "quantitative hedge funds," "the large French bank BNP Paribas," and the "rating agencies." *Id.* at 12; 8-18. Finally, Defendants contend that the Complaint merely alleges fraud by "hindsight" and that Citigroup accurately disclosed and valued its subprime exposure throughout the relevant period. *Id.* at 2; 8-9; 10-20.

While Defendants may have the opportunity to advance some of these arguments to the jury at the appropriate stage of the litigation, each of the fact-specific arguments they raise in their opposition fails to provide any basis for denying class certification.

First, these merits-based arguments are obviously irrelevant to the Rule 23 analysis. How a jury views the argument that Citigroup became insolvent only because it was the innocent victim of a market-wide collapse or the unfortunate target of a "short-selling conspiracy" has no bearing on

whether the elements of commonality, typicality, predominance, and superiority have been established. These factual defenses plainly raise questions that are common to the Class and susceptible to generalized class-wide proof. As Judge Lynch has held, at the class certification stage, the court's role is simply to determine whether there are "common *questions* of fact or law," not to "*answer* those questions" on the merits. *Hnot v. Willis Group Holdings Ltd.*, 241 F.R.D. 204, 211 (S.D.N.Y. 2007) (emphasis in original).

Second, Defendants fail to support their factual arguments with any evidence. Instead, they rely on convenient mischaracterizations of the financial crisis and their own explanations of market events. *See* Def. Mem. at 1-20. This failure to provide a shred of admissible evidence is particularly troubling given that the Court has already rejected many of these same arguments at the motion to dismiss stage. Specifically, the Court has rejected Defendants' assertions that Plaintiffs are trying to plead falsity by "hindsight;" that Citigroup had no duty to disclose its subprime exposure earlier; and that Citigroup accurately valued its subprime assets. *Citigroup*, 723 F. Supp. 2d at 589-90, 592-95. Defendants point to nothing that undermines any aspect of the Court's prior decision, and their attempts to relitigate these issues provide no basis for failing to certify the Class.

Third, even the limited discovery that Plaintiffs have obtained to date demonstrates that Defendants' factual arguments are wrong. Defendants ignore the fact that the SEC charged Citigroup and two of its senior officers with violating both the Securities Act and the Securities Exchange Act of 1934 by misrepresenting the bank's exposure to subprime assets during the Offerings Period. Similarly, Citigroup's effort to portray the enormous government bailout as being caused solely by a "market misperception" ignores the findings of a detailed analysis conducted by the government, which concluded that Citigroup had up to *$43 billion* of "embedded losses" on its balance sheet by November 2008. *See* Decl. Of Steven B. Singer In Support Of Pl. Mot. For Class Cert., dated Mar. 11, 2011 (the "Singer Decl."), Ex. 10 at 19.

Moreover, although discovery is far from complete, the evidence adduced thus far demonstrates

Similarly, in late 2007, senior Citigroup officers informed the bank's highest-ranking executives that the bank had not "recognized the material financial losses inevitably associated with" its high-risk mortgage operation. Singer Decl., Ex. 6 at 20. Then, in early 2008, the OCC concluded that the bank had accumulated "untenable risks for the sake of profitability" in its portfolio of CDOs, SIVs, and mortgage loans. Singer Decl., Ex. 9 at 2. In sum, Defendants' self-serving narrative of Citigroup's near disintegration ignores these (and other) inconvenient facts, which provides further confirmation that these merits issues are not appropriate for consideration at the class certification stage.[1]

II. PLAINTIFFS HAVE ESTABLISHED ALL THE ELEMENTS OF RULE 23

A. There Are Numerous Questions Of Law And Fact Common To The Class

"The commonality requirement, particularly in securities fraud litigation, is generally considered a *low hurdle easily surmounted*. Commonality ... merely requires that the claims arise from a common nucleus of operative facts." *Marsh & McLennan Cos.*, 2009 WL 5178546, at *9 (emphasis added).[2] Remarkably, despite this low threshold, Defendants argue that commonality is defeated

[1] Indeed, the notion that Citigroup's near collapse was caused by the FDIC's actions in late 2008 and subsequent "opportunistic short-selling" was directly contradicted in public remarks made by Citigroup's CEO, Vikram Pandit, on May 15, 2011 at the Wharton School of Business: "to recap very briefly for those who may not be familiar with the story, I became CEO of Citigroup in December of 2007 – *a bit like becoming captain of the Titanic after the ship hit the iceberg*." As Mr. Pandit admitted, as a result of the long-running problems at Citigroup, the bank "needed significant help from the American taxpayer to survive." *See* CEO Vikram Pandit Speaks at the Graduation Ceremony of the University of Pennsylvania's Wharton School, *available at* http://www.citigroup.com/citi/press/executive/110515a.htm (emphasis added).

[2] *See also In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 307-10 (3d Cir. 1998) ("A finding of commonality does not require that all class members share identical claims, and indeed 'factual

because Plaintiffs' claims relate to multiple SEC filings made over "the most turbulent 28-month period in the financial markets," during which time Citigroup's disclosures purportedly "changed materially." Def. Mem. at 26; 1-4; 8-20; 22-29. No court has ever accepted this argument as grounds for denying class certification and, in fact, Defendants are unable to cite a single decision by any court holding that commonality was not established in a Section 11 case. As set forth below, none of Defendants' "commonality" arguments has merit.

1. Commonality Is Established Because Plaintiffs' Claims Arise From A Common Set Of Facts And Share A Common Legal Theory

Defendants' primary argument on commonality is that Plaintiffs' claims do not satisfy Rule 23(a)(2) because Plaintiffs allege that, before the end of 2007, Citigroup failed to disclose its exposure to billions of dollars of subprime MBS, CDO and SIV assets and, thereafter, Citigroup misrepresented the value of these assets on the bank's balance sheet. Def. Mem. at 3-4; 23-26. Defendants thus claim that class members who purchased Citigroup securities before the end of 2007 and those who purchased afterwards "have fundamentally different claims that depend on fundamentally different legal arguments and fundamentally different facts." *Id.* at 24. In essence, Defendants are arguing that the Court must split this case into (at a minimum) two class actions – one for purchasers prior to the end of 2007 and another for purchasers in 2008. *Id.* at 3-4; 24-26. This argument is wrong.

First, courts routinely certify securities class actions involving numerous categories of alleged misrepresentations, and multiple partial disclosures, over extended time periods. For example, the court in *Enron* rejected the exact argument that Defendants make here: namely, that the "claims are unsuitable for single-class certification" because they involved "more than eighty-five nonuniform, allegedly material misrepresentations … on different subjects" as well as "many separate fraudulent schemes, in at least seven distinct time periods" over more than three years. *Enron*, 529 F. Supp. 2d at

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differences among the claims of the putative class members do not defeat certification.'"); *In re Alstom SA Sec. Litig.*, 253 F.R.D. 266, 275 (S.D.N.Y. 2008) (commonality represents a "low hurdle" in securities class actions); *In re Veeco Instruments, Inc. Sec. Litig.*, 235 F.R.D. 220, 237 (S.D.N.Y. 2006) (commonality is a "permissive" requirement that is satisfied if a "single common issue is shared by the class").

653-54. In rejecting that argument and certifying a single, unitary class – of both common stock and bond purchasers asserting Section 10(b) *and* Section 11 claims – the court held that the commonality requirement was satisfied because, notwithstanding any variations in the alleged misrepresentations over time, all of the claims arose from the "same set of facts" (*i.e.*, a scheme to misrepresent Enron's financial condition) and were "brought under shared legal theories." *Id.* at 673; *see also id.* at 650, n.4 (collecting cases). The same is true here: the misstatements at issue are part of a common course of conduct to misrepresent Citigroup's financial condition, and the Class's claims are brought pursuant to a single, unified legal theory. Under such circumstances, there is no doubt that commonality is established. *See, e.g.*, *In re Connetics Corp. Sec. Litig.*, 257 F.R.D. 572, 574-75, 579 (N.D. Cal. 2009) (rejecting argument that "the putative class should be divided into two classes" because claims concerned the safety of a drug and a separate "channel stuffing" scheme).[3]

Second, Defendants are incorrect that Citigroup's alleged misstatements and disclosures "changed dramatically over time, reflecting changing market conditions." Def. Mem. at 26. In reality, all of the securities issued during the Offerings Period were investment-grade, and in connection with each of the Offerings, Citigroup assured investors that its financial condition was sound and that the bank was "well capitalized." These statements were false. As the Court has recognized, Plaintiffs allege that, long before the end of 2007, Citigroup was misrepresenting the value of the MBS and CDO

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[3] *See also WorldCom*, 219 F.R.D. at 276 (certifying single class of stock and bond purchasers under both Section 10(b) and Section 11 where misrepresentations included a "series of illegitimate accounting strategies" over more than three years); *Connecticut Ret. Plans & Trust Funds v. Amgen, Inc.*, 2009 WL 2633743, at *1-3 (C.D. Cal. Aug. 12, 2009) (certifying single class where misrepresentations concerned the separate issues of the safety and off-label marketing of different drugs); *In re Tyco Int'l Ltd. Multidistrict Litig.*, 236 F.R.D. 62, 66 (D.N.H. 2006) (certifying class where misrepresentations concerned separate "accounting fraud" and "looting" schemes over multiple years).

Defendants' reliance on *Morris v. Wachovia Sec., Inc.*, 223 F.R.D. 284 (E.D. Va. 2004), is misplaced. *See* Def. Mem. at 26. *Morris* was an out-of-district case that concerned Section 10(b) claims, not Section 11 claims. Further, the *Morris* court actually certified a large portion of the Section 10(b) class at issue there, despite the unique facts present in that case where the defendant had *simultaneously* issued one set of truthful disclosures to one group of class members, and a different set of misleading disclosures to other class members. 223 F.R.D. at 293. This bears no relation to this case where it is alleged that for each Offering, Citigroup issued a single set of disclosures, and these disclosures were uniformly misleading.

assets on its balance sheet (¶¶287, 292), and that Citigroup made misrepresentations regarding essentially the same subjects – loss reserves, net income, Tier 1 capital adequacy, compliance with GAAP – with respect to *each and every Offering at issue* (¶¶150, 317, 319-20, 326, 333-37). *See Citigroup*, 723 F. Supp. 2d at 584-85. For example, Plaintiffs allege that Citigroup overvalued its CDOs beginning as of December 31, 2006, and continued to misrepresent the value of these assets throughout the Offerings Period. ¶¶287, 292. Plaintiffs also allege that Citigroup failed to maintain adequate loan loss reserves throughout the relevant period. ¶¶229, 233-35. Such allegations share a "unifying thread" that readily satisfies the commonality requirement. *See, e.g.*, *Deutsche Telekom*, 229 F. Supp. 2d at 281 (commonality met with questions including existence of "material misrepresentations and omissions … [in] the registration statement"); *WorldCom*, 219 F.R.D. at 280, 288 (commonality satisfied where questions included the "nature and extent of misrepresentations" and the liability of defendants under Section 11 for such statements); *In re Livent, Inc. Noteholders Sec. Litig.*, 210 F.R.D. 512, 515-16 (S.D.N.Y. 2002) (same).[4]

Defendants also argue that Plaintiffs have failed to establish commonality with respect to their allegations that Citigroup misrepresented its loan loss reserves, violated GAAP, and misrepresented its "well-capitalized" status, because these topics are all "different." Def. Mem. at 24-25. If such an argument were accepted (and Defendants do not cite a single case where it was), it would mean that there would have to be a separate class action for each category of allegations in the Complaint. It goes without saying that no court has ever interpreted Rule 23 in this fashion. *See supra* at pp. 9-10.

For instance, Defendants contend that Plaintiffs cannot establish commonality with respect to loan loss reserves because Citigroup's reserves "increased dramatically over the class period." *Id.* at

[4] For the same reason, Defendants' argument that Plaintiffs' claims will turn on "fundamentally different legal arguments" depending on when each class representative purchased securities is misplaced. *See* Def. Mem. at 24. In reality, all of Plaintiffs' claims arise under identical statutory provisions (Sections 11 and 15 of the Securities Act), which place a "low burden" on Plaintiffs of establishing only a material misrepresentation in the registration statements pursuant to which each security was issued. Because, as discussed above, the misstatements alleged by Plaintiffs relate to essentially the same topics and stem from a common course of conduct to misrepresent Citigroup's financial condition, commonality is established.

24. But Defendants make no attempt to articulate how these increases in Citigroup's loan loss reserves defeat commonality. The fact that Citigroup periodically increased its loan loss reserves does not alter the allegations of Plaintiffs' Complaint – which the Court sustained – that Citigroup's loan loss reserves were understated *throughout the Offerings Period.* Defendants will be free to argue to the trier of fact, at the appropriate time, that various increases in the loan loss reserves means that at some point Citigroup's reserves were accurately stated, but that is a merits argument that has no bearing whatsoever on commonality (or any element of class certification for that matter). Indeed, questions about the adequacy of Citigroup's loan reserves present a quintessentially common issue because Plaintiffs allege that Citigroup understated its reserves by violating the *same* accounting provision (namely, FAS 5) for the *same* reasons in connection with *every* Offering. *See* ¶¶219-35.[5]

Finally, Defendants argue that Plaintiffs' "allegations of GAAP violations or misrepresentations concerning Citigroup's 'well-capitalized' status fail to satisfy commonality." *Id.* at 25. While Defendants' argument is far from clear, it appears that they are contending that commonality does not exist because one set of GAAP rules may apply to Plaintiffs' allegations that Citigroup concealed its exposure to CDOs, SIVs and subprime mortgages prior to the end of 2007, and another set applies to Plaintiffs' allegations that Citigroup failed to properly value these assets post-2007. *Id.* This argument has no merit. The fact that Citigroup failed to comply with multiple GAAP requirements throughout the Offerings Period provides no basis for refusing to certify a class – nor does it require that the Court certify a *separate* class for each GAAP requirement allegedly violated. Because GAAP consists of a set of *uniform* standards, claims alleging GAAP violations are particularly suited to class-wide

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[5] Defendants also blatantly mischaracterize a chart depicting Citigroup's loan loss reserves, which is cited in the Complaint. Def. Mem. at 24. Contrary to their assertions, the chart does not reflect that Citigroup was "over-reserved" in its North American portfolio by the third quarter of 2007. Rather, it demonstrates that: (i) before the third quarter of 2007, the bank's reserves for its North American portfolio were below its actual charge-offs, and (ii) thereafter, Citigroup's reserves for that portfolio merely began to track its actual charge-offs. Because GAAP required Citigroup to maintain reserves significantly *in excess* of its actual charge-offs at all times, this chart demonstrates that Citigroup understated its reserves *both before and after* the third quarter of 2007. ¶¶228-30.

treatment. The question of whether Citigroup complied with these standards presents no unique issues and will necessarily involve a common set of factual and legal inquiries across all Class members.[6]

2. Plaintiffs Have No Obligation To Prove The Merits Of Their Claims At The Class Certification Stage

Defendants' final argument against commonality is that "Plaintiffs have not met their burden … to prove that commonality exists across the class" because Plaintiffs' evidence focuses on the "fall and winter of 2007," and there is insufficient evidence relating to allegations concerning the 2008 time period. *See* Def. Mem. at 25-27. However, it is well-established that Plaintiffs have no obligation to prove at class certification that they will prevail on the *merits* of their case. *See, e.g.*, *In re Initial Pub. Sec. Offerings Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement"); *Hnot*, 241 F.R.D. at 208 (Lynch, J.) (court should not "make a preliminary inquiry into the merits of a case in order to determine whether it may be maintained as a class action") (internal quotation marks omitted). Indeed, Rule 23 specifically provides that class certification should be decided "[a]t an early practicable time" – not at the end of discovery. Fed. R. Civ. P. 23(c)(1)(A). Defendants' argument fails for this reason alone.

Moreover, Defendants did not even begin producing documents from 2008 until more than a month *after* Plaintiffs' class certification motion was filed, and to this day they have produced very few documents from that time period – while at the same time withholding potentially thousands of critical documents from this time period based on a so-called "bank examination" privilege. *See* Pl. Mot. To Compel Prod. Of Docs. Being Withheld By The Citigroup Defs. Based On The "Bank Examination" Privilege, Dkt. No. 87. In any event, Plaintiffs have made an extensive showing that the evidence adduced to date strongly supports their claims for the *entire* relevant period. *See, e.g.*, Singer Decl.,

[6] Perhaps recognizing this fatal flaw in their argument, Defendants contend that commonality is defeated because Plaintiffs allege "significant changes in accounting rules and Citigroup's accounting methodologies." Def. Mem. at 25. Of course, these facts, even if true, would be common to the Class, and in fact the Complaint alleges that both of the GAAP standards which governed Citigroup's CDO valuations during the Offerings Period (first FAS 115 and later FAS 157) required the same thing: that Citigroup record these securities at "fair value." ¶¶288-89.

Exs. 6-10.[7]

B. The Class Representatives' Claims Are Typical Of The Claims Of The Class

Courts in this District "have emphasized that the typicality requirement is not demanding, and that [t]ypicality does not require that the factual background of each named plaintiff's claim be identical to that of all class members.'' *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *13 (S.D.N.Y. July 27, 2007) (internal quotation marks omitted); *In re Prestige Brands Holdings, Inc. Sec. Litig.*, 2007 WL 2585088, at *3 (S.D.N.Y. Sept. 5, 2007) (same); *Fogarazzao v. Lehman Bros., Inc.*, 232 F.R.D. 176, 180 (S.D.N.Y. 2005) (same). Thus, as demonstrated in Plaintiffs' opening brief, this Court and numerous others have held that the typicality requirement is readily satisfied in securities cases involving alleged misstatements arising from a common course of conduct, notwithstanding factual differences involving the type of security or the date of purchase. *See, e.g.*, *Deutsche Telekom,* 229 F. Supp. 2d at 281 (typicality established where plaintiffs purchased securities pursuant to a misleading registration statement); *see also Katz v. Image Innovations Holdings, Inc.*, 2010 WL 2926196, at *4 (S.D.N.Y. July 22, 2010) (Koeltl, J.) (same); *In re SCOR Holding (Switzerland) AG Litig.*, 537 F. Supp. 2d 556, 571 (S.D.N.Y. 2008) (Cote, J.); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 451-52 (S.D.N.Y. 2004) (Lynch, J.).

1. Purported "Differences" In The Characteristics And "Price Sensitivities" Of The Securities At Issue Do Not Defeat Typicality

Defendants' primary attack on typicality is that supposed differences in the coupon rates, maturity dates, and "price sensitivities" of the securities at issue mean that "the class representatives' claims are not typical of those belonging to class members holding securities that the class representatives did not own." Def. Mem. at 4-5; 28-30. In other words, Defendants have found another

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[7] Defendants' argument that there is no commonality because each underwriter and individual Defendant is not liable for every Offering utterly lacks merit. *See* Def. Mem. at 27, n.11. "The focus [of the commonality requirement] must be on whether the fact to be proved is common to *the members of the class*, not whether it is common to *all the defendants*." *In re School Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986) (emphasis added). Also, due diligence defenses present common factual issues. *See WorldCom*, 219 F.R.D. at 293, n.30.

way to contend that the proposed class representatives must have purchased *each* of the 43 securities at issue in order to assert a claim on those securities. As Defendants acknowledge, this argument is "contrary" to this Court's two prior decisions holding that Plaintiffs have standing to assert claims in connection with all securities at issue, regardless of whether Plaintiffs purchased each security. *See* Def. Mem. at 28, n.12; *Citigroup*, 723 F. Supp. 2d at 583-85; Order dated Mar. 29, 2011, Dkt. No 82.[8] As set forth below, Defendants' effort to relitigate this issue for the third time, now under the guise of "typicality," should be rejected.

As an initial matter, Defendants are unable to cite a single case holding that differences in a security's maturity date or coupon rates can defeat typicality. This is because courts have held *for decades* that securities far more diverse than those at issue here are properly included in a class where, as here, the plaintiff has alleged a common course of conduct. For instance, in *Enron*, the court held that "[w]hen plaintiffs have alleged such a common course of conduct, *courts consistently have found no bar to class certification even though members of a class may have purchased different types of securities or interests, or purchased similar securities at different times*." 206 F.R.D. at 445, 446 (emphasis added) (collecting cases). In accordance with this principle, the *Enron* court certified a class consisting of common stock, call and put options, six preferred securities, and 23 bonds. *See Enron*, 529 F. Supp. 2d at 650, n.3; *see also In re Washington Mut., Inc. Sec., Deriv. & ERISA Litig.*, 2010 WL 4272567, at *10 (W.D. Wash. Oct. 12, 2010) (certifying a single class consisting of

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[8] While Defendants seek to undermine this Court's prior decision (*see* Def. Mem. at 28, n.12), they fail to acknowledge that it was adopted in full by Judge Swain in *In re AIG, Inc. 2008 Sec. Litig.*, 741 F. Supp. 2d 511, 537-38 (S.D.N.Y. 2010). Moreover, the Court's decision is consistent with the well-established rule that typicality exists regardless of whether a plaintiff has purchased all securities-in-suit. *See* authorities cited in Pl. Mem. Of Law In Supp. Of Their Mot. For Class Cert. ("Pl. Mem."), at 24-25. Tellingly, Defendants largely ignore this wealth of authority, consigning it to a single footnote, where they contend that "those cases did not involve offerings as numerous and diverse as those present here." Def. Mem. at 30, n.15. However, this Court's decision in *In re PaineWebber Limited P'ships Litig.*, 171 F.R.D. 104, 107-108 (S.D.N.Y. 1997), involved ***70*** limited partnerships in areas as diverse as "oil and gas, aircraft leasing and research and development, as well as real estate investment trusts." Moreover, Defendants misconstrue the reasoning of those cases, which turned on whether the alleged misstatements were similar, not on the type of securities at issue. *See, e.g.*, *In re Dreyfus Agg. Growth Mut. Fund Litig.*, 2000 WL 1357509, at *3 (S.D.N.Y. Sept. 20, 2000).

purchasers of common stock, preferred stock, and numerous debt offerings).[9]

Defendants' next argument, that the Class cannot be certified because "differences among the securities affected their value in different ways, and their pricing exhibited significant inconsistencies as a result," fares no better. Def. Mem. at 28-30. In essence, Defendants ask the court to split this case into 43 different class actions, one for each security, because the prices of the various securities purportedly did not react identically to Citigroup's disclosures throughout the relevant period. This argument is incorrect.

First, no court has held that plaintiffs have the burden of establishing at class certification that all of the securities in a class traded in the same fashion, or reacted in precisely the same manner to the same disclosures. Rather, as discussed above, courts routinely certify classes involving a wide variety of different securities, without any requirement that plaintiffs establish that they all reacted identically to the same information. *See Enron*, 206 F.R.D. at 445, 446; *WorldCom*, 219 F.R.D. at 275; *HealthSouth*, 261 F.R.D. at 650. Indeed, while courts have explicitly recognized that stocks and bonds often trade differently, and may well react differently to certain disclosures, courts have uniformly certified classes involving purchasers of those securities. As the court explained in certifying a single class including both common stock and debenture holders in *Endo v. Albertine*, 147 F.R.D. 164 (N.D. Ill. 1993):

> Plaintiffs' claims arise from the defendants' participation in the issuance of Prospectuses containing false or misleading statements or omitting material facts. These claims are equally applicable to stock and debenture holders. The facts and legal theories asserted by the class to prove any violations will be identical regardless of the type of security at issue. ... *The only difference between the claims for the different types of securities is that any violation may have affected the value of each*

[9] *See also Freudenberg v. E*Trade Fin. Corp.*, 2008 WL 2876373, at *6 (S.D.N.Y. July 16, 2008) (courts "often appoint purchasers of one type of security to represent purchasers of other types of securities of the same issuer where the interests of those purchasers are aligned"); *WorldCom*, 219 F.R.D. at 275; *In re HealthSouth Corp. Sec. Litig.*, 261 F.R.D. 616, 650 (N.D. Ala. 2009) (numerous bonds with different maturity dates, convertible subordinated dentures and senior notes); *Tyco*, 236 F.R.D. at 71 (different securities issued under "56 different registration statements"); *Neuberger & Scott v. Shapiro*, 1998 WL 826980, at *3 (E.D. Pa. Nov. 25, 1998) ("factual distinctions that exist among putative class members' claims, including the difference between fixed rate and demand certificates, are insufficient" to defeat typicality).

> *differently. ... This difference does not make the claims of the purchasers of each type of security atypical of the others.* The defendants point to no claim under which the positions of the holders of the different types of securities would be adverse.

Id. at 167-68 (emphasis added and citations omitted).

Second, Defendants are wrong on the facts. The examples that Defendants provide of the supposed pricing "inconsistencies" in Citigroup's securities actually demonstrate that these securities traded in substantially the same manner throughout the relevant period. Defendants' own brief acknowledges that the Lehman Brothers bankruptcy filing on September 15, 2008 had "an observable negative price impact on *virtually all the Citigroup securities*" – thus confirming that the "pricing trends" of Citigroup's securities are typical across the Class. Def. Mem. at 29 (emphasis added). The mere fact that one bond may have declined more than another has no bearing on typicality and, at most, impacts the calculation of damages. *See Endo*, 147 F.R.D. at 167-68.

Finally, although it is not Plaintiffs' burden to establish that all of the securities at issue in this case traded in an identical manner or reacted exactly the same way in response to every alleged disclosure – particularly in a case where Plaintiffs do not need to prove loss causation to prevail – publicly-available information demonstrates that Citigroup's preferred stock and bonds *actually did* trade in a substantially similar fashion throughout the relevant period. For example, Exhibit A to the Reply Declaration Of Steven B. Singer In Support Of Plaintiffs' Motion For Class Certification, dated June 10, 2011 (the "Singer Reply Decl.") demonstrates that the market price of each of the preferred securities involved in this case experienced substantial declines in value from June 28, 2006 through November 28, 2008. Similarly, Exhibit B demonstrates that the bonds also experienced significant declines during that time frame.[10]

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[10] While Defendants submit a cursory five-page "expert" report in an effort to support their assertion that Citigroup's securities demonstrated significant "pricing inconsistencies" (*see* Karp Decl., Ex. 41), the conclusions of this report either have no basis in fact or law, or they support Plaintiffs. For example, the report's conclusion that "[m]any securities exhibited price impairment below par before September 30, 2008" (*id.* at 2) *concedes* that the securities exhibited similar trading patterns, and corroborates Plaintiffs' allegations that the prices were declining during the relevant period. In addition, the report's conclusion that "different securities

In sum, Defendants' contentions about coupon rates, maturity dates, and "pricing sensitivities" provide no ground for denying class certification.

2. The Timing Of The Class Representatives' Purchases Is Irrelevant And, In Any Event, Supports A Finding Of Typicality

Defendants next argue that typicality cannot exist "because none of the class representatives transacted during all of the relevant time periods, [and therefore] none is capable of establishing liability across the class." Def. Mem. at 31; 4-6; 30-32. While Defendants fail to explain precisely what they mean by the supposedly "relevant time periods," it appears that they are contending that each class representative must have purchased securities *before, during and after* every period in which Citigroup made a potential partial disclosure. *See id.* This argument is meritless.

Defendants do not cite a single case denying class certification on this basis. Indeed, the law is clear that a plaintiff is not required to have bought securities continuously throughout the class period, or even on any particular date. This is black-letter law even in Section 10(b) cases, which, unlike this Section 11 case, affirmatively require plaintiffs to prove reliance as an element of the claim:

> Defendants in securities class actions have often argued that a plaintiff's claim cannot be typical of the claims of class members who purchased at different times in reliance on different documents. *It is now settled, however, that the claims of such a plaintiff are typical of the claims of the class if all the documents relied upon are part of a common course of conduct or common scheme to defraud.*

7 WILLIAM B. RUBENSTEIN, ALBA CONTE AND HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 22:26 (4th ed. 2010) (emphasis added); *see also Sumitomo*, 182 F.R.D. at 92 (Pollack, J.) ("it is settled in this Circuit that factual differences in the … date, size or manner of purchase … will not defeat class

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were impaired at different times and without any consistent relationship" is incorrect. *Id.* at 2. In reaching this conclusion, the report relies on an invented standard for determining "impairment," which takes no account of the magnitude of the price declines in Citigroup's securities, and determines whether a security was "impaired" simply by comparing a 15-day average market price of the security against its issuance price. *Id.* at 3. This flawed methodology leads the report to conclude that one of the securities at issue (CUSIP 172967EA5) became "impaired" in March 2007 – just two weeks after it was issued – when its price dropped by one-hundredth of one percent, from $99.912 to $99.900. *Id.* at Ex. B. Furthermore, the report's conclusion that seven of the twelve preferred securities at issue were trading at or above their issue price as of January 15, 2008 ignores the fact that *four of these seven securities had not even been issued as of that date*, meaning that it was obviously impossible for these securities to have been impaired by that date. *Compare* report at 3 *with* Ex. C thereto.

action certification"); *In re Oxford Health Plans, Inc.*, 191 F.R.D. 369, 378 (S.D.N.Y. 2000) (Brieant, J.) (same). As one court cogently explained, "[i]f the court were to follow Defendants' reasoning[,] it would be nearly impossible to ever certify a class action in a securities fraud case involving any significant period of time as the putative class would always comprise investors who purchased securities at different times and prices." *In re Worlds of Wonder Sec. Litig.*, 1990 WL 61951, at *3 (N.D. Cal. Mar. 23, 1990). Thus, as this Court has recognized, typicality requires only that a plaintiff purchased at some time "during the class period" – which Plaintiffs indisputably did. *See Deutsche Telekom*, 229 F. Supp. 2d at 281; *Saddle Rock*, 2000 WL 1182793, at *3.[11]

Moreover, even if the law did require Plaintiffs to have purchased each security at issue before and after each potential partial disclosure, it would not advance Defendants' cause here, because the proposed class representatives did collectively purchase Citigroup securities throughout the relevant time period. Indeed, the proposed class representatives collectively purchased securities issued pursuant to the March 2 Registration Statement throughout the entire period at issue, including: (i) 8 purchases from the beginning of the Offerings Period in mid-2006 though the first half of 2007; (ii) 21 purchases from mid-2007 through early 2008, during the time when Citigroup was disclosing its CDO exposure and consolidating its SIVs; and (iii) 20 purchases throughout mid- and late-2008, continuing until just days before the bailout was announced.[12] *See* Singer Reply Decl., Ex. C.

[11] *See also In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 86 n.5 (S.D.N.Y. 2007) (rejecting timing arguments); *Enron*, 529 F. Supp. 2d at 713 (rejecting argument that "different class members purchased and sold Enron securities at different times"); *Werner v. Satterlee, Stephens, Burke & Burke*, 797 F. Supp. 1196, 1215 (S.D.N.Y. 1992) (same); *Ross v. Abercrombie & Fitch Co.*, 257 F.R.D. 435, 445 (S.D. Ohio 2009) ("Differences in the timing of stock purchases by class representatives do not make their claims atypical…."); *Danis v. USN Commc'ns, Inc.*, 189 F.R.D. 391, 398-99 (N.D. Ill. 1999) (plaintiffs' "claims are typical of those of the class regardless of when they purchased").

[12] While Defendants argue that "five of the nine putative class representatives" that purchased pursuant to the March 2 Registration Statement "did not buy *any* securities in the calendar year 2007," when the credit crisis supposedly began (Def. Mem. at 30-31), the other four class representatives purchased securities issued pursuant to that registration statement on *fourteen separate occasions in 2007*, including seven separate purchases *prior to August 20, 2007*. *See* Singer Reply Decl., Ex. C. While Defendants claim that these seven purchases before August 20 are "short term in-and-out" trades that resulted in no damages, they are incorrect. *See* Def. Mem. at 31, n.17. For example, Arkansas Teacher purchased shares of EC1 in May 2007, retained

Similarly, while Defendants contend that the class representatives who purchased securities pursuant to the June 20 Registration Statement supposedly purchased "long *before* the subprime crises began" in mid-2007 and "*after* nearly all of the key disclosures at issue were made" purportedly in late 2007 (Def. Mem. at 5-6), in reality, they purchased these securities *throughout* the relevant time period, including: (i) in 2006, before Citigroup disclosed its CDO exposure; (ii) in 2007, shortly after Citigroup disclosed its exposure to CDOs and SIVs, but while the bank was continuing to misrepresent the value of these assets; and (iii) in 2008, when Citigroup further misrepresented the value of these assets and their impact on its solvency. *See* Singer Reply Decl., Ex. D.[13]

Defendants' final argument with respect to "timing" is a speculative contention that unidentified class representatives might be subject to "unique knowledge defenses" based on the timing of their purchases. Def. Mem. at 32. However, as discussed in more detail at pages 24 to 26 b elow, Defendants have not offered a shred of evidence remotely suggesting that any proposed class representative possessed any non-public information concerning Citigroup's misstatements and omissions. Nor have Defendants stated which class representative could potentially be subject to this defense, or what knowledge that representative supposedly possessed. Defendants' vague allusions to a "unique knowledge defense" lack the slightest factual basis and should be rejected out of hand. *See Saddle Rock*, 2000 WL 1182793, at *5 (Stein, J.) (rejecting similar defense where, as here, "there is no claim that [plaintiff] was privy to any insider information concerning [defendant]'s prospects, and he

them for more than eight months, and sold them for a loss in January 2008. *See* Singer Decl., Ex. 13 at 1. Likewise, Louisiana Sheriffs suffered damages in connection with its purchase of the EC1 security in August 2007, which it sold at a loss in December 2007 following Citigroup's disclosure of its CDO exposure. *See* Singer Decl., Ex. 12 at 1. In any event, this argument is simply a reference to Defendants' affirmative defense of negative causation, which Plaintiffs are not required to rebut at the class certification stage.

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purchased the stock at prices set by the operation of the market").

3. **The Affirmative Defense Of "Negative Causation" Cannot Defeat Typicality**

Defendants also contend that typicality cannot exist because the Complaint supposedly does not allege a corrective disclosure until the announcement of the bailout on November 23, 2008, and any losses suffered by the class representatives before that date supposedly will be subject to "unique negative causation" affirmative defenses, as Defendants will prove that these losses were caused by unidentified "market forces."[14] Def. Mem. at 32-33. This argument is meritless, as was recently confirmed by the Supreme Court's decision in *Erica P. John Fund, Inc. v. Halliburton*, 536 U.S. --, 2011 WL 2175208, at *3, 7 (June 6, 2011). In *Halliburton*, the Supreme Court unanimously held that, in a Section 10(b) case, plaintiffs do not have to show that loss causation existed to obtain class certification, as that inquiry is wholly unrelated to class certification. *Id.* Given that a plaintiff in a Section 10(b) case is not required to show loss causation at the class certification stage, it necessarily follows that a plaintiff in a Section 11 case is not required to *rebut* an affirmative defense of negative causation in order to obtain class certification.

Indeed, courts unanimously recognize that this affirmative defense is no bar to class certification. *See Metropolitan*, 2008 WL 5102303, at *2 ("independent research has failed to uncover[] a Section 11 case in which a court has ruled that the existence of a loss causation defense precludes certification under Rule 23(b)(3)"); *Washington Mut.*, 2010 WL 4272567, at *10 (rejecting argument that plaintiff was "subject to unique defenses regarding negative causation"); *Prestige Brands*, 2007 WL 2585088, at *6 (holding that "defendants can raise later the affirmative defense of 'loss causation,' and there is no reason for the court to adjudicate that issue at this stage of the

[14] Section 11(e) provides an affirmative defense of "negative causation," which permits Defendants to reduce damages by showing that the decline in the value of a security was due to something other than Defendants' misstatements. *See* 15 U.S.C. § 77k(e). The "heavy burden" of establishing this affirmative defense rests solely on Defendants. *WorldCom*, 219 F.R.D. at 289 (*quoting Akerman v. Oryx Commc'ns, Inc.*, 810 F.2d 336, 341 (2d Cir. 1987)).

proceedings").[15]

Moreover, any negative causation defense implicates *common*, class-wide issues. As the Third Circuit explained in summarily rejecting the exact argument that Defendants make here:

> Any affirmative defense on this ground would present a *common* issue – not an individual one. If something other than the alleged misrepresentations produced a drop in stock price, be it the weather, market conditions, or any other factor, class members would be affected uniformly. If, for example, Investors X, Y, and Z all purchase Security A, and Security A's price happens to fall dramatically in the ensuing months, the cause of that decline would not differ as to each investor.

Constar, 585 F.3d at 785 (emphasis in original); *see also WorldCom*, 219 F.R.D. at 293, n.30 (same).[16]

Accordingly, issues related to Defendants' affirmative defense of negative causation provide no bar to class certification.

4. Defendants' "Statute Of Repose" Argument Should Be Rejected

Defendants also incorrectly contend that class representative James M. Brown's claim – which relates to just one Offering (CUSIP ending in "201" issued on November 22, 2006 pursuant to the June 20 Registration Statement) – is barred by the three-year statute of repose in Section 13 of the Securities Act. *See* 15 U.S.C. § 77m. The statute of repose on this claim expired on November 22, 2009.[17] Section 11 claims with respect to this security were first asserted on October 28, 2008, and were re-asserted in the present Complaint on January 15, 2009. *See* Singer Reply Decl., Ex. F at 30; Complaint at page 94. As this Court has held, Plaintiffs have standing to assert claims for *all* securities issued

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[15] The fact that Minneapolis Firefighters, Arkansas Teacher, and City of Philadelphia may have engaged in a handful of profitable "in-and-out" transactions is irrelevant, as there is no dispute that each class representative suffered losses as a result of its purchases of the securities at issue. *See* Def. Mem. at 33.

[16] Finally, Defendants have mischaracterized the Complaint in asserting that it does not allege a corrective disclosure before November 23, 2008. Although Plaintiffs are not required to allege any corrective disclosure to establish their *prima facie* case, as Defendants themselves state only a few pages earlier in their brief (*see* Def. Mem. at 23), Plaintiffs allege that one of the partial corrective disclosures in this case – Citigroup's disclosure of an additional $43 billion of exposure to subprime CDOs – occurred on November 4, 2007, more than a year before the bailout was announced. *See* ¶¶176-84.

[17] Contrary to Defendants' assertion that the statute of repose began to run from the date of post effective amendment 1 ("PEA 1") to the June 20 Registration Statement, the statute of repose began to run from the date of the November 22, 2006 Offering, as Defendants' own authority establishes. *See Finkel v. Stratton Corp.*, 962 F.2d 169, 175-76 (2d Cir. 1992) (holding that statute of repose runs from date of actual solicitation).

under the June 20 Registration Statement, including the security that Mr. Brown purchased. Thus, the original Plaintiffs properly asserted these claims in October 2008, more than a year *before* the statute of repose expired in November 2009.

Defendants now argue that, because the original Plaintiffs purchased securities pursuant to a post-effective amendment to the June 20 Registration Statement ("PEA 3"), and Mr. Brown purchased pursuant to post-effective amendment 1 ("PEA 1"), no original Plaintiff had standing. Def. Mem. at 34. Defendants' distinction between PEA 1 and PEA 3 is meaningless. All purchasers pursuant to the registration statement relied upon the same false statements, as this Court has already held. *Citigroup*, 723 F. Supp. 2d at 584. Defendants have not pointed to a single difference between PEA 1 and PEA 3, let alone one that calls the Court's prior holding into question.[18]

C. <u>Individual Issues Do Not Predominate Over Common Issues</u>

As explained in Plaintiffs' opening brief, questions of law or fact common to Class members predominate over any questions affecting only individual members. *See* Pl. Mem. Of Law In Supp. Of Their Mot. For Class Cert ("Pl. Mem."), at 20-22. The core issue in this case is whether Citigroup made material misstatements and omissions in the registration statements from which all the Offerings derive. Questions of falsity and materiality are therefore class-wide issues, regardless of which Offering was purchased. *See, e.g.*, *WorldCom*, 219 F.R.D. at 293 (whether company's "Registration Statements ... contained material, untrue statements and omissions" presented "common questions of fact and law [that] will predominate"). Similarly, Defendants' principal defenses, including any "due diligence" or "negative causation" defense, raise factual and legal issues that are common to class

[18] In any event, the statute of repose on this claim was tolled as of October 28, 2008, when suit was brought. *See, e.g.*, *In re Flag Telecom Holdings Ltd. Sec. Litig.*, 352 F. Supp. 2d 429, 454-56 (S.D.N.Y. 2005); *Joseph v. Wiles*, 223 F.3d 1155, 1166-67 (10th Cir. 2000) (finding that *American Pipe* tolling applies to Section 13's statute of repose); *Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 176 (D. Mass. 2009) (same). *In re Lehman Bros. Sec. & ERISA Litig.*, 2011 WL 1453790, at *2-3 (S.D.N.Y. Apr. 13, 2011), on which Defendants rely (Def. Mem. at 34, n.18), is against the weight of authority and wrongly decided. The *Lehman* court explicitly recognized that "most courts that have addressed this issue have concluded that *American Pipe* does apply to toll statutes of repose." *Id.* at *3.

members. *Id.* at 293, n.30; *see also PaineWebber*, 171 F.R.D. at 123 (in case involving Section 11 claims, common questions of law and fact "overwhelmingly predominate"); *Deutsche Telekom*, 229 F. Supp. 2d at 282; *In re Globalstar*, 2004 WL 2754674, at *5 (S.D.N.Y. Dec. 1, 2004).

In response, Defendants make a series of assertions that "individual issues" – such as Plaintiffs' supposed knowledge of Citigroup's alleged misstatements or omissions, causation, damages, reliance and the statute of limitations – will predominate over the core common issues of falsity and materiality. *See* Def. Mem. at 34-45. Defendants' arguments are meritless.

1. Defendants Fail To Show That Any Class Representative Purchased With Knowledge Of Citigroup's Misrepresentations

Defendants contend that Plaintiffs must show "lack of knowledge" of the alleged misstatements or omissions at the time of their purchase, and that because Citigroup publicly disclosed its CDO exposure in November 2007, individual issues of knowledge will supposedly predominate for any class representatives who purchased after that date. Def. Mem. at 6; 35-38. Once again, Defendants ask the Court to split this case into two class actions: one for people who bought prior to November 2007, and one for people who bought afterwards. Once again, Defendants are wrong.

First, Defendants misstate the burden under the law. Section 11 provides an *affirmative defense* "if it can be proved that at the time of such acquisition [plaintiff] knew of such untruth or omission." 15 U.S.C. § 77k(a). Thus, in order to defeat liability *at trial*, *Defendants* bear the burden of proving that Plaintiffs knew that Citigroup was misrepresenting its financial condition in the Offering materials.

Second, Defendants have failed to carry their burden of showing that any proposed class representative is uniquely susceptible to this affirmative defense. Significantly, Defendants themselves rely solely on *publicly-available information* in attempting to argue that Plaintiffs somehow knew something that the rest of the Class did not. *See* Def. Mem. at 35-41. By definition, whether Citigroup's own *public* disclosures or other public information put the Class on notice of Citigroup's financial condition is an issue that is *common* to all Class members. *See In re PE Corp. Sec. Litig.*, 228

F.R.D. 102, 110-11 (D. Conn. 2005) (holding that "this defense – that this information was available to all purchasers prior to the secondary offering – will be against the entire class, and not the individual purchasers," and thus, "common questions and common defenses will predominate at trial"). Thus, far from demonstrating that any class representative possessed unique information, the fact that the class representatives here relied solely on public information that was available to the Class supports a finding of predominance.

Accordingly, Defendants' reliance on *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006), is misplaced. In that case, plaintiffs alleged that the underwriters of more than 900 public offerings engaged in a complex series of schemes to manipulate the market for initial public offerings ("IPOs") by, *inter alia*, secretly requiring purchasers in the IPOs to purchase additional shares in the aftermarket to obtain a favorable IPO price. *Id.* at 27. Defendants established that the class consisted largely of institutions that were actual *"participants" in the schemes*, and thus *knew* the very non-public information which plaintiffs claimed had not been disclosed. *Id.* at 44. That is a far cry from this case, where there is no indication, much less *any* evidence, that any class representative had access to any non-public information regarding Citigroup's financial condition. The fact that Citigroup may have made partial disclosures during the relevant period does not mean that later purchasers possessed any unique information that would exclude them from this Class.[19]

Defendants next contend that the Class cannot be certified because Plaintiffs were "sophisticated" investors who used money managers who performed their own analysis of Citigroup.

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[19] For similar reasons, Defendants' reliance on *N.J. Carpenters Health Fund v. Res. Cap., LLC*, 272 F.R.D. 160 (S.D.N.Y. 2011) is misplaced. *See* Def. Mem. at 36-38. In that case, plaintiffs alleged that issuers of mortgage-backed securities misrepresented the underwriting guidelines of the mortgage originators. Judge Baer found that defendants established that the class consisted of a specialized group of institutions that *knew* the loans were poorly underwritten because they had: (i) met with the mortgage lenders whose loans backed the securities for the specific purpose of "understand[ing] what their underwriting guidelines were," and (ii) "were extensively involved ... in the review and selection of the loans that backed the certificates." *Id.* at 169. That is not the case here, where the Class consists of ordinary investors who had no access to non-public information regarding Citigroup. The plaintiffs in *N.J. Carpenters* requested permission to appeal Judge Baer's decision to the Second Circuit pursuant to Rule 23(f). The Second Circuit accepted that appeal, which is currently pending.

See Def. Mem. at 38-41. Again, however, Defendants fail to point to any non-public information that these money managers relied on. [redacted] Thus, not surprisingly, this argument has been rejected by every court in this District. *See, e.g., DeMarco v. Robertson Stephens, Inc.*, 228 F.R.D. 468, 471-72 (S.D.N.Y. 2005) (Lynch, J.) (noting that "[c]ourts in this circuit have repeatedly rejected" arguments over a plaintiff's "relative sophistication and the particulars of his investment strategy"); *WorldCom*, 219 F.R.D. at 281-82 (same); *Saddle Rock*, 2000 WL 1182793, at *4-5.[20]

2. **Damages, Causation, Reliance, And Statute Of Limitations Defenses Do Not Raise Individualized Issues That Will Predominate**

a. Damages

Defendants do not contend that Class members who have sold their securities at a loss have not suffered damages. However, Defendants contend that individual damages issues predominate because "buy-and-hold claimants have suffered no damages" for three reasons: (i) their securities are trading above par at present, nearly three years after this Action was filed, and after Citigroup received a massive taxpayer bailout; (ii) the "value" of their securities at the time suit was filed was something other than – and much higher than – the securities' price, because the markets were purportedly "stricken by a financial crisis of historic dimension" which "irrationally" impacted the price of Citigroup's securities and "all securities issued by financial institutions generally;" and (iii) the securities have not defaulted and "all coupon payments have been made in full." Def. Mem. at 42-43; 1-8. Defendants' arguments fail.

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[20] Defendants argue that lawsuits filed against Citigroup on September 30 and October 28, 2008 somehow necessitate individual inquiries into the knowledge of each Class member. *See* Def. Mem. at 37-38. However, nothing in these complaints suggest that Plaintiffs knew Citigroup was "insolvent" at the time of the Offerings. Indeed, as late as November 17, 2008 – just 6 days before the bailout was announced – Citigroup's CEO assured investors that the bank had "significantly reduced our risky assets while putting the company in a very strong capital position," and was "very well positioned from a capital standpoint to weather future potential challenges." ¶252.

It is well-established that questions concerning the calculation of damages do not defeat predominance in securities class actions. *See, e.g.*, *Fogarazzo v. Lehman Bros., Inc*, 263 F.R.D. 90, 109 (S.D.N.Y. 2009) (damage arguments are "no impediment to class certification"); *In re NYSE Specialists Sec. Litig.*, 260 F.R.D. 55, 74 (S.D.N.Y. 2009) (same); *WorldCom*, 219 F.R.D. at 302-03 ("When liability can be determined on a class-wide basis, individualized damage issues are not ordinarily a bar to class certification."). This is especially true with respect to Section 11 claims, because Section 11(e) provides a statutory, mechancial formula for computing damages that is applicable to the entire Class. *See* 15 U.S.C. § 77k(e); *Constar*, 585 F.3d at 784-85.

Moreover, the fact that certain securities are currently trading above par, nearly three years *after* the alleged misconduct at issue, is irrelevant under the plain langue of Section 11(e). Section 11(e) provides that, where a class member currently retains its shares, its damages are calculated as the "difference between the amount paid for the security … and the value thereof *as of the time [] suit was brought*." 15 U.S.C. § 77k(e) (emphasis added). Although Congress was well aware of the fact that a security's price could either recover or decline further years *after* a suit is filed, it declined to consider that subsequent price pertinent to the calculation of damages under Section 11(e), unless the investor actually "disposed of" the security. This is because Section 11(e) reflects "Congress's desire to allocate the risk of uncertainty to the defendants … and to deter negligence by providing a penalty for those who fail in their duties" to provide accurate and complete information to investors. *Levine v. AtriCure, Inc.*, 508 F. Supp. 2d 268, 272 (S.D.N.Y. 2007) (internal quotation marks omitted).

Recognizing that their argument fails under the plain language of Section 11(e), Defendants next ask the Court to conclude – as a matter of law – that buy-and-hold claimants have not suffered damages because the "value" of their securities at the time of suit was not the actual "price," but rather some other purportedly higher and unspecified amount because the market was supposedly acting "irrationally" at that time. Def. Mem. at 41-42. This argument is obviously premature and unsupported

by any evidence, and cannot be credited at this stage of the litigation.[21]

Defendants' final assertion – that none of Citigroup's securities has defaulted and "all coupon payments have been made in full" – is irrelevant. Def. Mem. at 42. Section 11(e) makes clear that damages are calculated without reference to whether a security has defaulted, or to any dividend or interest payments that have been made. *See* 15 U.S.C. § 77k(e); *see also* ARNOLD S. JACOBS, DISCLOSURE AND REMEDIES UNDER THE SECURITIES LAWS § 3:89 (West 2011) ("Dividends and interest the plaintiff receives … should not affect the Section 11 measure of damages.").

Moreover, all of Defendants' damages arguments enumerated above fail because, at best, they raise issues that are common to the Class. Any debate about the meaning of the term "value" contained in the class-wide damages formula, for example, necessarily applies to the Class. Accordingly, these issues should be litigated on a class-wide basis at the appropriate time.

b. <u>Causation</u>

Defendants argue that their affirmative defense of "negative causation" will raise individual issues that will predominate over common issues. *See* Def. Mem. at 43. However, as set forth above at pages 21-22, arguments concerning the affirmative defense of negative causation cannot preclude class certification. Indeed, the Third Circuit flatly rejected this argument:

> The error in [defendants'] reasoning is that plaintiffs' case is brought under § 11 of the Securities Act, rather than § 10(b) of the Exchange Act. A *prima facie* case under § 11 is straightforward, requiring only a showing of a material misrepresentation or omission from a defendant's registration statement. … *The formulaic nature of § 11 leaves defendants with little room to maneuver. … [W]here reliance and loss causation are not part of the equation, an individualized inquiry is not required.*

Constar, 585 F.3d at 782, 785-86 (emphasis added).

c. <u>Reliance</u>

Defendants argue that "any purchasers of Citigroup securities registered pursuant to the March

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[21] Defendants also contend that the "value" of Citigroup's securities differs from their price because Plaintiffs have not established market efficiency. Def. Mem. at 42. However, as reliance is not an element of the claim, Plaintiffs are not required to demonstrate market efficiency in a Section 11 case. *See Constar*, 585 F.3d at 783-84 (rejecting argument that plaintiffs were required to show market efficiency to establish damages under Section 11).

2 Shelf who bought after August 3, 2007" must demonstrate reliance and, in turn, individualized issues of reliance will predominate with respect to their claims. Def. Mem. at 43-44. Accordingly, Defendants claim that these purchasers – and only these purchasers – cannot be part of the Class. This argument is not supported by a single case citation, and is without merit.

To start, the plain language of Section 11 makes clear that Defendants have mistakenly calculated the August 3, 2007 date. Ordinarily, a plaintiff is not required to prove reliance in order to establish a Section 11 claim; reliance is presumed pursuant to the statute. 15 U.S.C. § 77k(a). There is, however, an "exception" whereby a plaintiff must demonstrate reliance if the plaintiff purchased a security after the issuer has made available "an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement." 15 U.S.C. § 77k(a). Defendants incorrectly contend that, for all Offerings conducted under the March 2 Registration Statement, the 12-month period began to run on the *original* date of the shelf, or March 2, 2006, regardless of when a particular Offering was actually conducted. *See* Def. Mem. at 44 & n.22. This yields the absurd result that the 12-month period for all Offerings at issue had run by August 3, 2007 – even though 16 Offerings were conducted under the March 2 Registration Statement *after* that date. *See* Complaint, pages 89-92. Precisely to avoid this result, the statute itself specifically provides that the 12-month period begins to run from the registration statement's "effective date," and *not* its original date. 15 U.S.C. § 77k(a). Pursuant to SEC regulations, the "effective date" is the date of each particular offering, and not the original date of the shelf. *See* 17 C.F.R. § 229.512(a)(2) (providing that each offering creates "a new registration statement relating to the securities offered therein"); *Citigroup*, 723 F. Supp. 2d at 584; *see also* Complaint ¶304. When Defendants' error is corrected, and the 12-month period is properly calculated by reference to the date of the Offerings at issue, it is clear that, by August 3, 2007, Citigroup had *not* issued a 12-month earning statement for 27 out of the 35

Offerings conducted under the March 2 Registration Statement.[22]

Moreover, even with respect to the eight Offerings for which Citigroup had issued a 12-month earning statement by August 3, 2007, the "exception" to the presumption of reliance does not apply. It is well-established that, in order to trigger the statutory exception, a company must issue a 12-month earning statement that is *free of misstatements*, which Citigroup failed to do at any time during the Offerings Period. As explained by Judge Cote in *WorldCom*:

> An earning statement that violates the SEC filing requirements should not be considered an "earning statement" for purposes of Section 11, and should not function in a Section 11 claim to shift to the plaintiff the burden of proving reliance. It would be illogical indeed if any filing – no matter how inaccurate or misleading, and despite its perpetuation of the very misrepresentations at stake in the Section 11 claim – were sufficient to shift the burden to the plaintiffs to establish reliance on the Registration Statement. Whether a filing is sufficient to shift the burden must depend on whether it meets the requirements for earning statements imposed by the SEC rules and regulations. Here, because the earning statement requirements were not met, the burden does not shift to plaintiffs to prove reliance.

219 F.R.D. at 293-94; *see also Enron*, 529 F. Supp. 2d at 697 (adopting *WorldCom's* analysis). Here, as in *WorldCom*, Plaintiffs allege that Citigroup's earning statements were misstated for the *entire relevant period*; hence, the exception is not triggered at any time, and the burden does not shift to Plaintiffs to prove reliance. Consequently, individual issues of reliance cannot predominate.

In addition, even if a misleading SEC filing could constitute an "earning statement" for the purposes of Section 11, common issues would still predominate because the presumption of reliance from *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) applies to all purchases of the eight securities at issue made after August 3, 2007. *See WorldCom*, 219 F.R.D. at 294. The *Basic* presumption applies to Section 11 claims because, while the statute contains an exception requiring reliance in the narrow circumstances described above, "it does not require direct proof of that reliance" and "[i]ndeed, the statute itself makes explicit that even when a plaintiff must demonstrate reliance, she has no burden to

[22] Specifically, Citigroup had not issued a 12-month earning statement for any of the 27 Offerings conducted on or after November 7, 2006, at which point the Offering Materials began to incorporate Citigroup's Form 10-Q for the third quarter of 2006. *See* Appendix to the Complaint at pages A-3 to A-12.

so do by showing that she actually read the registration statement." *WorldCom*, 219 F.R.D. at 294; *see also* 15 U.S.C. § 77k(a). Given this statutory framework, where, as here, there is an "open and developed market" in the company's securities and "no curative disclosure in the [12-month] earning statement," then "the registration statement remains among the sources of information affecting the market price of the security," and reliance "may be presumed." *WorldCom*, 219 F.R.D. at 294.

d. Statute Of Limitations

Finally, Defendants speculate that purchasers of securities prior to September 30, 2007, may be subject to "potential" statute of limitations defenses. *See* Def. Mem. at 44-45. This argument is purely speculative, and wrong.

The Securities Act provides for a one-year statute of limitations, which begins to run from "the discovery of an untrue statement or omission, or after such discovery should have been made by the exercise of reasonable diligence." 15 U.S.C. § 77m. As alleged in the Complaint, the truth about Citigroup's financial condition was not and could not have been known until the fall of 2008. While Plaintiffs allege that Citigroup's first corrective disclosure with respect to its CDO exposure was on November 4, 2007, claims were timely filed with respect to those allegations in September and October 2008.[23] Moreover, "the mere fact that such concerns may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones. As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification under Rule 23(b)(3)." *WorldCom*, 219 F.R.D. at 303 (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000)).

D. Plaintiffs Are Adequate Representatives Of The Class

To be adequate, a class representative must not have interests that are "antagonistic" to the

[23] While Defendants suggest that the Complaint alleges that Citigroup disclosed its CDO exposure on July 20, 2007 (*see* Def. Mem. at 45), the Complaint alleges that the July 20 disclosure was false. *See* ¶¶166-69.

class. *Deutsche Telekom*, 229 F. Supp. 2d at 282. Adequacy is established where "plaintiffs, as with class member[s], were purchasers of [defendant's securities] who were allegedly injured by false and misleading statements about the company's financial condition." *Id.* This is the case here: the class representatives and the Class were injured by the same misleading statements in the registration statements, and their interests are therefore aligned. Although Defendants challenge the adequacy of five of the 10 proposed class representatives, they are unable to point to *any* conflict between even these five representatives and the Class.[24]

- City of Philadelphia's Rule 30(b)(6) designee, its acting Chief Investment Officer, possessed close familiarity with the Complaint, including the time of the Offerings Period and the nature of Citigroup's false statements; an astute understanding of the basis of City of Philadelphia's role as class representative; and a commitment to closely monitor this matter. *See* Singer Reply Decl., Ex. G at 61:23 – 62:16; 92:17 – 93:1; 215:6 – 216:20; 218:8 – 219:4.

[24] Defendants do not challenge the adequacy of Minneapolis Firefighters, Louisiana Sheriffs, City of Tallahassee, SEPTA, or American European Insurance Company.

[25]

Arkansas Teacher, James Brown, and Phillip Ruffin: Defendants assert that these representatives are inadequate because they have not taken the unnecessary and ministerial steps of filing individual complaints, moving to intervene, seeking to amend the Complaint to be added as plaintiffs, or filing certifications under the PSLRA.[26] *See* Def. Mem. at 46. Defendants have not cited any authority demonstrating that these steps are required for any reason, let alone to establish adequacy. Nor are any of these steps necessary as a practical matter: a consolidated complaint has already been filed; these representatives have formally sought to join this Action through this motion; they have all been deposed; and they have provided Defendants and the Court with all of their relevant transactions in the securities for which they are seeking appointment. *See* Singer Decl. Exs. 13, 19-20. Moreover,

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[26] The PSLRA requires a plaintiff who is named in a complaint to file a certification "with the complaint." *See* 15 U.S.C. § 78u-4(2)(A). Arkansas Teacher, Brown and Ruffin were not named in the Complaint and, indeed, did not seek to join this Action until more than two years *after* the Complaint was filed. The PSLRA does not require them to file a certification with a subsequent class certification motion.

these representatives are clearly adequate. For example, the deposition testimony of Arkansas Teacher's Rule 30(b)(6) designee, its General Counsel, established that she possessed close familiarity with the Complaint and the Court's opinion on the motion to dismiss, and was firmly committed to vigorously prosecuting this Action in order to recoup Arkansas Teacher's significant losses as a result of its purchases of Citigroup's securities. *See* Singer Reply Decl., Ex. J at 47:10 – 48:8; 99:2 –100:24; 109:4-21.

E. A Class Action Is The Superior Means Of Adjudicating Plaintiffs' Claims

Superiority is established where, as here, the putative Class consists of a large number of investors who are geographically dispersed, and whose individual damages are likely small enough to render individual litigation prohibitively expensive. *See, e.g.*, *Deutsche Telekom*, 229 F. Supp. 2d at 282; *WorldCom*, 219 F.R.D. at 304-05; *Vivendi*, 242 F.R.D. at 91; *Globalstar*, 2004 WL 2754674, at *5. Defendants dispute superiority by contending that this litigation would supposedly require "a morass of mini-trials," Plaintiffs have not submitted a "trial plan to address these complexities," and the absence of such a trial plan – nearly six months before fact discovery is to close – somehow infringes upon their "right to due process." Def. Mem. at 47. Defendants, however, cannot articulate why this case poses any unique manageability issue, or how their due process rights are violated by the absence of a "trial plan" that is not required by any rule or statute. Further, it is established that the federal courts are well-equipped to manage class action litigation. *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) (denying certification on the "ground that it would be unmanageable is disfavored").[27]

[27] Defendants' contention that "plaintiffs have made no showing that they seek to represent a class of people who have suffered any actual harm" both (i) implies a burden that Plaintiffs do not have at the class certification stage, and (ii) is wrong, as evidenced by the substantial losses suffered by the class representatives themselves. Def. Mem. at 47. Moreover, while Defendants contend that investors who sold their bonds at massive losses are "highly motivated to pursue individual claims," it should be sufficient to note that only five individual actions have been filed – a fact which demonstrates that the vast majority of investors prefer to resolve their claims through this class action. *See WorldCom*, 219 F.R.D. at 204. Finally, Defendants'

Defendants' final argument – that certifying the Class would "coerce" them into settling "nonmeritorious claims" because they would face "gigantic" liability – also fails. *See* Def. Mem. at 1; 48-49. This is not a valid basis for refusing to certify the Class. *See Visa Check*, 280 F.2d at 145 (where Rule 23 requirements are satisfied, "concerns about the possibility that certification will coerce defendants into settlement are largely inapposite"). In any event, it is hard to see how one of the largest and most powerful financial institutions in the world could be bullied into settling with Plaintiffs it believes have "nonmeritorious claims" and suffered "no damages." Def. Mem. at 48.

Requiring investors to assert their claims individually, as Defendants suggest, would effectively extinguish any realistic opportunity of redress for potentially thousands of investors who lack the resources to litigate against Citigroup, and will engender the wasteful inefficiency that Rule 23 was designed to prevent. Splintering this case into 43 separate class actions (one for each Offering), as Defendants essentially urge the Court to do, will necessitate 43 separate discovery schedules, summary judgment motions, and trials. In contrast, a single class action is by far the most efficient and effective way to resolve claims that are based on common misstatements and arise under a single statute.

CONCLUSION

For the reasons set forth herein and in Plaintiffs' prior submissions, Plaintiffs respectfully request that the Court certify the Class and appoint the proposed class representatives, with Bernstein Litowitz Berger & Grossmann LLP appointed as class counsel.

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contention that investors who still hold their securities will "reap a windfall" if they remain part of the Class contradicts the plain language of Section 11(e). *See supra* pp. 26-28.

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