No.

In the Supreme Court of the United States

CITIGROUP INC., PETITIONER,
v.
OTTO CANDIES, LLC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Private Securities Litigation Reform Act (PSLRA), Congress barred plaintiffs from bringing claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) based on conduct already covered by the federal securities laws. In particular, the PSLRA provides that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities" to establish a RICO violation. 18 U.S.C. § 1964(c). The question presented is whether the PSLRA bars a civil RICO claim based on conduct that is actionable as securities fraud by another potential plaintiff, even if the particular RICO plaintiff could not bring a securities-fraud claim.

PARTIES TO THE PROCEEDING

Petitioner is Citigroup Inc.

Respondents are Otto Candies, LLC, Adar Macro Fund Ltd., Ashmore Emerging Markets Debt and Currency Fund Limited, Ashmore Emerging Markets High Yield Plus Fund Limited, Ashmore Emerging Markets Tri Asset Fund Limited, Ashmore Sicav in Respect of Ashmore Sicav Emerging Funds Limited, Ashmore Sicav in Respect of Ashmore Sicav Emerging Debt Fund, Ashmore Sicav in Respect of Ashmore Sicav Emerging Markets High Yield Corporate Debt Fund, Coastline Maritime PTE. Ltd., Cooperatieve Rabobank U.A., Copernico Capital Partners (Bermuda) Ltd., Gulf Investments and Services Ltd., Halani International Ltd., HBK Investments L.P., HBK Master Fund L.P., Hoop Lobith International B.V., Ice Canyon LLC, Ice 1 Em Clo Limited, Maquinas Diesel S.A. De C.V., Marfield Ltd. Inc., Moneda Deuda Latino-Americana Fondo De Inversion, Moneda International Inc., Moneda Latin American Corporate Debt, Moneda Renta CLP Fondo De Inversion, Moneda S.A. Administradora General De Fondos, Nordic Trustee AS, Padstow Financial Corp., Shanara Maritime International S.A., Shipyard De Hoop B.V., and Waypoint Asset Management LLC.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Citigroup certifies that Citigroup Inc. is a publicly held corporation that has no parent corporation. No publicly held corporation owns 10% or more of Citigroup Inc.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

Otto Candies, LLC et al. v. *Citigroup Inc.*, No. 1:16-cv-20725 (February 26, 2016)

United States Court of Appeals (11th Cir.):

Otto Candies, LLC et al. v. *Citigroup Inc.*, No. 18-12663 (July 1, 2020)

United States Court of Appeals (11th Cir.):

Otto Candies, LLC et al. v. *Citigroup Inc.*, No. 23-13152 (September 26, 2023)

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INTRODUCTION

This case concerns the interaction of two important federal statutes: the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Private Securities Litigation Reform Act (PSLRA).

In 1970, Congress passed RICO as part of the Organized Crime Control Act, a comprehensive reform effort designed to crack down on organized crime. Congress was worried about "the predations of mobsters," *H.J. Inc.* v. *Nw. Bell Tel. Co.*, 492 U.S. 229, 245 (1989), and sought to "eliminat[e] . . . the infiltration of organized crime and racketeering into legitimate organizations," S. Rep. No. 91-617, at 76 (1969). To that end, RICO gave prosecutors potent new tools to break apart hard-to-target crime rings. Congress also adopted a

civil remedy, accompanied by punitive treble damages, for private victims of racketeering.

In the early 1980s, creative securities plaintiffs took note of RICO's strong medicine. They realized that by restyling their garden-variety securities claims as RICO claims, they could use treble damages to multiply the already-hefty settlement value of those claims. Given that powerful incentive, RICO quickly began to change from a tool for combatting organized crime into a vehicle for raising the stakes in commercial litigation. By the mid-1980s, 35% of civil RICO claims were predicated on securities fraud. *See* Eliza Clark Riffe, *Actionability and Ambiguity: RICO After the Private Securities Litigation Reform Act*, 2012 U. Chi. Legal F. 463, 467-468 (2012).

Congress responded to that trend when it tightened the standards for securities-fraud claims in the PSLRA. As then-SEC Chairman Arthur Levitt explained, "the securities laws generally provide adequate remedies," and it was "both unnecessary and unfair to expose defendants in securities cases to the threat of treble damages and other extraordinary remedies provided by RICO." S. Rep. No. 104-98, at 19 (1995). In line with that view, Congress used the PSLRA "to eliminate securities fraud as a predicate act of racketeering in a civil RICO action." *Id.* It added a provision making clear that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities" to establish a RICO violation. 18 U.S.C. § 1964(c).

By its plain terms, Section 1964(c)—sometimes called the PSLRA bar—asks only whether a lawsuit targets "*conduct*" actionable as securities fraud. If so, then "no person" may rely on that conduct to establish

a RICO claim. The statute does not ask whether the conduct is actionable as securities fraud by the *particular plaintiff* bringing suit at the moment. Congress instead chose a broader, conduct-focused approach: if conduct is covered by the federal securities regime, then no plaintiff can use RICO. That bright line makes abundant sense given Congress's concerns when it decided to limit RICO's reach.

In this case, the court of appeals misconstrued the PSLRA bar. The RICO plaintiffs here are bondholders who allege that Citigroup made various misrepresentations and omissions that induced them to hold their securities in a failing Mexican company. The court reasoned that because the plaintiffs merely held securities rather than purchasing them, and because there is no judicially inferred private right of action for mere holders, the PSLRA bar does not apply. App., *infra*, 56a (citing *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 735-736 (1975)). Critically, the court focused only on the plaintiffs here. It treated as dispositive that these specific "plaintiff bondholders . . . cannot sue under the securities laws." *Id.*

That reasoning is wrong. The court of appeals' plaintiff-centric approach misconstrues the statutory text, which focuses solely on the defendant's conduct. If allowed to stand, that approach would significantly cut back on Congress's efforts in the PSLRA to stop RICO's encroachment. It would even resurrect claims that fail under the securities laws, allowing plaintiffs to circumvent securities-laws protections—like *Blue Chip Stamps*'s holder rule—by recasting their claims under RICO. In other words, the *weakest* securities claims could be repurposed as treble-damages RICO claims precisely *because* Congress did not extend to

those claims a private right of action under the securities laws. The decision also creates a split with the First, Second, and Ninth Circuits, all of which have held that Section 1964(c) applies to plaintiffs who lack standing or a private cause of action to bring a securities-fraud claim themselves, so long as someone else could challenge the defendant's conduct under the securities laws.

Securities-strike suits are already a serious burden on American businesses, as Congress recognized when it enacted the PSLRA. The Eleventh Circuit's misreading of the PSLRA bar will reintroduce—and likely exacerbate—the problem that Congress sought to fix. This Court should grant review to correct the Eleventh Circuit's error, resolve the circuit split on the question presented, and make clear that the PSLRA means what it says: conduct that would be actionable as securities fraud cannot form the basis of a treble-damages RICO claim.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-77a) is reported at 137 F.4th 1158. The opinion of the district court (App., *infra*, 78a-108a) is not published in the Federal Supplement but is available at 2023 WL 6418135.

JURISDICTION

The court of appeals denied rehearing en banc on July 2, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 1964(c) provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

STATEMENT OF THE CASE

A. Factual Background

1. This lawsuit stems from the deterioration and ultimate insolvency of Oceanografía S.A. de C.V. (OSA), a Mexican oil-services company. *See Otto Candies, LLC* v. *Citigroup*, No. 16-cv-20725 (S.D. Fla. Feb. 26, 2016), Third Amended Complaint ¶ 51 (Compl.). OSA provided offshore drilling, vessels, and other services to its only customer, a Mexican state-owned oil company called Petróleos Mexicanas S.A. (Pemex). App., *infra*, 2a. As alleged in plaintiffs' complaint, Pemex did not promptly pay its contractors, including OSA, so OSA needed cash advances to provide liquidity for its operations. Compl. ¶ 74. To meet this need for

liquidity, Banco Nacional de Mexico S.A. (Banamex) established a line of credit to provide advances to OSA. App., *infra*, 2a-3a. Banamex is a Mexican subsidiary of petitioner Citigroup, a New York-headquartered financial services holding company. During the course of the lending relationship, Banamex allegedly advanced significant funds to OSA in reliance on forged documentation regarding Pemex's work estimates and invoices. *Id.* at 3a-8a. Plaintiffs allege that Banamex knew that the Pemex invoices were forged and that OSA was overleveraged, but thought that the loans were nevertheless low-risk because repayment of cash advances made to OSA came directly from Pemex, which was backed by the Mexican government. *Id.* at 3a-7a. Banamex thus continued lending money to OSA for several years.

2. Plaintiffs claim that throughout Banamex's dealings with OSA, Banamex provided various misleading assessments of OSA's finances to investors and the public. For example, shortly after OSA entered into the credit arrangement with Banamex, OSA commenced a $335 million bond offering. Compl. ¶¶ 261-263. The documents accompanying the bond issuance reflected Banamex's substantial cash injections into OSA, which, plaintiffs assert, "resulted in OSA's financials appearing more attractive to prospective investors" than they actually were. App., *infra*, 81a. According to the complaint, Banamex's advances to OSA thereby induced "Plaintiffs and others [to] believ[e] that OSA was a financially attractive company for investment," causing them to "invest and maintain their investments in OSA." *Id.* Similarly, plaintiffs allege that Banamex "provided Morgan Stanley with [false] information for use in marketing [OSA's] 2008 Bond

Issuance to potential investors." Compl. ¶ 1741; *see, e.g.*, *id.* ¶ 1769 (certain false statements were intended "to induce [an investor] to purchase and retain" bonds).

Other Banamex communications in the years following the 2008 bond offering were also allegedly intended to provide bondholders with "false comfort regarding OSA's financial condition and ability to consistently pay the bond coupon." Compl. ¶ 1742; *see id.* ¶¶ 1743-1748 (similar). Still other statements regarding OSA's financial stability were aimed to "induc[e]" existing creditors "to continue to offer credit to OSA," *id.* ¶ 1751; *see id.* ¶¶ 1754, 1759 (same), or to participate in additional bond offerings of OSA, *id.* ¶ 1766. In sum, plaintiffs allege that Banamex "misrepresent[ed] and omitt[ed] key information about OSA's financial condition and 'the stability and reliability of'" OSA's credit line when, in fact, "OSA was in 'financial crisis.'" App., *infra*, 5a.

3. Eventually, an unrelated investigation by a Mexican regulator into OSA's insurance holdings uncovered OSA's precarious and overleveraged finances. Compl. ¶¶ 162-187. Because of various financial and insurance violations, the regulator banned OSA from entering into new contracts with Pemex for nearly two years. *Id.* ¶¶ 163-164. Citigroup began investigating the situation as well, and Banamex requested that the Mexican government seize OSA and its assets. The Mexican government did so in March 2014. *Id.* ¶¶ 170-171, 177. Citigroup was the largest victim of the fraud, with losses totaling over $400 million. *See* Pet. C.A. Br. 6.

Citigroup terminated 12 employees for their role in the OSA loans, and a Mexican court issued arrest warrants for three employees. App., *infra*, 6a-7a. In

September 2014, the Mexican banking regulator Comisión Nacional Bancaria y de Valores fined Banamex $2.3 million, and in August 2018, the SEC fined Citigroup $4.75 million for controls failures. *Id.* at 6a; *see* Compl. ¶¶ 180, 186.

B. Procedural Background

1. In February 2016, after the Mexican banking regulator fined Banamex, more than 30 plaintiffs sued Citigroup for its alleged role in OSA's collapse. The plaintiffs include vendors, creditors, and bondholders of OSA. App., *infra*, 8a-9a. The operative complaint states seven causes of action, including a RICO violation, a conspiracy to violate RICO, and various fraud-related counts. According to plaintiffs, a central purpose of the alleged RICO scheme was to render OSA an attractive investment opportunity by "defraud[ing] . . . OSA's current and prospective investors, creditors, and vendors . . . into believing that OSA was financially healthy and had access to reliable liquid capital when, in reality, neither of those facts were true." Compl. ¶ 1737.

As for Citigroup's RICO-predicate acts, plaintiffs claimed that many of Banamex's communications regarding OSA's credit constituted wire fraud. *See* Compl. ¶ 1736. For example, plaintiffs highlighted Banamex's provision of allegedly false information "causing Morgan Stanley to provide . . . misleading information to investors regarding the value and stability of the bonds." *Id.* ¶ 1741. They also listed Banamex's supposed provision to bondholders of "false comfort regarding OSA's financial condition," which "induc[ed] them to continue holding" those bonds. *Id.* ¶ 1744; *see id.* ¶ 1746 (similar); ¶ 1747 (similar).

Plaintiffs requested "treble . . . damages"—RICO's typical remedy. Compl. ¶ 1833; *see* 18 U.S.C. § 1964(c).

2. The district court dismissed plaintiffs' complaint. App., *infra*, 78a-108a. The court held that plaintiffs had insufficiently pleaded the "heightened requirements" of Federal Rule of Civil Procedure 9(b) for the various fraud charges, including the RICO wire-fraud predicate. *See id.* at 84a. As the court explained, "Plaintiffs provide[d] no details about [Banamex's] specific misrepresentations that they relied on or[] . . . how their reliance was justifiable." *Id.* at 86a (citation omitted). Because the court determined that plaintiffs had not adequately pleaded a RICO predicate, it expressly declined to reach one of the alternative grounds that Citigroup had raised for rejecting plaintiffs' RICO claims: the PSLRA bar in 18 U.S.C. § 1964(c). *Id.* at 87a n.5.

3. The court of appeals reversed. App., *infra*, 1a-77a. It primarily faulted the district court for applying a too-rigorous standard under Rule 9(b). *Id.* at 18a-24a. The court of appeals held that plaintiffs had "adequately alleged the misrepresentations and omissions on which they relied" and had "thus satisfied their burden under Rule 9(b)." *Id.* at 55a. And even though the court acknowledged that plaintiffs had not met the Rule 9(b) standard for "every allegedly false statement," it believed that the standard "should be relaxed in appropriate circumstances to aid those alleging prolonged multi-act schemes" when the plaintiff offers "at least some examples to lay a complete foundation for the rest of his allegations." *Id.* at 34a (quoting *United States ex rel. Clausen* v. *Lab'y Corp. of Am.*, 290 F.3d 1301, 1314 n.25 (11th Cir. 2002)).

As for the PSLRA bar, the court of appeals held that it does not apply to the bondholder-plaintiffs' claims. App., *infra*, 55a-56a.[1] The court first noted that the bondholders were allegedly deceived into "holding" their already-executed investment in OSA. *Id.* at 56a. The court explained that this Court's precedents make clear that a plaintiff who holds an investment lacks a judicially inferred private right of action under the securities laws. *Id.* (citing *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 735-736 (1975)). So, the court of appeals (correctly) reasoned, "the plaintiff bondholders who merely held their investments in OSA because of the fraud cannot sue under the securities laws." *Id.* The court then took a critical (and incorrect) leap: because these particular plaintiffs could not sue under the securities laws, the court found it "unclear . . . why the PSLRA would foreclose the[ir] claims." *Id.* Indeed, the court believed that to bar these plaintiffs from suing under RICO would somehow "weaponize the PSLRA." *Id.*

Although the court of appeals quoted the PSLRA bar, it did not analyze Section 1964(c)'s text. Nor did the panel grapple with—or even mention—the multiple other court of appeals decisions that Citigroup had cited, all of which hold that the PSLRA bar applies so long as *any other* plaintiff could have brought a securities-fraud claim against the defendant arising out of the same conduct. *See* Pet. C.A. Br. 33-34 (citing *Lerner* v. *Colman*, 26 F.4th 71, 78-79 (1st Cir. 2022); *MLSMK Inv. Co.* v. *JP Morgan Chase & Co.*, 651 F.3d

[1] The court of appeals also addressed the RICO claims of other plaintiffs, including, for example, vendors of OSA. *See* App., *infra*, 56a. Only the bondholders' RICO claims are at issue in this petition.

268, 277-280 (2d Cir. 2011); *Howard* v. *Am. Online Inc.*, 208 F.3d 741, 749 (9th Cir. 2000)).

4. The Eleventh Circuit denied Citigroup's petition for rehearing en banc. App., *infra*, 109a.

REASONS FOR GRANTING THE PETITION

In enacting the PSLRA, Congress made a single amendment to the RICO framework: it forbade plaintiffs from taking conduct that would constitute securities fraud and repurposing it as a RICO predicate. In the three decades since, the courts of appeals have heeded Congress's instruction. They have focused on the defendant's alleged conduct and have asked whether that conduct could constitute securities fraud.

The decision below departs from that consensus. It allows a plaintiff to bring a RICO claim based on *conduct* that could amount to a securities-law violation so long as the particular *plaintiff* could not maintain a private securities-fraud action. That shift may sound subtle, but it is critical to the operation and purpose of the PSLRA bar. It opens up a RICO treble-damages remedy to plaintiffs that Congress has determined should have no private right of action under the securities laws. The topsy-turvy consequences of this decision will be felt by defendants who face RICO liability for a wide range of ordinary commercial disputes—exactly the result that Congress sought to avoid in the PSLRA.

I. THE DECISION BELOW IS WRONG.

The text of the PSLRA bar is straightforward. It asks whether the "conduct" a defendant is alleged to have committed "would have been actionable" as securities fraud. 18 U.S.C. § 1964(c). Citigroup's alleged conduct here falls comfortably within that broad

language. The court of appeals' contrary (and perfunctory) plaintiff-centric reasoning has no foothold in the statutory text.

A. The PSLRA Bar Focuses On Conduct, Not Plaintiffs.

1. Section 1964(c) is designed to keep allegations of securities fraud out of RICO's ambit. The statute thus speaks broadly: "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish" a RICO violation. 18 U.S.C. § 1964(c). Four central features of that text all underscore its breadth in restricting the availability of RICO and a treble-damages remedy.

First, the statute looks to a defendant's "conduct." It thus turns on what a defendant is alleged to have done, not who the plaintiff is or how a claim is formulated. What matters is whether the underlying conduct is securities fraud; if it is, the plaintiff may not "rely upon *any*" of it. 18 U.S.C. § 1964(c) (emphasis added); *see MLSMK Inv.*, 651 F.3d at 278-279 (emphasizing the breadth of the "any conduct" formulation).

Second, the PSLRA bar asks whether that conduct "would have been actionable" as securities fraud. The verb tense is notable: Congress did not care whether this plaintiff (or anybody else) could bring a suit today, as long as a securities-fraud suit *would have been* actionable at some point. The passive voice is notable, too. When Congress employs a passive-voice construction like this one, it "focuses on an event that occurs without respect to a specific actor." *Dean* v. *United States*, 556 U.S. 568, 572 (2009); *see A.J.T. by and through A.T.* v. *Osseo Area Schs., Indep. Sch. Dist. No. 279*, 605 U.S. 335, 358 (2025) (Sotomayor, J.,

concurring) (same). Putting those pieces together, the question is whether the defendant's conduct furnished someone (not necessarily this plaintiff) at some time (not necessarily at present) the legal ground for a securities suit.

Third, reinforcing that it does not matter whether the defendant's conduct is actionable by any particular person, the PSLRA bar provides that "*no person*"—whether a viable securities plaintiff or anyone else—may rely upon securities-fraud conduct. 18 U.S.C. § 1964(c) (emphasis added). "[W]hen Congress stated that 'no person' could bring a civil RICO action alleging conduct that would have been actionable as securities fraud, it meant just that. It did not mean 'no person except one who has no other actionable securities fraud claim.'" *MLSMK Inv.*, 651 F.3d at 278 (citation omitted).

Fourth, the statute requires that conduct be actionable as "fraud in the purchase or sale of securities," which is a clear reference to the broad federal securities-fraud statutes and regulations. That includes Section 10(b) of the Securities Exchange Act of 1934, which bars the use of "any manipulative or deceptive device" "in connection with the purchase or sale of any security." 15 U.S.C. § 78j(b). The SEC's Rule 10b-5, which enforces that provision, mirrors its language. *See* 17 C.F.R. 240.10b-5 (barring "scheme[s] . . . to defraud" and "untrue" or "misleading" "statement[s] of . . . material fact" made "in connection with the purchase or sale of any security"). As this Court has noted, Rule 10b-5 is a "broad[]" fraud prohibition. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. 71, 78 (2006).

2. To the extent this Court consults it, the legislative history of the PSLRA bar underscores its broad text. The Conference Report expressed Congress's intent to "eliminate securities fraud as a predicate offense in a civil RICO action." H.R. Rep. No. 104-369, at 47 (1995) (Conf. Rep.); *see* S. Rep. No. 104-98, at 19 (1995) (same). In a similar vein, the Conference Report emphasized that the PSLRA bar would apply to "conduct," without regard to whether the RICO plaintiff attempted to cast a claim relating to securities fraud as any "other specified offense[], such as mail or wire fraud." H.R. Rep. No. 104-369, at 47 (1995) (Conf. Rep.); *see* S. Rep. No. 104-98, at 19 (1995) (same).

At the time, the Securities and Exchange Commission also advocated for a sharp separation between the securities laws and RICO. Chairman Arthur Levitt explained that "[b]ecause the securities laws generally provide adequate remedies for those injured by securities fraud, it is both unnecessary and unfair to expose defendants in securities cases to the threat of treble damages." H.R. Rep. No. 104-369, at 47 (1995) (Conf. Rep.); *see* S. Rep. No. 104-98, at 19 (1995) (same). Chairman Levitt thus endorsed the PSLRA insofar as it would "eliminate civil RICO liability predicated on securities law violations." Testimony of Hon. Arthur Levitt, Chairman, SEC, before Comm. on Banking, Housing, & Urban Affairs, Apr. 6, 1995. Like the text, the clear legislative focus was on keeping RICO out of securities law, not on whether individual plaintiffs could bring their claims.

B. The Conduct Alleged In This Case Would Have Been Actionable As Securities Fraud.

Under the broad text of Section 1964(c), the relevant question is whether Banamex's alleged conduct was actionable as securities fraud by someone at some point. The answer is clearly yes. True, private holders of securities do not have a private right of action under Section 10(b). But, critically, the SEC has the authority to bring a Section 10(b) claim on behalf of investors who hold securities because of fraudulent misrepresentations. On top of that, many of the allegedly false or misleading statements Banamex made here were equally aimed at inducing buying and holding, so some other private plaintiffs might have had a Section 10(b) claim.

1. When a defendant uses misstatements or omissions to induce investors in securities to hold those securities, that conduct is "actionable" under the securities laws—by the SEC, not by private plaintiffs. It is not actionable by private holders of securities, because this Court has adopted a "purchaser-seller rule" under which only purchasers or sellers of securities (and not holders) have a judicially inferred private right of action. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 731-749 (1975). But it is actionable by the SEC—the entity with an express right of action under the securities laws. As *Blue Chip Stamps* confirmed, "the purchaser-seller rule imposes no limitation on the standing of the SEC to bring actions for injunctive relief under [Section] 10(b) and Rule 10b-5." *Id.* at 751 n.14.

When the SEC brings a case alleging fraud aimed at securities holders, it is proceeding against "fraud in the purchase or sale of securities" within the meaning of

Section 1964(c). That conclusion follows from the text of Section 10(b) and Rule 10b-5, whose substantive prohibitions are limited to fraud "in connection with the purchase or sale of any security." 15 U.S.C. § 78j(b); 17 C.F.R. 240.10b-5. In other words, *any* action that the SEC can bring to enforce Section 10(b) or Rule 10b-5 is necessarily targeting fraud in the purchase or sale of securities, consistent with Section 1964(c).

This Court's decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit,* 547 U.S. 71 (2006), confirms that analysis. In *Dabit*, the Court considered the scope of a federal statute that preempted state class actions alleging deception "in connection with the purchase or sale of a covered security." *Id.* at 83 (quoting 15 U.S.C. § 78bb(f)(1)). Making arguments similar to the decision below, the *Dabit* plaintiffs contended that the statute did not preempt state class actions brought by those who merely held securities, including because no federal private right of action was available to them in the first place. *Id.* at 84-86. This Court rejected that argument, embracing a "broad" understanding of what it means for fraud to occur "in connection with the purchase or sale" of securities. *Id.* at 85. Citing a "settled" meaning of that key phrase, the Court concluded that a claim "brought by holders" is also one brought in connection with the purchase or sale of securities. *Id.* at 85, 89. And it expressly rejected the plaintiffs' assertion that fraud occurs "'in connection with' a purchase or sale" only when "the plaintiff himself was defrauded into purchasing or selling particular securities." *Id.* at 85.

Because Banamex's alleged misstatements and omissions would be actionable by the SEC as fraud in connection with the purchase or sale of securities,

plaintiffs cannot "rely" on them "to establish a [RICO] violation." 18 U.S.C. § 1964(c).

2. Even beyond the SEC, Banamex's alleged misstatements might have been actionable by a private party who bought or sold securities in reliance on those statements. Plaintiffs repeatedly assert that the challenged statements had the dual effect of inducing some investors to hold securities and others to purchase securities in the first place. *See, e.g.*, Compl. ¶¶ 1768-1769. For example, plaintiffs allege that Banamex provided false information to OSA "in order to induce investors to purchase or retain the 2008 and 2013 bonds," *id.* ¶ 1778, or to Morgan Stanley to "induc[e] investors to purchase [OSA's] bonds," *id.* ¶ 1741. That general inducement of investors—whether purchasers or holders—appears throughout the complaint. *See, e.g.*, *id.* ¶ 1770 (misrepresentations "induc[ed] investors to purchase the 2013 bonds"); *id.* ¶¶ 1789, 1932. Section 1964(c) does not care that holder investors, rather than purchaser investors, happened to bring this RICO suit. Either way, the relevant conduct sounds in the securities laws. *Cf. Dabit*, 547 U.S. at 85, 89.

C. The Eleventh Circuit's Contrary Reasoning Lacks Merit.

The court of appeals' contrary conclusion fails to engage with the statutory text or with this Court's decisions in *Blue Chip Stamps* and *Dabit*. The court below observed that private persons who "hold[]" investments do not have "grounds to sue under the federal securities laws"—a proposition that no one disputes. App., *infra*, 56a. The court then posited that it is "unclear . . . why the PSLRA would foreclose" these plaintiffs' claims when these plaintiffs do not have a private

right of action as holders. *Id.* The court thus declined to "weaponize the PSLRA" "at the pleading stage," "where the allegations have little to do with securities fraud in the first place." *Id.* The court was wrong on all fronts.

First, the court of appeals did not meaningfully engage with the text of Section 1964(c). As explained above, that provision turns on the defendant's "conduct," not on the plaintiff's identity or the legal remedies available to a particular plaintiff. The court simply assumed that this particular plaintiff's ability to bring suit controlled, without grounding that assumption anywhere in the statutory text. To the extent the court believed that any conduct relating to holders of securities does not constitute "fraud in the purchase or sale of securities" under Section 1964(c), that would be wrong too. This Court already held in *Dabit* that the distinction between holders and purchasers or sellers "is irrelevant; the identity of the plaintiffs does not determine whether the complaint alleges fraud 'in connection with the purchase or sale' of securities." 547 U.S. at 89.

Second, the court of appeals' concern about "weaponiz[ing]" the PSLRA "at the pleading stage" is equally misplaced. For starters, the broad PSLRA bar was enacted to counteract the weaponization of RICO in commercial cases, so Citigroup is using the PSLRA bar in precisely the defensive manner that Congress intended. Anyway, it is unclear why the court deemed the pleading stage an inopportune time to assess whether a RICO complaint contravenes Section 1964(c). As other courts have frequently acknowledged, the PSLRA's animating purpose was to impose on plaintiffs "a heavy burden at the pleading stage."

Smallen v. *The Western Union Co.*, 950 F.3d 1297, 1305 (10th Cir. 2020); *see GSC Partners CDO Fund* v. *Washington*, 368 F.3d 228, 236-237, 246 (3d Cir. 2004); S. Rep. No. 104-98, at 15 (1995) ("stringent pleading requirement [is necessary] to curtail the filing of abusive lawsuits").

Third, the court of appeals was wrong both legally and factually to suggest that the bondholder-plaintiffs' allegations here "have little to do with securities fraud in the first place." App., *infra*, 56a. As explained above, the statutory test is whether the conduct alleged could have formed the basis of a securities-fraud suit, not whether a particular plaintiff has framed its RICO complaint to emphasize the securities-fraud angle. *See* pp. 12-15, *supra*. In any event, the complaint here is shot through with allegations about supposed misstatements and omissions that would be at home in an ordinary securities-fraud suit. *See, e.g.*, Compl. ¶ 1698 ("[M]aterial omissions similarly rendered [Citigroup employee's] representations about the [credit] facility false and misleading."); *id.* ¶ 1741 ("[I]nformation . . . provided to Morgan Stanley . . . caus[ed] Morgan Stanley to provide unwittingly misleading information to investors regarding the value and stability of the bonds and induc[e] investors to purchase the bonds."); *id.* ¶ 1788 ("Citigroup stated to counsel for the bondholders that OSA was above-board with its financials," which "was intended to execute the scheme to defraud by providing the bondholders with false comfort regarding OSA's financial condition and inducing them to continue holding the 2008 bonds."); *id.* ¶ 1791 ("Plaintiffs' investments[] . . . were based on Citigroup's and OSA's fraudulent misrepresentations and material omissions.").

II. THE DECISION BELOW WARRANTS REVIEW.

A. The Eleventh Circuit's Decision Creates At Least A 3-1 Circuit Split.

Until the decision below, every court of appeals to have addressed the PSLRA bar had focused on the defendant's conduct rather than the particular plaintiff's ability to bring a securities-fraud suit. The First, Second, and Ninth Circuits have all expressly rejected a plaintiff-focused reading of the PSLRA bar. And the Third and Tenth Circuits have discussed the PSLRA bar in ways irreconcilable with the decision below. As a result, the decision below creates a square 3-1 split, and arguably a 5-1 split, that this Court should resolve.

1. The Second Circuit has made clear that the PSLRA bar focuses on conduct rather than plaintiffs. In *MLSMK Investment Co.* v. *JP Morgan Chase & Co.*, the court considered whether a plaintiff could raise a RICO claim based on aiding and abetting securities fraud, when such aiding and abetting "cannot serve as a basis for a private right of action" under the securities laws. 651 F.3d 268, 274 (2d Cir. 2011); *see Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994) (no right of action available under Section 10(b) and Rule 10b-5 against aiders and abettors). The plaintiff in *MLSMK Investment* argued, as the Eleventh Circuit held here, that the PSLRA bar applies only to "RICO claims in cases where that plaintiff could have asserted a fraud claim against the named defendant." *MLSMK Inv.*, 651 F.3d at 274. And because there is no private right of action under Section 10(b) against aiders and abettors—just as there is no private right of action by holders of

securities—the plaintiff contended that its RICO suit could go forward.

The Second Circuit rejected that cramped reading of Section 1964(c). It observed that the PSLRA bar is "worded broadly" and "seems to . . . be unambiguous." *MLSMK Inv.*, 651 F.3d at 278. And the court explained that "the plain language of the statute does not require that the same plaintiff who sues under RICO must be the one who can sue under securities laws." *Id.* (quotation marks omitted). Therefore, the PSLRA bar applied regardless of whether the particular RICO plaintiff could sue under the securities laws. *Id.* at 277-280.

The Second Circuit also observed that it would make little sense to allow a plaintiff access to RICO's treble-damages remedy *only if* Congress had already decided that the same plaintiff could not maintain a private securities suit. *MLSMK Inv.*, 651 F.3d at 276. As an earlier court had explained, both the PSLRA bar and the restrictions on private federal securities claims could be "easily avoid[ed]" by merely pleading a securities-fraud claim as an aiding-and-abetting claim and then bringing it under RICO. *Fezzani* v. *Bear, Sterns & Co., Inc.*, 2005 WL 500377, at *5 (S.D.N.Y. Mar. 2, 2005); *see MLSMK Inv.*, 651 F.3d at 275-280 (favorably citing *Fezzani*).

The First Circuit and Ninth Circuit have likewise rejected the reasoning of the decision below, in the context of plaintiffs who lacked standing. The First Circuit reviewed the dismissal of RICO claims based on schemes that "could have formed the basis for securities fraud actions by proper plaintiffs, though all parties agree[d]" that the RICO plaintiff "would not have had standing to bring those actions." *Lerner* v. *Colman*, 26 F.4th 71, 78 (1st Cir. 2022). Relying on

Section 1964(c)'s directive that "no person" may bring the type of action it describes, as well as the statute's focus on the defendant's "conduct," the First Circuit determined that the PSLRA bar applies to *all* RICO plaintiffs suing over securities fraud, regardless of whether they "could have maintained a securities-fraud action against the defendant." *Id.*

In a similar case, the Ninth Circuit squarely rejected the proposition that the PSLRA bar applies only to plaintiffs with "standing to bring securities fraud claims against" the particular defendant. *Howard* v. *Am. Online Inc.*, 208 F.3d 741, 749 (9th Cir. 2000). Like the First Circuit, that court held that the PSLRA bar applies so long as the RICO plaintiff's "securities fraud claim[] could be brought by a plaintiff with proper standing." *Id.*

Finally, both the Third and Tenth Circuits have split from the Eleventh Circuit on the overlapping question of whether a plaintiff can artfully plead around the PSLRA bar. For example, the Tenth Circuit confronted a case where the plaintiffs "maintain[ed] that their allegations" were about "mail and wire fraud, bank fraud, extortion, obstruction of justice," or anything other than securities fraud. *Bixler* v. *Foster*, 596 F.3d 751, 760 (10th Cir. 2010). The court shut down that attempt to evade the PSLRA bar based on pleading labels. It held that so long as conduct is actionable "in connection with the purchase of a security," it "'cannot support a civil RICO claim after the enactment of the PSLRA.'" *Id.* (quoting *Bald Eagle Area Sch. Dist.* v. *Keystone Fin., Inc.*, 189 F.3d 321 (3d Cir. 1999). The court noted that mail fraud, wire fraud, and obstruction of justice "may well constitute illegal and fraudulent acts," but they may not be used as RICO

predicates when "undertaken in connection with the purchase of a security." *Id.* (quoting *Bald Eagle Area School Dist.* v. *Keystone Financial, Inc.*, 189 F.3d 321, 330 (3d Cir. 1999)) (brackets omitted).

The Third Circuit has said the same. It explained that "a plaintiff cannot avoid the [PSLRA] bar by pleading mail fraud, wire fraud and bank fraud as predicate offenses in a civil RICO action if the conduct giving rise to those predicate offenses amounts to securities fraud." *Bald Eagle Area Sch. Dist.*, 189 F.3d at 330. A contrary rule, the court reasoned, "would undermine the congressional intent behind the" PSLRA bar and allow easy circumvention. *Id.*

2. Until the decision below, the only non-abrogated decision that read the PSLRA bar more narrowly came from a district court in the Northern District of Illinois. *See Menzies* v. *Seyfarth Shaw LLP*, 197 F. Supp. 3d 1076, 1104-1114 (N.D. Ill. 2016).[2] That court rejected the "'actionable-by-anyone' approach" as a supposed "distort[ion] [of] the plain statutory text." *Id.* at 1106; *see id.* at 1109 (disagreeing "with both the Second Circuit's reasoning and its result" in *MLSMK Investment*). The court was also troubled by the risk of creating a "gap in statutory coverage" if a would-be plaintiff could sue under neither RICO nor Section 10(b). *Id.* at 1107.

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[2] Before *MLSMK Investment* held otherwise, some district courts in the Second Circuit had endorsed a narrower reading of the PSLRA bar, too. *See, e.g.*, *OSRescovery, Inc.* v. *One Groupe Int'l, Inc.*, 354 F. Supp. 2d 357, 370-371 (S.D.N.Y. 2005) (holding that Section 1964(c) did not bar plaintiffs' claims because those specific claims were "not actionable under the federal securities law"); *Renner* v. *Chase Manhattan Bank*, 1999 WL 47239, at *6 (S.D.N.Y. Feb. 3, 1999) (same for aiding-and-abetting claim).

The *Menzies* court was wrong, and other courts have appropriately rejected its reasoning. *See Lerner*, 26 F.4th at 79-82. The PSLRA bar "expressly contemplates restricting [a RICO plaintiff's] reliance on conduct beyond that which specifically injured the plaintiff." *Id.* at 80. And it does not create a "gap" in remedies if private parties who cannot sue under the securities laws cannot sue for the same conduct under RICO, either. Indeed, that is a far more sensible outcome than allowing plaintiffs Congress forbade from suing for securities fraud to turn to RICO's treble-damages remedy instead.

B. The Question Presented Is Important.

The court of appeals' shift from "conduct" to "plaintiff" is exceptionally important for American businesses and risks undermining a number of key constraints on both securities and RICO suits. This Court should correct the error now.

1. This case illustrates the importance of a proper application of the PSLRA bar. Plaintiffs claim to have suffered over $1 billion in losses. *See* Compl. ¶ 146. If they are permitted to treble their damages despite the PSLRA bar, this becomes a *$3 billion* case. Because the bondholder plaintiffs most clearly subject to the PSLRA bar account for two-thirds of the plaintiffs in this case, the elimination of their RICO claims drastically changes the damages here, by hundreds of millions of dollars or more. App., *infra*, 8a-9a & nn.2-4. Those numbers are particularly notable because the SEC, which is actually charged with addressing any violations Citigroup has committed, examined this case and assessed a $4.75 million fine. By arming private plaintiffs to re-enforce (at over $3 billion) the securities

laws the SEC has already enforced (at $4.75 million), the decision below exponentially multiplies Citigroup's exposure.

2. If the decision below stands, this case will not be an isolated example. The reasoning of the decision below could allow numerous, costly suits that Congress did not want under any statute, let alone the onerous RICO regime. The perverse result will be that an investor who does not have a strong enough claim to bring a securities action will be reincarnated as a treble-damages RICO plaintiff. There are several groups of potential plaintiffs who will benefit under that implausible system.

First up, as this case illustrates, are holders of securities. Under *Blue Chip Stamps*, holders are not entitled to privately enforce the securities laws. Under the decision below, though, they can jump to RICO instead.

Similarly, plaintiffs who want to target aiders and abettors of securities violations may use the decision below to do so under RICO. As with suits by holders of securities, this Court has concluded that private suits (though not SEC-initiated suits) against aiders and abettors are unavailable under the securities laws. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994). But several courts of appeals, including the Eleventh Circuit, have held that plaintiffs may sue defendants who have aided and abetted RICO predicate acts. *See, e.g.*, *Cox* v. *Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1410 (11th Cir.), *modified on reh'g on other grounds*, 30 F.3d 1347 (11th Cir. 1994); *see also Banks* v. *Wolk*, 918 F.2d 418, 421 (3d Cir. 1990). Under the decision below, then, a doomed aiding-and-abetting suit under the securities

laws may rise again as a RICO aiding-and-abetting violation.

Finally, the decision below would seem to allow an otherwise time-barred securities plaintiff to bring a RICO suit instead. Civil RICO claims must be brought within four years of when a RICO injury was or should have been discovered. *See Agency Holding Corp.* v. *Malley-Duff & Assocs.*, 483 U.S. 143, 156-157 (1987). Section 10(b), on the other hand, allows securities suits only within two years of discovery (subject to a five-year statute of repose). *See* 28 U.S.C. § 1658(b); *Merck & Co., Inc.* v. *Reynolds*, 559 U.S. 633, 644 (2010). Thus, a plaintiff who discovered a securities claim three years ago, or discovered a securities claim six years after it occurred, would not have a viable suit under the securities laws but could apparently bring a treble-damages RICO claim for precisely that reason.

III. THIS CASE IS AN EXCELLENT VEHICLE.

This case offers an excellent vehicle for addressing the proper construction of the PSLRA bar. There are no apparent jurisdictional, threshold, or prudential bars to this Court's review of that question.

The question presented is a purely legal question. The parties briefed it before the panel below. *See* Pet. C.A. Br. 32-35; Resp. C.A. Reply Br. 20-21 & n.11. The panel clearly ruled on the Section 1964(c) issue. App., *infra*, 55a-56a. Although the panel devoted surprisingly little space to such an important issue, its perfunctory treatment should not shield its flawed textual analysis. Citigroup detailed the panel's error in a petition for rehearing or rehearing en banc, *see* C.A. Pet. 7-13, and the court neither corrected itself nor supplied any further justification for its outlier decision. There

is therefore no doubt that the decision's flawed analysis of Section 1964(c) is the law of the Eleventh Circuit.

Although the decision below is interlocutory, that is no real obstacle here. There will be no further development of the Section 1964(c) issue. Plaintiffs have other claims (and non-bondholder plaintiffs may have RICO claims), but further proceedings on remand will have no bearing on the question presented or its importance. And like many cases of this size, there is no guarantee that the case will wind its way to final judgment. As this Court has recognized, "[e]ven weak [securities] cases . . . may have substantial settlement value." *Dabit*, 547 U.S. at 80. Congress's objective in the PSLRA, including its amendment to Section 1964(c), was to reduce the resulting settlement pressure at the pleading stage. Review of a pleading-stage decision about the scope of the PSLRA is thus fully consistent with Congress's design.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 30, 2025

APPENDIX

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-13152

OTTO CANDIES, LLC, ADAR MACRO FUND LTD., ASHMORE EMERGING MARKETS DEBT AND CURRENCY FUND LIMITED, ASHMORE EMERGING MARKETS HIGH YIELD PLUS FUND LIMITED, *et al.*,

Plaintiffs-Appellants,

versus

CITIGROUP INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:16-cv-20725-DPG

Filed May 8, 2025

Before JILL PRYOR, BRANCH, and GRANT, *Circuit Judges.*

GRANT, *Circuit Judge*:

For the second time, we consider this long-running dispute alleging a transnational fraudulent scheme resulting in over $1 billion of losses to thirty plaintiffs. The case has cycled through four complaints, and it has languished at the pleading stage for nine years. The

district court dismissed all seven counts in the 541-page third amended complaint for failure to state a claim. We see things differently. Because each of the plaintiffs has sufficiently pleaded the elements of each count alleged in the complaint, we reverse and remand.

I. FACTS

A. BACKGROUND

Given the breadth of the allegations, we describe the factual background in detail. We set out the facts as pleaded in the third amended complaint and, as we must at the motion-to-dismiss stage, accept them as true. *See Wood v. Moss*, 572 U.S. 744, 755 n.5, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014).

We start with the major players. Citigroup, Inc. is a banking and financial institution incorporated in Delaware and headquartered in New York. Citibank is Citigroup's "primary U.S. lending and banking entity." Oceanografía S.A. de C.V. (OSA) is a now-defunct Mexican oil and gas services company. At one time, OSA provided offshore drilling services to Petróleos Mexicanos S.A. de C.V. (Pemex), Mexico's state-owned oil and gas company. Banco Nacional de México (Banamex) is a wholly owned Mexican subsidiary of Citigroup that furnished on-the-ground banking services for Citigroup.

Next, the scheme. In 2008, Citigroup, through Banamex, established credit facilities—a type of loan allowing borrowers to take out loans over extended periods of time—to provide cash advances to Pemex contractors, including OSA.[1] These facilities were "operated, managed,

[1] This system is also called "accounts receivable factoring" in the banking industry. Citigroup Inc., Exchange Act Release No.

supervised, and controlled" by a New York-based division within Citigroup called the Institutional Client's Group (ICG). The ICG collaborated with Banamex to run the cash-advance facilities, including the one used by OSA. Citigroup ICG employees were responsible for approving all increases in OSA's cash-advance limit. And Citigroup managed and supervised those Banamex and Citigroup ICG employees operating the cash-advance facility at issue here.

Because Pemex often did not pay its contractors immediately, the cash advances provided OSA with liquidity to perform its underlying contracts. Under their arrangement, Citigroup advanced OSA funds—subject to steep interest rates—in exchange for the right to collect repayment directly from Pemex. Given Pemex's low likelihood of default as a state-owned entity, Citigroup upped the amount of its advances nine times to sums that far exceeded the value of the underlying contracts. *See Otto Candies, LLC v. Citigroup, Inc. (Otto Candies I)*, 963 F.3d 1331, 1336 (11th Cir. 2020). This, in turn, bloated OSA with debt up to nearly half of its revenue and enabled Citigroup to earn millions in "risk-free" profits. All told, Citigroup advanced over $3.3 billion to OSA from 2008 to 2014. *See* Citigroup Inc., Exchange Act Release No. 83,858, 2018 SEC LEXIS 2009, 2018 WL 3913653, at *1, *3 (Aug. 16, 2018).

Citigroup knew about OSA's financial condition. Indeed, OSA sent the bank audited financial statements and other information detailing its outstanding debts and general

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83,858, 2018 SEC LEXIS 2009, 2018 WL 3913653, at *1 (Aug. 16, 2018).

financial condition. Despite its knowledge that OSA was overleveraged, Citigroup boosted its advances to OSA by almost 600% between 2009 and 2012. Yet OSA's revenue increased by less than half that rate during that period.

As early as 2011, Citigroup's internal-control procedures mandated that for each cash-advance request, OSA had to submit copies of a Pemex work estimate and a "work estimate authorization" form. These documents were signed by both Pemex and the relevant contractor (here, OSA) reflecting the amount owed to the contractor by Pemex for services provided.

Citigroup did not hew to these procedures for OSA. Instead, the bank granted OSA's requests even though (1) their value dwarfed the value of the Pemex contracts, and (2) Citigroup knew that OSA had forged Pemex signatures on the authorization forms it submitted to Citigroup. The plaintiffs allege that none of that mattered to the bank. Citigroup had "deepen[ed] its ties with one of the largest state-owned enterprises in the world"—Pemex—and continued to amass greater interest payments on the illicit funds.

Worse yet, in 2012, Citigroup orchestrated a secret contract with OSA that became known as the Regulatory Contract. Under that arrangement, Citigroup outsourced to OSA—the player that stood to gain the most from inflating the value of the Pemex contracts—the job of authenticating the documents it submitted in support of its own cash-advance requests. The fox, in other words, was guarding the henhouse. And in constructing this arrangement, Citigroup further violated its internal-control procedures and sought to insulate itself from scrutiny.

Citigroup also profited from its relationship with OSA in other ways. The ties between the two entities nurtured "a relationship that extended far beyond the cash advance facility." For example, Citigroup (or its agents and subsidiaries) served as trustee of OSA's 2008 bond issuance and as fiduciaries of the trust that facilitated OSA's 2013 bond issuance. These bond issuances helped OSA raise capital for general corporate purposes, repay loans, and finance acquisitions of shipping vessels. The trusts, in turn, were designed to "guarantee payment to OSA's creditors" should OSA default. Beyond the trusts, Citigroup also helped restructure OSA's debt; drafted investor presentations; advised OSA on acquisitions; and served as OSA's banker. *See Otto Candies I*, 963 F.3d at 1337.

These deeper ties spawned deeper fraud. During the bond issuances, Citigroup duped investors—including the bondholding plaintiffs—by misrepresenting and omitting key information about OSA's financial condition and "the stability and reliability of the cash advance facility." In reality, OSA was in "financial crisis." So much so, the plaintiffs allege, that Citigroup froze the cash-advance facility because "Pemex had refused to pay Banamex" on certain invoices "for funds [Citigroup] had already advanced to OSA." More broadly, Citigroup played an integral role in drafting the fraudulent materials distributed to investors between 2008 and 2014, and in vouching for OSA's fraudulent financial statements. The links between Citigroup and OSA were so "extensive" that the very existence of the fraud depended on Citigroup's knowledge, consent, and funding.

Things came to a head in 2014, when during an investigation of OSA's insurance policies, Mexican authorities determined that the company had violated Mexican law. As a result, the government prohibited OSA from executing new contracts with Pemex. During the investigation, Mexican regulators uncovered the cash-advance scheme and determined that ten Citigroup employees were criminally liable under Mexican law. Prosecutors fined Banamex $2.3 million, and a Mexican court issued arrest warrants for three Citigroup employees for banking violations. Finally, the Mexican government seized OSA and placed it into restructuring proceedings, triggering its collapse.

Citigroup fared little better in the United States. After an internal investigation, the bank discovered that it had issued nearly $430 million in fraudulent cash advances. Citigroup also disclosed in its 2014 SEC annual report that the Department of Justice and the SEC were investigating the cash-advance scheme, and in 2018, the latter fined Citigroup $4.75 million for failing to maintain a system of internal controls related to Banamex. *See* Citigroup Inc., Exchange Act Release No. 83,858, 2018 SEC LEXIS 2009, 2018 WL 3913653, at *9 (Aug. 16, 2018). The SEC called Banamex's internal-control mechanisms "critically flawed" because they permitted "a single Banamex employee to verify invoices that led to disbursement of funds" to OSA. 2018 SEC LEXIS 2009, [WL] at *6. And it found that "[s]everal individuals within Banamex" had "rais[ed] questions about the propriety" of how the cash-advance facility operated. *Id.*

Finally, Citigroup's then-CEO, Michael Corbat, explained one result of the company's "rigorous internal

investigation": Citigroup "terminated one employee, who we believe was directly involved in the fraud." Corbat also divulged that Citigroup's investigation had led to the dismissal of eleven other employees, including "four Managing Directors, two of whom are business heads in Mexico," because their "actions or inactions failed to protect our company from this fraud." He promised that Citigroup was "reviewing our controls and processes in Mexico," with the goal of ensuring that the bank and its subsidiaries acted "with the highest ethical standards."

* * *

To summarize, the plaintiffs thoroughly allege that Citigroup and its agents (Citibank and Banamex) conspired with OSA to orchestrate and execute a vast and fraudulent scheme designed to boost the appearance of OSA's profits and increase Citigroup's earnings from interest payments. OSA, they say, submitted inflated cash-advance requests containing forged Pemex signatures to Citigroup, which—with full knowledge of the fraud—approved them. The result? A cycle in which OSA requested larger and larger cash advances from Citigroup, allowing the fraud to flourish. In the process, OSA collected millions in "increased illicit income," while Citigroup amassed millions in "increased illicit interest."

All the while, Citigroup masked the true nature of OSA's precarious financial condition from bondholders and other investors. Citigroup failed to disclose that (1) the cash-advance facility lacked adequate safeguards; (2) it had entered into a secret agreement granting OSA the power to vet its own financials; and (3) its banking arm was neglecting internal-control procedures. Together,

these misrepresentations and omissions caused the plaintiffs to (1) "invest and maintain their investments in OSA"; (2) "restructure their debts with OSA"; and (3) continue to enter into financial agreements with OSA. When OSA collapsed, the plaintiffs collectively lost over $1 billion on their investments. The plaintiffs allege that had they known the truth, they would "have never done business" with OSA.

B. PROCEDURAL HISTORY

Based on these allegations, over thirty plaintiffs filed suit against Citigroup in 2016. The plaintiffs are shipping and leasing companies, investment funds, and a bank. Each was a vendor, creditor, or bondholder of OSA. The plaintiffs can be grouped into three categories:

(1) shipping companies and a service provider that sold or leased vessels to OSA or that provided it with services;[2]

(2) those who bought or held bonds issued by OSA or its affiliates;[3] and

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[2] The shipping company and service provider plaintiffs include Otto Candies, LLC; Coastline Maritime Pte. Ltd. (together with Marfield Ltd. Inc. and Shanara Maritime International, S.A., Coastline); Shipyard De Hoop B.V.; Hoop Lobith International B.V. (together with Shipyard De Hoop B.V., De Hoop); Gulf Investments and Services Ltd.; Halani International Ltd.; and Máquinas Diesel S.A. de C.V. (MADISA). As relevant here, Marfield and Shanara are wholly owned subsidiaries of Coastline.

[3] The bondholding plaintiffs include Adar Macro Fund Ltd.; Ashmore Emerging Markets Debt and Currency Fund Limited; Ashmore Emerging Markets High Yield Plus Fund Limited; Ashmore Emerging Markets Tri Asset Fund Limited; Ashmore SICAV in respect of Ashmore SICAV Emerging Markets Corporate

(3) a bank that loaned money to OSA.[4]

The plaintiffs are based in the United States and abroad.

In 2018, the district court granted Citigroup's motion to dismiss for *forum non conveniens*. *Otto Candies, LLC v. Citigroup, Inc.*, No. 16-CV-20725, 2018 U.S. Dist. LEXIS 14646, 2018 WL 3008740, at *7 (S.D. Fla. June 15, 2018) (unpublished). This Court reversed and remanded, holding that the district court had failed to give proper deference to the domestic plaintiffs' choice of forum. *See Otto Candies I*, 963 F.3d at 1335. We also explained that Citigroup had failed to carry its burden to show that most of the relevant documents and witnesses were in Mexico and criticized the

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Debt Fund; Ashmore SICAV in respect of Ashmore SICAV Emerging Markets Debt Fund; Ashmore SICAV in respect of Ashmore SICAV Emerging Markets High Yield Corporate Debt Fund (collectively with other Ashmore funds, Ashmore); Copernico Capital Partners (Bermuda) Ltd.; HBK Investments L.P.; HBK Master Fund L.P.; ICE Canyon LLC; ICE 1 EM CLO Limited; Padstow Financial Corp.; Moneda Deuda Latinoamericana Fondo de Inversión; Moneda International Inc.; Moneda Latin American Corporate Debt; Moneda Renta CLP Fondo de Inversión; Moneda S.A. Administradora General de Fondos (collectively with other Moneda funds and Padstow Financial Corporation, Moneda); Nordic Trustee; and Waypoint Asset Management LLC.

As relevant here, HBK controls GPF II's bondholding interest. Moneda "is an agent for and acts on behalf of" Padstow.

Plaintiffs Adar, Ashmore, Copernico, HBK (on behalf of itself and GPF II), ICE, Moneda, and Waypoint purchased bonds in the 2008 issuance. Only Plaintiffs HBK and Moneda purchased bonds in the 2013 bond issuance. Plaintiff Nordic Trustee represents HBK and Moneda's interests in the 2013 bonds.

[4] The plaintiff bank is Coöperatieve Rabobank U.A. (Rabobank).

bank for "misconstruing the complaint" and "contradicting the plaintiffs' allegations." *Id.* at 1345-46, 1348.

Plaintiffs filed a second amended complaint, and Citigroup again moved to dismiss. The district court yet again granted the motion, holding that the complaint was "an impermissible shotgun pleading" and did not "meet the heightened pleading standard for fraud." At the hearing, the court said it would allow the plaintiffs leave to amend, but warned them to allege the "who, what, when and where" of the fraudulent misrepresentations and omissions.

A slimmed-down group of thirty plaintiffs filed a 541-page third amended complaint in 2022. That complaint is the operative one here, and it raises seven claims:

(1) substantive violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) under 18 U.S.C. § 1962(c);

(2) conspiracy to violate RICO under 18 U.S.C. § 1962(d);

(3) common-law fraud;

(4) common law aiding and abetting fraud;

(5) common-law conspiracy to commit fraud;

(6) vicarious liability based on actual agency; and

(7) vicarious liability based on apparent agency.

Attempting to satisfy the district court's request for more specificity, the plaintiffs attached four appendices to the complaint:

(1) a list of contracts;

(2) a table describing the major Citigroup employees involved in the scheme;

(3) a table describing additional Citigroup employees involved; and

(4) a table describing the allegedly fraudulent misrepresentations and omissions and how the plaintiffs relied on them to their detriment.

Citigroup again moved to dismiss, and the district court again obliged, dismissing all seven counts. *Otto Candies, LLC v. Citigroup, Inc.*, No. 1:16-CV-20725, 2023 U.S. Dist. LEXIS 168612, 2023 WL 6418135, at *12 (S.D. Fla. Aug. 25, 2023) (unpublished). The court disposed of the plaintiffs' substantive RICO and common-law fraud claims first, concluding that the allegations came up short on two fronts: failure to provide details about which specific misrepresentations the plaintiffs relied on, and failure to claim that their reliance was "justifiable." 2023 U.S. Dist. LEXIS 168612, [WL] at *3-4. According to the court, these failures meant the counts fell short of Federal Rule of Civil Procedure 9(b)'s heightened requirements for pleading fraud. *See* Fed. R. Civ. P. 9(b).

The plaintiffs' RICO and common law conspiracy-to-commit-fraud claims fared no better. The court dismissed the RICO conspiracy claims for failure to plead "an agreement to the overall objective of the alleged conspiracy or an agreement to commit two predicate acts." *Otto Candies*, 2023 U.S. Dist. LEXIS 168612, 2023 WL 6418135, at *5. As for the common-law conspiracy claim, the district court found that the plaintiffs had once more failed to satisfy Rule 9(b).

Next was the plaintiffs' common-law aiding-and-abetting-fraud claim. The district court concluded that the plaintiffs had failed to allege facts giving rise to "a strong inference of actual knowledge" on Citigroup's part about the fraud. 2023 U.S. Dist. LEXIS 168612, [WL] at

*7 (quotation omitted). Plus, the court said, the plaintiffs failed to plead with particularity that Citigroup had substantially assisted the fraud. That left the second and third elements of the claim unsatisfied.

Finally, the court rejected the plaintiffs' vicarious liability claims. Though Citigroup did not dispute the existence of an agency relationship between itself, Citibank, and Banamex, the court dismissed the vicarious liability counts for the same reason it threw out the substantive RICO and fraud counts: a lack of specificity in the pleading.

This appeal followed.

II. STANDARD OF REVIEW

We review a dismissal for failure to state a claim de novo, accepting the complaint's factual allegations as true and construing them in the light most favorable to the plaintiffs. *Wildes v. BitConnect Int'l PLC*, 25 F.4th 1341, 1345 (11th Cir. 2022).

III. DISCUSSION

We proceed in three parts, tracing the lower court's reasoning. *First*, we address the plaintiffs' aiding-and-abetting claim (count four). *Second*, we analyze the court's dismissal of the substantive RICO, common-law fraud, and vicarious liability counts (counts one, three, six, and seven). *Finally*, we turn to the plaintiffs' RICO and common-law conspiracy claims (counts two and five).

A. AIDING AND ABETTING COMMON-LAW FRAUD

The complaint alleges that Citigroup aided and abetted OSA's fraudulent scheme so that it could financially benefit from interest and fee payments. The district court

disagreed. Florida law governs the plaintiffs' aiding-and-abetting claim. Though "no Florida court has explicitly recognized a cause of action for aiding and abetting fraud, Florida courts have assumed that the cause of action exists." *Chang v. JPMorgan Chase Bank, N.A.*, 845 F.3d 1087, 1097 (11th Cir. 2017). The aiding-and-abetting-fraud tort has three elements: "(1) the existence of an underlying fraud; (2) that the defendant had knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the commission of the fraud." *Id.* at 1097-98 (alterations adopted and quotations omitted).

Because the parties "do not dispute the existence of the underlying fraud," only the second and third elements—actual knowledge and substantial assistance—are relevant here. *Otto Candies*, 2023 U.S. Dist. LEXIS 168612, 2023 WL 6418135, at *6. The district court dismissed this claim, concluding that the plaintiffs had not properly alleged either element. We disagree. We treat each in turn, and in the process clarify the standard for pleading knowledge for an aiding-and-abetting-fraud claim under Florida law.

1. KNOWLEDGE ELEMENT

The district court concluded that the plaintiffs had failed to satisfy the knowledge element. The court acknowledged that "the element of actual knowledge may be alleged generally," but said such allegations must include "specific facts that give rise to a *strong inference of actual knowledge* regarding the underlying fraud." 2023 U.S. Dist. LEXIS 168612, [WL] at *7 (emphasis added) (quoting *Lamm v. State St. Bank & Tr. Co.*, 889 F. Supp. 2d 1321, 1332 (S.D. Fla. 2012) (quotation omitted)). While the plaintiffs' allegations contained "*some* particularity,"

the district court explained, they did not plead facts "that would give rise to a strong inference" of actual knowledge. *Id.*

That standard was improper. Because confusion has crept into district courts' standards for pleading knowledge, we "take the opportunity to get our house in order." *McDonough v. Garcia*, 116 F.4th 1319, 1321 (11th Cir. 2024) (en banc).

a. PLEADING STANDARD FOR KNOWLEDGE

First, the basics. The plaintiffs allege fraud, so they must satisfy the heightened pleading standards of Rule 9(b). To meet this standard, plaintiffs must allege "(1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the Plaintiffs; and (4) what the defendants gained by the alleged fraud." *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1291 (11th Cir. 2010) (quotation omitted). Though Rule 9(b) requires more particularity than the normal Rule 8(a) standard, its application "must not abrogate the concept of notice pleading." *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (quotation omitted). Courts should "hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that [the] plaintiff has substantial prediscovery evidence of those facts." *Gose v. Native Am. Servs. Corp.*, 109 F.4th 1297, 1318 (11th Cir. 2024) (quotation omitted). "A defendant has knowledge of an underlying fraud if it has a general awareness that its role was part of an overall improper

activity." *Gilison v. Flagler Bank*, 303 So. 3d 999, 1003 (Fla. Dist. Ct. App. 2020).

Because the plaintiffs filed this lawsuit in federal court, Rule 9(b)'s specificity requirements apply. But even under that rule, the "conditions of a person's mind," including knowledge, "may be alleged generally." Fed. R. Civ. P. 9(b). That's why, in an adjacent context, we have held that a plaintiff "need not have pled [the defendant's] knowledge of the relevant contracts with specificity, even assuming Rule 9(b) applies." *Sun Life Assurance Co. of Can. v. Imperial Premium Fin., LLC*, 904 F.3d 1197, 1215 (11th Cir. 2018).

It is also necessary to differentiate between the standards for pleading common-law fraud under Rule 9(b) and securities fraud under the Private Securities Litigation Reform Act (PSLRA). *See* 15 U.S.C. § 78u-4(b). Passed in 1995, the PSLRA mandates that private plaintiffs "allege facts supporting a strong inference of scienter for each defendant with respect to each violation" when pleading securities fraud, heightening the pleading standard. *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1238 (11th Cir. 2008) (quotation omitted); *see also Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313-14, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007). So in securities-fraud cases, "a plaintiff can no longer plead the requisite scienter element generally, as he previously could under Rule 9(b)." *Mizzaro*, 544 F.3d at 1238.

Because the plaintiffs here do not bring securities-fraud claims, these requirements are inapplicable. But some district courts have also extended the PSLRA's pleading standard, requiring plaintiffs to plead a "strong inference of actual knowledge regarding the underlying fraud"

under Florida aiding-and-abetting law.[5] *Otto Candies*, 2023 U.S. Dist. LEXIS 168612, 2023 WL 6418135, at *7 (quotation omitted). Some have not.[6] And still other district courts have flagged the inconsistency.[7]

Those courts requiring a heightened standard for pleading knowledge have gotten it wrong—there is no

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[5] *See, e.g.*, *Lawrence v. Bank of Am., N.A.*, No. 8:09-CV-2162-T-33TGW, 2010 U.S. Dist. LEXIS 89539, 2010 WL 3467501, at *3 (M.D. Fla. Aug. 30, 2010) (unpublished); *Lamm*, 889 F. Supp. 2d at 1332; *Meridian Tr. Co. v. Batista*, No. 17-23051, 2018 U.S. Dist. LEXIS 166556, 2018 WL 4693533, at *3 (S.D. Fla. Sept. 26, 2018) (unpublished); *Todd Benjamin Int'l, Ltd. v. Grant Thornton Int'l, Ltd.*, 682 F. Supp. 3d 1112, 1136-37 (S.D. Fla. 2023); *Rusty115 Corp. v. Bank of Am., N.A.*, No. 22-CV-22541, 2023 U.S. Dist. LEXIS 165584, 2023 WL 6064518, at *6 (S.D. Fla. Sept. 18, 2023) (unpublished); *Metrocity Holdings, LLC v. Bank of Am., N.A.*, No. 22-CV-80980, 2023 U.S. Dist. LEXIS 165582, 2023 WL 6064516, at *9 (S.D. Fla. Sept. 18, 2023) (unpublished); *Wang v. Revere Cap. Mgmt., LLC*, No. 22-CV-80884, 2023 U.S. Dist. LEXIS 26607, 2023 WL 2198570, at *5 (S.D. Fla. Feb. 15, 2023) (unpublished).

[6] *See, e.g.*, *Trinity Graphic, USA, Inc. v. Tervis Tumbler Co.*, 320 F. Supp. 3d 1285, 1296 (M.D. Fla. 2018) (explaining that "[t]he second element [of an aiding-and-abetting-fraud claim], whether the [defendants] had knowledge of the fraud, is not subject to the particularly [sic] requirement"); *Cabot E. Broward 2 LLC v. Cabot*, No. 16-61218-CIV, 2016 U.S. Dist. LEXIS 188787, 2016 WL 8739579, at *4 (S.D. Fla. Oct. 25, 2016) (unpublished); *Platinum Ests., Inc. v. TD Bank, N.A.*, No. 11-60670-CIV, 2012 U.S. Dist. LEXIS 30684, 2012 WL 760791, at *3-4 (S.D. Fla. Mar. 8, 2012) (unpublished); *Bruhl v. Price WaterhouseCoopers Int'l*, No. 03-23044-CIV, 2007 U.S. Dist. LEXIS 21885, 2007 WL 983263, at *10 (S.D. Fla. Mar. 27, 2007) (unpublished).

[7] *See, e.g.*, *Angell v. Allergan Sales, LLC*, No. 3:18-cv-282-J-34JBT, 2019 U.S. Dist. LEXIS 142768, 2019 WL 3958262, at *10 n.16 (M.D. Fla. Aug. 22, 2019) (unpublished).

reason to import the PSLRA's standard onto Florida common-law fraud claims. In *Mizzaro*, for example, we expressly stated that "Rule 9(b) does not require a plaintiff to allege specific facts related to the defendant's state of mind when the allegedly fraudulent statements were made." 544 F.3d at 1237. Rather, "it is sufficient to plead the who, what, when, where, and how of the allegedly false statements and then allege generally that those statements were made with the requisite intent." *Id.*

Other decisions interpreting Rule 9(b) tell the same story. We held in *Sun Life*, for example, that "even assuming Rule 9(b) applies," the plaintiff "need not have pled" the defendant's "knowledge of the relevant contracts with specificity" because "[i]n alleging fraud knowledge may be alleged generally." 904 F.3d at 1215-16 (ellipses omitted) (quoting Fed. R. Civ. P. 9(b)). So too in *United States ex rel. Matheny v. Medco Health Solutions, Inc.*, where we concluded that "[u]nder Rule 9(b)'s standards" for pleading knowledge, "general allegations are sufficient." 671 F.3d 1217, 1224 (11th Cir. 2012).[8]

This approach makes sense. It also comports with the text of Rule 9(b) and recognizes that a plaintiff rarely will be able to plead a defendant's actual state of mind—particularly before it has access to discovery. In assessing

[8] Citigroup's reliance on *Perlman v. Wells Fargo Bank, N.A.*, 559 F. App'x 988, 993-94 (11th Cir. 2014) (unpublished), is unpersuasive. For starters, other unpublished cases go the other direction. *See, e.g.*, *W. Coast Roofing & Waterproofing, Inc. v. Johns Manville, Inc.*, 287 F. App'x 81, 88 (11th Cir. 2008) (unpublished) (explaining that "Rule 9(b) permits states of mind, including knowledge, to be pled generally"). But more fundamentally, unpublished cases "are not precedential and they bind no one." *Ray v. McCullough Payne & Haan, LLC*, 838 F.3d 1107, 1109 (11th Cir. 2016).

a defendant's knowledge, we therefore ask whether "the plaintiff pleads factual content that allows the court to draw the reasonable inference" that a defendant knew about the alleged fraud. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).[9]

b. APPLICATION OF THE PLEADING STANDARD

Applying that standard here, we conclude that the plaintiffs effectively pleaded the knowledge element of their aiding-and-abetting claim. *First*, the complaint plausibly alleges that Citigroup employees and agents

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[9] This standard matches those of most of our sister circuits, which also recognize the different pleading requirements for securities fraud and fraud under Rule 9(b). *See, e.g.*, *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012); *Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200, 213 (5th Cir. 2009); *Ashland, Inc. v. Oppenheimer & Co.*, 648 F.3d 461, 471 (6th Cir. 2011); *Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 833 & n.7 (7th Cir. 2007); *Migliaccio v. K-tel Int'l, Inc.* (*In re K-tel Int'l, Inc. Sec. Litig.*), 300 F.3d 881, 889 (8th Cir. 2002); *ESG Cap. Partners, LP v. Stratos*, 828 F.3d 1023, 1036 (9th Cir. 2016); *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 552, 351 U.S. App. D.C. 30 (D.C. Cir. 2002).

We recognize that the Second Circuit sees things differently. But in that circuit—even before the PSLRA's passage—plaintiffs have always had "to allege facts that give rise to a strong inference of fraudulent intent" in order "to serve the purposes of Rule 9(b)." *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). That has never been the standard in this Circuit.

In the Third Circuit, the standard is less clear. *See, e.g.*, *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1418, 1420-21 (3d Cir. 1997); *Cal. Pub. Emps.' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 144 (3d Cir. 2004).

themselves knew about the fraud. "Under Florida law, knowledge an agent or employee acquires within the scope of her authority generally may be imputed to her principal or employer." *Chang*, 845 F.3d at 1095. True, an exception to this general rule applies "where an individual is acting adversely to the corporation." *Beck v. Deloitte & Touche*, 144 F.3d 732, 736 (11th Cir. 1998) (quotation omitted). But this carveout is narrow in scope: "an agent's knowledge will be imputed to the principal unless the agent's interest is entirely adverse to the principal's interest, meaning the actions must neither be intended to benefit the corporation nor actually cause short-or long-term benefit to the corporation." *Chang*, 845 F.3d at 1096 (quotations omitted).

Citigroup does not dispute that Banamex and Citibank employees acted as its agents—and for good reason. To begin, Citibank is Citigroup's "primary U.S. lending and banking entity," which acted as trustee for the 2008 bond issuance. And Banamex was a wholly owned subsidiary of Citigroup that ran the cash-advance facility on which the "fraud centers." A division within Citigroup called the Institutional Client's Group (ICG) "operated, managed, supervised, and controlled" the cash-advance facility and collaborated closely with Banamex.

We also recognize the ways in which Citigroup represented its relationship with Banamex to the plaintiffs. Take Banamex's letterhead logo, which was sent to Plaintiff Otto Candies:

Or the email signature and business card of a Banamex employee from September 2010 and April 2011, respectively:

These representations, and others like them, led the plaintiffs to "perceive[] Citigroup and Banamex as one and the same" because "ICG and Banamex employees identif[ied] themselves as employees of 'Banamex-Citi' or 'Banamex-Citigroup,'" and ICG employees "sign[ed] documents on behalf of Banamex."

One employee was responsible "for Citigroup's relationship with OSA" and helped to oversee the processing of cash-advance requests. Another, "ICG's Pemex-Citigroup Relationship Manager and a Citigroup Managing Director," oversaw "Citigroup's relationship with Pemex," signed the Regulatory Contract on Citigroup's behalf, and "approved increases in the cash advance limit for OSA." Citigroup terminated the managing director for his role in the fraud, and Mexican regulators declared them both criminally responsible.

Nor were the actions of Banamex and Citibank employees "entirely adverse" to Citigroup's interests.

After all, Citigroup "collected tens of millions of dollars in interest every year" from the cash-advance scheme alone. And in an appendix to the complaint, the plaintiffs detailed how certain Citigroup employees—including "ICG's Pemex-Citigroup Relationship Manager and a Citigroup Managing Director" and the "CEO of Citigroup's ICG-GTS for Mexico"—were aware of (and actively participated in) the fraud.[10]

Citigroup's own acts and statements also support the plaintiffs' contentions that Citigroup employees knew of the fraud. The bank's then-CEO, Michael Corbat, announced that Citigroup had fired an employee who the company "believe[d] was directly involved in the fraud." And Citigroup's subsequent investigation led to it terminating eleven other employees, including "four Managing Directors, two of whom are business heads in Mexico," because their "actions or inactions failed to protect our company from this fraud." Conceding criminal involvement in fraud requires knowledge of that fraud. Corbat's statements, together with Citigroup's subsequent remedial actions, are enough to plausibly show that Citigroup employees and agents knew about the fraud.

The district court resisted these conclusions. Addressing Corbat's admission, the court labeled "misleading" the plaintiffs' assertion that Citigroup had fired an employee "because he was 'criminally involved' in the fraudulent scheme." *Otto Candies*, 2023 U.S. Dist. LEXIS 168612, 2023 WL 6418135, at *6 (quoting operative complaint). Citigroup, the court said, had only admitted to terminating

[10] Citigroup's ICG is divided into five groups, of which Global Transaction Services (GTS) is one.

an employee "who it believed was directly involved in the fraud," but had not said that it fired the employee for being "criminally involved" in the fraud. *Id.* (alterations adopted and emphasis deleted). That is a rather fine distinction. And in any event, that purported interpretation of the statement is quite flimsy considering that Mexican authorities eventually brought criminal charges against multiple Citigroup employees. More on that below.

Citigroup, for its part, contends that the complaint "provides no support" for the plaintiffs' characterization that "*Citigroup* employees were involved in the fraud." To start, it makes the odd assertion that Corbat's statement could mean that Citigroup fired a non-Citigroup employee. It would be peculiar for Citigroup's then-chief executive to issue a "Dear Colleagues" memorandum—on formal Citigroup letterhead, no less—to disclose the termination of an employee from a *different* company.

On top of that, the plaintiffs have pointed to several employees—including three employees who used ICG or "Citi" email addresses and identified themselves as either Citigroup or Banamex employees—involved in the scheme. Even if these persons were theoretically Banamex employees, Citigroup conceded that they functioned as Citigroup's agents. It is immaterial whether the terminated employee was a Citigroup or Banamex employee because that person's actions are imputed to Citigroup. *See Chang*, 845 F.3d at 1095. In short, Citigroup fights the factual allegations of the complaint. But its efforts to litigate the nuances of the agency relationship between itself and Banamex are better suited for summary judgment than a motion to dismiss.

Aside from the statements of its own employees and agents, the actions of Mexican authorities bolster the plaintiffs' allegations that Citigroup knew about the fraud. The Mexican government found that Citigroup employees were criminally responsible for "extending loans they know recipients cannot repay" and "knowing participation in the fraudulent scheme." Arrest warrants were issued for three Citigroup ICG employees.

The district court rejected reliance on this allegation because "Mexican law does not necessarily mirror the standard" applicable in American courts. *Otto Candies*, 2023 U.S. Dist. LEXIS 168612, 2023 WL 6418135, at *8. True enough. But also beside the point—of course neither foreign law nor foreign regulators bind this Court. Even so, the Mexican authorities' conclusions make it less plausible that Citigroup employees or agents were in fact unaware of the alleged scheme.

What's more, the discrepancies between the cash-advance values and the underlying Pemex contracts render it plausible that Citigroup knew of the fraud. Consider the sheer volume of the disparities. OSA once requested a cash advance of $126 million on a contract paying $39 million annually. Another request asked for "approximately $110 million on a contract that only paid $23 million annually." Ultimately, OSA's requests exceeded the amount of the Pemex contracts by over $200 million.[11]

[11] The plaintiffs contend that this number lowballs the true figure. That's because "Citigroup limited its internal investigation to 166 cash advance requests (totaling approximately $430 million), even though, according to the documents it provided to the PGR

"Simply put, the numbers did not add up." *Gilison*, 303 So. 3d at 1003. Citigroup is one of the world's most sophisticated financial institutions, and it strains credulity to conclude that, assuming the plaintiffs' allegations are true, Citigroup lacked awareness of OSA's activities.

In sum, the plaintiffs' complaint meets the knowledge pleading standard allowed under Rule 9(b). The complaint sufficiently pleads that Citigroup employees and agents knew about and participated in the alleged fraud.

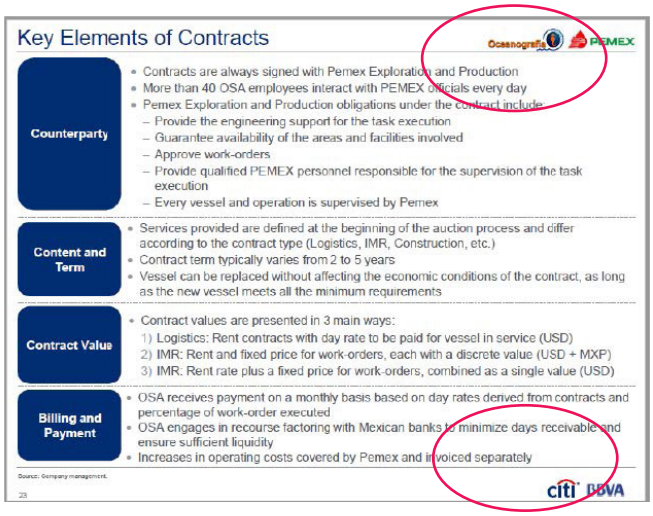
2. SUBSTANTIAL-ASSISTANCE ELEMENT

To plead an aiding-and-abetting-fraud claim, a plaintiff must also show that the defendant substantially assisted the fraud. "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." *Chang*, 845 F.3d at 1098 (quotation omitted). Pleading substantial assistance "requires the plaintiff to allege that the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." *Gilison*, 303 So. 3d at 1004 (quotation omitted). Providing funds to enable fraud qualifies as supplying substantial assistance under Florida law. *Id.* And because pleading substantial assistance involves "the circumstances constituting fraud," it must be alleged with particularity. Fed. R. Civ. P. 9(b).

[Mexican Attorney General's Office] in or around March 2014, Oceanografía submitted approximately 223 cash advance requests (totaling approximately $750 million) over that period."

Parsing the complaint reveals allegations that Citigroup provided "substantial assistance" to OSA by any measure of that phrase. Take its approval of hundreds of millions of dollars of cash advances to OSA, which far exceeded the value of the Pemex contracts. These cash injections were critical to OSA's performance of its basic functions—and also to perpetuating the fraud. The advances, and the imprimatur that they provided for the stability of the cash-advance facility, convinced the plaintiffs to invest, and maintain their investments, in what looked like a lucrative investment opportunity. Plaintiff MADISA, for instance, received OSA's 2010 and 2011 financial statements in a March 20, 2012, email. The documents "discussed OSA's cash flow from the Citigroup cash advance facility," suggesting that "OSA had sufficient cash flow to pay MADISA." And that, in turn, convinced MADISA "to renew OSA's line of credit in 2012" and "continu[e] to do business with OSA between 2012 and 2014." Without representations like these, OSA's liquidity would have dried up.

The plaintiffs point to other examples of Citigroup's assistance, too. For one, Citigroup helped prepare a December 2013 presentation given to Plaintiffs HBK, Moneda, Nordic, and Waypoint that was designed to "maintain investor confidence in OSA and solicit new investors." A slide from the presentation prominently features Citigroup's logo:



This detail conveyed Citigroup's endorsement of the presentation's content and communicated to the presentation's audience that OSA was a "financially strong" investment. Because a "highly regarded international bank"—indeed, "one of the largest financial institutions in the world"—backed the cash-advance facility, the plaintiffs assumed that the facility was "stable, reliable and sufficiently controlled." Hindsight, of course, revealed the opposite. The SEC concluded that "throughout the life of the Banamex-OSA accounts receivable factoring facility, Banamex's internal accounting controls were insufficient to appropriately evaluate numerous red flags." Citigroup Inc., Exchange Act Release No. 83,858, 2018 SEC LEXIS 2009, 2018 WL 3913653, at *6 (Aug. 16, 2018).

The complaint is replete with alleged examples of Citigroup's substantial assistance to OSA's fraud, and we include a few below:

- At an April 5, 2011, meeting between Plaintiff Gulf, Citigroup, and OSA, a Citigroup senior executive vouched for OSA's stability. The Citigroup executive told Gulf that Banamex "support[ed] Oceanografía's finances" and that "all Oceanografía payments were coming through them [Banamex]." These statements convinced Gulf to lease a vessel called the Titan 2 to OSA from April 2011 to February 2014.
- During a September 26, 2012, telephone conference between Plaintiff Otto Candies, Citigroup, and OSA, a Citigroup senior executive told Otto Candies that OSA's debt was "quite over collateralized." OSA would therefore be able to settle its debt. OSA could not pay its debt, however, leaving Otto Candies unable to recover "the unpaid debt of approximately $120 million, and the loss of the use of the 21 vessels Candies leased to OSA" that were "worth hundreds of millions of dollars."
- In a February 23, 2011, email exchange, Citigroup—acting as trustee of the 2008 bond issuance through a Citibank vice president—provided Plaintiff ICE with "OSA's audited financial statements for 2009 and quarterly financial statements for 2010." Based on the financial metrics it received from Citibank, ICE retained the bonds.

The plaintiffs allege that each of these communications, among others, either misrepresented or omitted mention of the fraudulent cash-advance scheme and OSA's true financial condition. And in response to the district court's request that they plead their allegations in a manner that

was "clear to understand," the plaintiffs appended a chart chronicling "Plaintiff by Plaintiff Examples of Aiding and Abetting Claims."

Citigroup fights these allegations, arguing that the plaintiffs "fail to identify facts" showing "substantial assistance on the part of *Citigroup*" rather than "Banamex or other Citigroup subsidiaries." That's a nonstarter. As we have explained, the complaint thoroughly alleges that Citigroup ICG employees both knew of and substantially assisted the commission of the fraud. And even if *Citigroup* employees lacked knowledge or did not abet the fraud, actions of the company's agents are imputed to the company. *See Chang*, 845 F.3d at 1095. Finally, based on the allegations in the complaint, we question Citigroup's characterization of its role as simply providing "basic banking services" to OSA. But even if true, that would not win the day for Citigroup. The simple "performance of ordinary business transactions" can "satisfy the substantial assistance element of an aiding and abetting claim if the bank actually knew those transactions were assisting the customer in committing a specific tort." *Id.* at 1098 (quotation omitted).

After reviewing the allegations in the complaint and appendices, we are satisfied that each plaintiff pleaded the substantial-assistance element with requisite particularity. *See, e.g.*, Doc. 187 ¶¶ 408 (Adar), 512 (Ashmore), 563-66 (Copernico), 682, 687 (GPF II), 767 (HBK), 894 (ICE), 1031 (Moneda), 1100-05 (Nordic Trustee), 1167 (Waypoint), 1300 (Otto Candies), 1372 (Coastline), 1472 (De Hoop), 1508 (Gulf), 1570 (Halani), 1612 (MADISA), 1706 (Rabobank); *see also id.* ¶¶ 87-88, 130-32, 1241-45. We therefore agree

with the plaintiffs that the "fraud could not have existed without Citigroup's assistance."

The plaintiffs, in short, have adequately pleaded that Citigroup knew about the fraud and substantially assisted its commission. Because the district court concluded otherwise, we reverse its dismissal of this count.

B. COMMON-LAW FRAUD, RICO, AND VICARIOUS LIABILITY

We now move to the common-law fraud claim (count 3), the substantive RICO claim (count 1), and vicarious liability claims (counts 6 and 7). The district court dismissed these claims as a group for the same reasons. But because different standards apply to them, we will break them apart.

1. COMMON-LAW FRAUD

We start with common-law fraud because the plaintiffs' fraud allegations form the heart of their complaint. Florida law requires a plaintiff to allege four things to plead a fraud claim: "(1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation." *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010) (emphasis deleted and quotation omitted). "Fraud also includes the intentional omission of a material fact." *Ward v. Atl. Sec. Bank*, 777 So. 2d 1144, 1146 (Fla. Dist. Ct. App. 2001). Where "failure to disclose a material fact is calculated to induce a false belief, the distinction between concealment and affirmative representations is tenuous." *Johnson v. Davis*,

480 So. 2d 625, 628 (Fla. 1985). Should a "party in an arm's length transaction undertake[] to disclose information, all material facts must be disclosed." *Gutter v. Wunker*, 631 So. 2d 1117, 1118-19 (Fla. Dist. Ct. App. 1994). And even if "a party to a transaction owes no duty to disclose facts within his knowledge or to answer inquiries respecting such facts, if he undertakes to do so he must disclose the whole truth." *Nicholson v. Kellin*, 481 So. 2d 931, 936 (Fla. Dist. Ct. App. 1985).

Finally, because the plaintiffs sued in federal court, the requirements of Rule 9(b) apply. So they must "plead the who, what, when, where, and how of the allegedly false statements." *Mizzaro*, 544 F.3d at 1237. But the plaintiffs may still "allege generally that those statements were made with the requisite intent." *Id.*

The district court dismissed the plaintiffs' fraud claims for not satisfying Rule 9(b). The court criticized the plaintiffs for "mostly offer[ing] vague and conclusory statements that they suffered damages/injuries because they relied on Citigroup's alleged misrepresentations." *Otto Candies*, 2023 U.S. Dist. LEXIS 168612, 2023 WL 6418135, at *3. It further concluded that they had neither provided the "details about the specific misrepresentations that they relied on" nor showed "how any misrepresentations informed their decision to invest in OSA." 2023 U.S. Dist. LEXIS 168612, [WL] at *3-4. We think that the plaintiffs properly pleaded both specific misrepresentations and reliance on those misrepresentations. The same goes for omissions.

a. MISREPRESENTATIONS AND OMISSIONS

The complaint details Citigroup's responsibility for both its own misrepresentations and omissions and those of third parties like OSA.

Direct Misrepresentations

We start with the plaintiffs' allegations of direct misrepresentations. The plaintiffs say that Citigroup was directly involved in the fraud in five ways:

(1) executing the 2012 Regulatory Contract with OSA;

(2) approving increases in OSA's cash-advance limit;

(3) greenlighting OSA's submission of false documentation to support its cash-advance requests;

(4) misrepresenting and omitting the details of the scheme—and OSA's true financial condition—to the plaintiffs; and

(5) "directing and supervising Banamex employees" who helped perpetrate the fraud.

Citigroup, in contrast with the district court, implicitly acknowledges that Plaintiffs Ashmore, GPF II, ICE, Moneda, Otto Candies, Gulf, and Rabobank allege misrepresentations made by Citigroup itself.

We highlight several examples. Plaintiff Otto Candies alleges that on May 13, 2011, it met with senior Citigroup executives, among others, to discuss OSA's outstanding debt. During the meeting, Citigroup said it was helping OSA restructure its debt to Otto Candies, even though the executives recognized that OSA's liquidity crisis made

such a restructuring impossible. A telephone conference on September 26, 2012, followed. There, another Citigroup ICG senior executive described OSA's debt to Otto Candies as "quite over collateralized," meaning that investors could recoup their investment should OSA default. This was not true—OSA's cash flow hung by a thread, largely dependent on the fraudulent advance system propped up by Citigroup.

When Otto Candies finally had enough, it sent Citigroup a demand letter for millions in unpaid fees from OSA. Citigroup employees requested that Otto Candies withdraw the letter. On a February 19, 2014, phone call, Citigroup assured Otto Candies that its "financial guys" would solve OSA's debt problem; indeed, the bank was collaborating with OSA to "cover[]" the debt owed to creditors. In other words, Citigroup suggested that it would make sure OSA survived its financial difficulties. But by this point Citigroup had begun to investigate the scheme and intended to shutter the cash-advance facility. In fact, a Citigroup representative on the call knew of the bank's investigation because of his "dual role as a senior Citigroup ICG executive and Pemex-Citi Relationship Manager." Yet none of this information was communicated to Otto Candies. Unaware but reassured, Otto Candies "declined to take other action against OSA to recover the debt owed."

Otto Candies was not the only plaintiff misled. In conversations "on or around" February 21, 2014, Citigroup reassured a group of bondholders, including Plaintiffs Ashmore, GPF II, ICE, and Moneda, that OSA's financial outlook was stable. Citigroup told the plaintiffs that it

wanted to have "a constructive and proactive approach" to prevent an OSA default. Citigroup's approach—potentially terminating the cash-advance facility, "OSA's primary and most important source of liquidity"—was not what the plaintiffs expected, however.

The complaint also alleges multiple direct misrepresentations or omissions by Citigroup's agents. Plaintiffs ICE and MADISA, for example, assert that they were misled by direct communications from either Citibank or Banamex. ICE points to a February 23, 2011, email exchange, where a Citibank vice president provided OSA's audited financial statements from 2009 and quarterly statements from 2010. MADISA highlights the March 2013 "CitiConnect" Agreement between itself and Banamex, in which a Banamex employee promised that MADISA would encounter "no problem receiving payments from Oceanografía." And Plaintiffs ICE and Moneda pleaded that Citibank affected their investment decisions when it circulated OSA's fraudulent financial statements to the plaintiffs on February 23, 2011, and July 15, 2013, respectively. These are only a few examples—the plaintiffs allege a wide range of other misstatements and omissions by Citigroup or its agents.[12]

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[12] *See, e.g.*, **Ashmore**: Doc. 187 ¶¶ 413, 416, 429, 488-92; Doc. 187-4 at 2; **GPF II**: Doc. 187 ¶¶ 573-77, 590, 631-32, 663-64; Doc. 187-4 at 6; **Halani**: Doc. 187 ¶¶ 1544-48; **ICE**: *id.* ¶¶ 775, 779, 815-16, 1747; Doc. 187-4 at 12-13, 15; **Moneda**: Doc. 187 ¶¶ 233-44, 903, 937-42, 1007-11; Doc. 187-4 at 16; **Otto Candies**: Doc. 187 ¶¶ 130-32, 1241-45, 1251, 1258-67, 1283-90, 1295; Doc. 187-4 at 21-22; **Gulf**: Doc. 187 ¶¶ 1488-95; Doc. 187-4 at 27; **MADISA**: Doc. 187 ¶¶ 1577-78, 1601-06; Doc. 187-4 at 29; **Rabobank**: Doc. 187 ¶¶ 130-32, 1621-23, 1669-70, 1675-76, 1688-90, 1694-96; Doc. 187-4 at 30-31.

The district court labeled these "general allegations" and said they were insufficient to satisfy Rule 9(b). *Otto Candies*, 2023 U.S. Dist. LEXIS 168612, 2023 WL 6418135, at *6. That gives the complaint too little credit. At its hearing on Citigroup's motion to dismiss the second amended complaint, the district court instructed the plaintiffs to "be pretty clear about what the fraudulent misrepresentations and omissions were; provide the who, what, when and where in a succinct way so that it's clear to understand." As we have explained, the plaintiffs followed through on that request. The complaint contains detailed allegations of the "who, what, when, where, and how" for each plaintiff. *Mizzaro*, 544 F.3d at 1237. And the complaint's appendices summarize the misrepresentations and omissions in a "succinct way" that is "clear to understand"—in other words, just what the district court directed.

To be sure, Rule 9(b) applies here. But even in cases where a plaintiff does not plead the precise date and time of every allegedly false statement, the higher pleading threshold does not nullify the complaint's allegations if a "plaintiff has substantial prediscovery evidence of those facts." *Gose*, 109 F.4th at 1318 (quotation omitted). And we have suggested that Rule 9(b)'s pleading standards "should be relaxed" in "appropriate circumstances to aid those alleging prolonged multi-act schemes"—like the one alleged here—if the plaintiff alleges "at least some examples" to "lay a complete foundation for the rest of his allegations." *United States ex rel. Clausen v. Lab'y Corp. of Am.*, 290 F.3d 1301, 1314 n.25 (11th Cir. 2002). A contrary "application of the rule" would "abrogate the concept of notice pleading," which it cannot do. *Durham v. Bus. Mgmt. Assocs.*, 847 F.2d 1505, 1511 (11th Cir. 1988).

We ask instead whether the plaintiffs accompanied their complaint with sufficient detail of the underlying acts that allegedly constitute fraud to provide defendants with notice of the "precise misconduct with which they are charged." *Id.* (quotation omitted). Given the breadth and depth of the allegations in the complaint and accompanying appendices, we do not see how the plaintiffs could have pleaded their fraud claims with greater specificity.

Resisting these conclusions, Citigroup wrangles over the factual allegations. But its counterarguments are not persuasive. Plaintiff Gulf alleges that a Citigroup employee vouched for OSA's finances at an April 2011 meeting. Citigroup counters that this speaker was a Banamex employee, not a Citigroup ICG representative. This dispute is one best resolved at summary judgment. Citigroup also contends that it did not make any disclosures to the plaintiffs that could have made it liable for fraudulent omissions, but that contradicts dozens of allegations in the complaint. And at this stage, we must construe all facts and inferences in the light most favorable to the nonmoving party—here, the plaintiffs.

Third Party Misrepresentations and Omissions

The bondholding plaintiffs also seek to hold Citigroup accountable for the misrepresentations and omissions of third parties, including OSA. That's because, they say, Citigroup recognized that certain investment materials it had a hand in assembling or circulating would be transmitted to the plaintiffs "on Citigroup's behalf and with Citigroup's imprimatur." And though Citigroup knew that these materials contained misrepresentations or material omissions, it did nothing.

The district court disagreed. It found that because many of the misrepresentations or omissions alleged in the complaint were made by OSA, they could not be attributed to Citigroup. Citigroup, for its part, agrees that OSA's statements are not enough, and contends that Plaintiffs Adar, Copernico, HBK, Nordic, Waypoint, Coastline, De Hoop, Halani, and MADISA did not share "any substantive communications whatsoever" with Citigroup or its agents.[13]

We agree with the plaintiffs that OSA's misrepresentations and omissions can lead to liability for Citigroup. Florida law imposes civil liability for third-party misrepresentations in certain cases. *See Forbes v. Auerbach*, 56 So. 2d 895, 900 (Fla. 1952); *Reimsnyder v. Southtrust Bank, N.A.*, 846 So. 2d 1264, 1270 (Fla. Dist. Ct. App. 2003). Indeed, the Florida Supreme Court permits recovery for "misrepresentation as to a third party's financial condition" when, "for the purpose of inducing another to lend money or sell goods," a party "misrepresent[s] the solvency or financial responsibility" of the third party. *Forbes*, 56 So. 2d at 900.

The Second Restatement of Torts, which has been cited approvingly by the Florida Supreme Court, is also instructive. *See First Fla. Bank, N.A. v. Max Mitchell & Co.*, 558 So. 2d 9, 14-15 (Fla. 1990). It explains that in certain cases, those who make fraudulent misrepresentations can be held liable for statements conveyed to third parties:

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[13] We note, however, that contrary to Citigroup's claim, MADISA allegedly communicated with its agent, Banamex, about the "CitiConnect" agreement.

> The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.

Restatement (Second) of Torts § 533 (Am. L. Inst. 1977). Indeed, for fraudulent misrepresentations, liability extends to "those whom [the speaker] has reason to expect it to reach and influence." *Id.* cmt. d. This "class" may include "potential sellers, buyers, creditors, lenders or investors, or others who may be expected to enter into dealings in reliance upon the misrepresentation." *Id.* § 531 cmt. e. And "if [the speaker] is aware of the intention of the third person to make use of the misrepresentation by communicating it to others, he has a special reason to expect that it will be so communicated and will be relied on." *Id.* § 533 cmt. d. Overall, the message is clear: "Florida law does not require that the defendant directly communicate any fraudulent misrepresentation to the plaintiff." *Globe Commc'ns Corp. v. R.C.S. Rizzoli Periodici, S.p.A.*, 729 F. Supp. 973, 977 (S.D.N.Y. 1990); *see also Albertson v. Richardson-Merrell, Inc.*, 441 So. 2d 1146, 1150 (Fla. Dist. Ct. App. 1983).

Applied here, the plaintiffs pin liability on Citigroup for two categories of misrepresentations or omissions made by third parties. First are those related to Citigroup's communications with OSA's external financial consultant. Second are misrepresentations and omissions regarding

the bank role's in producing and helping to distribute investor materials. These materials include: (1) the December 2013 and January 2014 investor presentations and (2) the so-called "Pareto Materials," which were given to investors like the plaintiffs.[14] After careful review, we agree that all plaintiffs have adequately pleaded Citigroup's liability for these misrepresentations and omissions.

First, the plaintiffs argue that Citigroup is liable for the misrepresentations of OSA's external financial consultant. OSA retained the consultant between 2010 and 2013 to "assist OSA in restructuring its debt to Plaintiffs Candies and Rabobank." In this capacity, the consultant "communicated and worked directly with Citigroup," "received information from Citigroup" about OSA's financial condition, debt, and the cash-advance facility, and then "disseminated it to at least Plaintiffs Candies and Rabobank." The consultant also communicated or met with several plaintiffs, including Ashmore, De Hoop, GPF II, ICE, MADISA, Moneda, Gulf, and Halani.

All the while, Citigroup was "aware" that the consultant "was relaying information and documents" it received "to Plaintiffs who inquired about OSA's finances" when determining whether to invest in OSA. That's because (1) the consultant maintained a consistent line of communication with Citigroup; (2) Citigroup and Banamex (as well as OSA) "participated in meetings and telephone

[14] OSA hired Pareto to manage the 2013 bond issuance. Pareto consists of Pareto Securities AS, Pareto Securities Pte. Ltd., and Pareto Securities, Inc. For ease of reference, we refer to them collectively as "Pareto."

conferences" between the consultant and the plaintiffs; and (3) the purpose of retaining the consultant was to restructure OSA's debt, which necessitated "providing assurances about OSA's finances and the strength and reliability of the cash advance facility." But the consultant remained ignorant of the scheme, instead functioning as an unaware middleman between OSA, Citigroup, and investors.

A few examples add color. They also underscore why it makes sense to hold Citigroup responsible for the misrepresentations of the OSA consultant. Consider:

- A January 21, 2014, phone conversation where the consultant told Plaintiff ICE that media reports highlighting "irregularities" in OSA/Pemex contracts were false. Instead, "any discrepancy is a Pemex bookkeeping error" because "Oceanografía has never defaulted on a Pemex contract." The consultant promised that "everything will be fine." Everything, it turned out, was not fine—ICE has not recovered principal or interest on its purchase of the 2008 bonds.
- On May 9, 2013, representatives from Plaintiff Halani, OSA, OSA's consultant, and Citigroup met to discuss OSA's debt to Halani. The consultant introduced the Citigroup representatives as "the guys from Citibank" before "assur[ing] Halani that OSA would pay the past due amounts and timely make the future lease payments." Halani is owed roughly $14 million in overdue lease payments.
- On January 27, 2012, the consultant and Fatma Kamara from Plaintiff Ashmore met. During the meeting, the consultant explained that he had "a plan for the

company [OSA] and the liquidity/connections to be successful" and that OSA had "settled a number of disputes/extensions with the banks." Given Citigroup and OSA's "constructive manner" of attack to improve OSA's financial condition, the consultant recommended that Ashmore "be a buyer of more paper at these levels." But Citigroup's submission of false financial information to the consultant—and knowledge that the consultant used it to pitch investors—falsely forecasted "improvements in OSA's financial situation" and misrepresented "OSA's plan for increased liquidity." Indeed, "Ms. Kamara at Ashmore would routinely call Citigroup for confirmation of the information."

- On February 4, 2011, the consultant met Mario Trevino from Plaintiff MADISA to discuss "renewing OSA's credit line" with a MADISA distributor. The consultant reassured Trevino that OSA had sufficient liquidity to make timely payments, telling him that "everything is ok" because OSA's "big line of credit with Banamex" would ensure payment. This convinced MADISA to renew OSA's line of credit despite its "doubts given OSA's untimely payments for a prior line of credit."

These allegations, and others like them, are "classic illustration[s] of fraud" where one party has "superior knowledge" and yet fails to disclose information "which is not discoverable by ordinary observation." *Nessim v. DeLoache*, 384 So. 2d 1341, 1344 (Fla. Dist. Ct. App. 1980). ICE, Gulf, and Halani had no way to discern OSA's true financial condition. Apart from performing their own due diligence, the plaintiffs relied on OSA's financial consultant and on Citigroup—a "highly regarded international bank"—for its "purported neutrality as a third-party, expertise and professionalism."

Citigroup, on the other hand, was in a unique position given its intimate knowledge of OSA's financial condition. After all, the bank served as trustee and collateral agent of OSA's 2008 bond issuance (through Citibank and Banamex) and as trustee of a trust established for 2013 bondholders. And when "the maker of the representation knows that his recipient intends to transmit the information to a similar person, persons or group"—as Citigroup recognized that the consultant would distribute the information that it received from Citigroup to the plaintiffs—that party can be held accountable. *First Fla. Bank*, 558 So. 2d at 15 (quotation omitted).

Second, the plaintiffs allege that Citigroup is responsible for misrepresentations and omissions related to (1) the December 2013 and January 2014 investor presentations, and (2) the preparation and distribution of the Pareto Materials. Citigroup, the complaint alleges, contributed to the misrepresentations within these investor materials by "knowingly providing misleading information and omitting key facts." And as before, Citigroup recognized that these misrepresentations would be distributed to OSA's investors. The district court did not credit these allegations. It instead found that the plaintiffs "mostly offer vague and conclusory statements that they suffered damages/injuries." *Otto Candies*, 2023 U.S. Dist. LEXIS 168612, 2023 WL 6418135, at *3. We see things differently.

Start with the December 2013 and January 2014 investor presentations. Conceived by Citigroup to "re-acquaint debt investors" with OSA's "story," these presentations were adapted by OSA to "maintain investor confidence" and "solicit new investors." But Citigroup still played a role. At one December meeting, two Citigroup employees presided while OSA's consultant delivered a

presentation aboard the Goliath shipping vessel—a vessel OSA had acquired with funds raised in the 2013 bond issuance.

Citigroup also played a key role in arranging another December investor presentation given to Plaintiff Moneda, among other investors. Not only that, but Citigroup's logo was affixed to "each page" of the presentation, suggesting to investors that a "highly regarded international bank" vouched for its contents. Nodding to the cash-advance facility, the presentation promised that "OSA engages in recourse factoring with Mexican banks to minimize days receivable and ensure sufficient liquidity." But this statement omitted important details, including the lack of internal controls.

Next, the plaintiffs allege that they may sue Citigroup for its role in helping to prepare and distribute the Pareto Materials. The gist: Citigroup provided misleading information and omitted key facts about OSA's financial condition, recognizing that this information would be incorporated into investor materials and "distributed to and relied upon" by the plaintiffs.

Here is one example. To acquire the Goliath vessel, OSA issued $160 million in bonds as part of its 2013 bond issuance. OSA hired Pareto to manage the bond issuance and Plaintiff Nordic Trustee to serve as trustee. Pareto needed "information and documents" from OSA and Citigroup to raise capital and solicit investors—and Citigroup was in a prime position to supply such information. It worked as OSA's banker, had functioned previously as "trustee and collateral agent of the 2008 Bond Issuance through Citibank and Banamex," and served as trustee of the "Mexican Trust." The latter position was significant because it "ensure[d] the security and service

of the 2013 bonds," reassuring the 2013 bondholders that if OSA defaulted, they would be compensated.

After receiving OSA's financial data from OSA and Citigroup, Pareto synthesized and distributed it to investors between May 2013 and early 2014. The Pareto Materials were circulated to the plaintiffs at several junctures and through several avenues.[15] They were also distributed via in-person solicitations. Ultimately the Pareto Materials were circulated to Plaintiffs Adar, Ashmore, Copernico, GPF II, HBK, ICE, Moneda, Nordic, Waypoint, and Halani.

The problem? The information Citigroup funneled to Pareto boasted of "positive financial forecasts and cash flow for OSA" and pledged "that bondholders would be protected by the Mexican Trust" through "Banamex's role as fiduciary of such Trust." Yet Citigroup omitted any mention of the mounting problems with the cash-advance facility or the shakiness of OSA's finances. And that was not because Citigroup did not know; from "at least" 2010 to 2013, "OSA sent to Citigroup its annual audited financial statements" as well as "other financial and operational information detailing its financial condition." Citigroup, in other words, had "full access" to the relevant information.

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[15] These avenues included (1) a September 3, 2013, Preliminary Offering Memorandum; (2) a September 2013 Pareto Investor Presentation; (3) a September 2013 Pareto Credit Analysis Presentation, which called the cash flow "solid and sufficient" to service the bond and explained that "Pemex expects to invest more than 110bn over the coming years"; (4) weekly periodic reports to investors between starting in October 2013; and (5) an investor site for the bond issuance, which included "financial reports" and "company presentations," all of which were accessed by the 2008 and 2013 bondholders between "October 2013 and February 2014."

The 2013 Pareto Materials also incorporated information from OSA's 2008 bond offering. These materials, including the "2008 Offering Memorandum" and the "2008 Bond Indenture," were distributed "to all 2008 Bondholders, including the 2008 Bond Plaintiffs." But they too contained false and misleading information about OSA's financial condition, especially the cash-advance facility. Citigroup likewise never updated the 2008 bond documents before their incorporation into the Pareto Materials even though circumstances had materially changed during that five-year period. The plaintiffs assert that the deterioration of OSA's financial condition, Pemex's refusal to pay certain Banamex invoices, and Citigroup's freezing of the cash-advance facility in 2010 all necessitated the revision of the 2008 bond documents. Yet "with Citigroup's knowledge," those unedited materials were circulated to investors between 2009 and early 2014 "to solicit investments in both the 2008 and 2013 bonds."

Citigroup understood, moreover, that the Pareto Materials would be distributed to investors like the plaintiffs. And documents encompassing "future profitability projections" and describing "protections for bondholders" would naturally be among the most important for investors. Although only Plaintiffs Moneda and HBK purchased bonds from the 2013 issuance, each bondholding plaintiff received materials from Pareto.[16]

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[16] As a reminder, the bondholding plaintiffs purchased and retained bonds—from either the 2008 bond issuance, the 2013 bond issuance, or both—at different junctures:

- **Adar**: Only purchased 2008 bonds. Retained those bonds through 2014. Received Pareto Materials in September 2013 and partially relied on them in maintaining investment in 2008 bonds.

- **Ashmore**: Only purchased 2008 bonds. Retained those bonds through 2014. Received Pareto Materials at a September 6, 2013, meeting with OSA and Pareto. Partially relied on these materials in maintaining investment in 2008 bonds.
- **Copernico**: Only purchased 2008 bonds. Retained those bonds through 2014. Received Pareto Materials shortly after a September 9, 2013, meeting with Pareto representatives. Partially relied on these materials in maintaining investment in 2008 bonds.
- **GPF II**: Only purchased 2008 bonds. Those bonds are now held by Plaintiff HBK. Received Pareto Materials on or around September 9, 2013, via email. Partially relied on these materials in maintaining investment in 2008 bonds.
- **HBK**: Purchased both 2008 and 2013 bonds. Met with Pareto representatives multiple times in September 2013 and received Pareto Materials in or around this time. Partially relied on these materials in maintaining investment in 2008 bonds.
- **ICE**: Only purchased 2008 bonds. Retained those bonds through 2014. Received Pareto Materials on September 3, 2013. Partially relied on these materials in maintaining investment in 2008 bonds.
- **Moneda**: Purchased both 2008 and 2013 bonds. Retained those bonds through 2014. Received Pareto Materials in September 2013. Partially relied on these materials in maintaining investment in 2008 bonds.
- **Nordic Trustee**: Does not hold bonds from the 2008 Bond issuance; represents the interests of all 2013 bondholders, including Moneda and HBK.
- **Waypoint**: Only purchased 2008 bonds. Retained those bonds through 2014. Listened to a presentation by a Pareto representative about the Pareto Materials in September 2013. Partially relied on these materials in maintaining investment in 2008 bonds.

Those that did not buy bonds through the 2013 issuance allege that they *retained* their prior investments in OSA (*i.e.*, from 2008 bond issuance) or *invested* in OSA as late as 2013 in reliance on the Pareto Materials.

Relatedly, the complaint alleges that Citigroup knew about the false, misleading, and omitted information in OSA's financial statements. But Citigroup helped to distribute them anyway.[17] Between 2008 and 2014, OSA issued—"at a minimum"—annual financial statements from 2018 to 2012 and quarterly statements from 2010 to 2013. These were distributed to 2008 and 2013 bondholders like the plaintiffs.

Even so, none of OSA's "annual or quarterly financial statements" suggested problems with the cash-advance facility, "OSA's primary source of liquidity and cash flow." Nor did the data divulge that between 2008 and 2010, Pemex had rebuffed requests to pay Banamex for certain invoices where Banamex had advanced OSA payment. *See* Citigroup Inc., Exchange Act Release No. 83,858, 2018 SEC LEXIS 2009, 2018 WL 3913653, at *5 (Aug. 16, 2018) . Still, Citigroup either distributed these materials through Citibank or sat idly by while they were given to the plaintiffs. Because "[f]raud also includes the intentional omission of a material fact," the plaintiffs satisfy that threshold. *Ward*, 777 So. 2d at 1146.

* * *

The district court did not address these allegations. Its oversight ignored how the plaintiffs pleaded the "who,

[17] This allegation excludes situations in which Citigroup distributed OSA's financial information directly to investors.

when, how, and to whom" about misrepresentations and omissions. We have recounted only a sampling of the plaintiffs' allegations, and are confident that they have pleaded more than enough. Indeed, we see little more that the plaintiffs could have pleaded in alleging the misrepresentations and omissions.

"Fraud may be proven by showing a series of distinct acts, each of which may be a badge of fraud and when taken together as a whole, constitute fraud." *Allen v. Tatham*, 56 So. 2d 337, 339 (Fla. 1952). The complaint pleads that Citigroup both directly and indirectly misrepresented and omitted information relevant to the plaintiffs' investments in OSA. The mosaic of fraud that the plaintiffs have put forth, alleged with appropriate specificity, satisfies Rule 9(b). The district court erred in finding otherwise.

b. RELIANCE

Pleading a misrepresentation alone is not enough to show fraud. Reliance is required, too. To establish reliance under Florida law, the plaintiffs must show that "but for the alleged misrepresentation or nondisclosure, the party would not have entered the transaction." *Humana, Inc. v. Castillo*, 728 So. 2d 261, 265 (Fla. Dist. Ct. App. 1999). Under Rule 9(b), a "bare allegation of reliance on alleged misrepresentations, bereft of any additional detail, will not suffice." *Wilding v. DNC Servs. Corp*, 941 F.3d 1116, 1128 (11th Cir. 2019). So, alleging "the technical elements of fraud" without supporting details "will not satisfy the rule's pleading-with-particularity requirement." 5A Charles Alan Wright, Arthur R. Miller & A. Benjamin

Spencer, *Federal Practice and Procedure* § 1297 (4th ed. 2018) (Wright & Miller).

The district court found that the plaintiffs failed to specify "the exact misrepresentations they relied on to induce them to either invest in OSA, renegotiate the terms of their loans to OSA, or enter into an agreement with OSA." *Otto Candies*, 2023 U.S. Dist. LEXIS 168612, 2023 WL 6418135, at *3. Again, we disagree. The complaint explains how each plaintiff relied on a misrepresentation or omission when deciding whether to invest in, maintain an investment in, or conduct business with OSA. And the misrepresentations were not contained in generic advertisements; they were specific, targeted communications composed of financial and audit statements, materials related to bond offerings, and investor presentations from Citigroup, its agents, and OSA. The complaint also explains how the plaintiffs' investment decisions would have been different without those misrepresentations and omissions.

Plaintiff MADISA, for example, alleges that it relied on fraudulent misrepresentations and omissions in a March 22, 2013, email from a Banamex employee when deciding whether to enter a "CitiConnect" contract and whether to continue doing business with OSA. The Banamex employee told MADISA that under the contract, MADISA would have "no problem receiving payments" from OSA. Of course, plenty of problems followed, and MADISA has still not recovered its overdue invoices. MADISA alleges that had it known about the scheme (and OSA's financial condition), it would not have entered the CitiConnect

Agreement and would have pulled its business in 2013-2014.[18]

Plaintiff Rabobank presents another good example. It loaned OSA funds to purchase nine vessels from Plaintiff De Hoop. When OSA stopped making payments on the loan, Rabobank agreed to restructure the terms, with Banamex as trustee to ensure repayment. Rabobank points to a February 3, 2010, meeting between Banamex and Rabobank's counsel, where Rabobank agreed to restructure the loan. But Banamex did not share that by that point "OSA was on the brink of bankruptcy." Additional meetings on August 19 and 23, 2011, as well as an email and telephone call on July 9, 2013, brought more of the same—Citigroup misrepresenting the stability of the cash-advance facility. But to date, Rabobank has only received partial repayment of the principal and interest. Had Rabobank known the truth, it claims that it would have (1) declined to renegotiate the terms of the loan; (2) not entered into the various trust agreements; and (3) promptly "take[n] adverse actions against OSA due to its failure to repay."

Or take Plaintiff Moneda. On July 15, 2013, a Moneda representative, George Atuan, exchanged emails with a Citibank vice president, Louis Piscitelli. After sending copies of OSA's 2012 preliminary financial statements and those from the first quarter of 2013, Piscitelli assured

[18] Citigroup argues that these communications "merely concerned" the "mechanics" of the CitiConnect contract. That reads the situation too narrowly. MADISA did in fact have a problem receiving payments; it has not received "several past-due invoices." Indeed, MADISA may have avoided investing altogether had it known the truth.

Atuan that OSA's financials "are going through the audit process[;] I believe they are fine." Crediting the vice president's guarantee, Moneda retained bonds from the 2008 bond issuance and purchased bonds in 2013.

The other plaintiffs tell similar stories. They too pleaded specific reliance on various misrepresentations and omissions. *See, e.g.*, Doc. 187 ¶¶ 408-11 (Adar), 512-17 (Ashmore), 563-71 (Copernico), 687-92 (GPF II), 767-72 (HBK), 894-99 (ICE), 1031-35 (Moneda), 1100-11 (Nordic Trustee), 1167-71 (Waypoint), 1300-02 (Otto Candies), 1372-78 (Coastline), 1472-74 (De Hoop), 1496, 1508-14 (Gulf), 1570-73 (Halani), 1612-15 (MADISA), 1706-08 (Rabobank). And the plaintiffs offered the clarity the lower court requested, distilling their misrepresentation and reliance claims into two easy-to-digest charts. Examples abound, but the point remains: the district court erred by not recognizing the plaintiffs' allegations of reliance.

Instead, the court relied on *Fernau v. Enchante Beauty Products* to dismiss this count. 847 F. App'x 612 (11th Cir. 2021) (unpublished). To start, that unpublished case is not precedential. But it's also very different: the plaintiffs there "alleged only that if [the defendants] had made 'full and accurate disclosure at the time of sale,' the plaintiffs 'would not have invested into the company.'" *Id.* at 621-22. That sort of "bare allegation of reliance" fails to satisfy Rule 9(b), but here, the plaintiffs bolstered their claims with far more. *Wilding*, 941 F.3d at 1128; *see also* Oral Arg. at 19:01.

The district court also suggested—again relying on *Fernau*—that the plaintiffs' allegations fail because they did not allege that they read the materials in question. But that is not the benchmark. To begin, the cases cited

to support that conclusion allege *securities* fraud, which as we have said compels more robust pleading. In any event, there are no magic words to plead reliance—the complaint, for example, states that at least three plaintiffs "reviewed" the relevant investment documents.[19] It follows that sophisticated investors who "reviewed" financial documents "read" those documents.

Citigroup, for its part, argues that certain plaintiffs failed to meet a heightened standard to plead reliance for claims based on "holding" an investment (rather than making a new one). That argument also misses its mark. Even if Florida law imposes a heightened pleading requirement for these claims, the "rules of procedure that apply in federal cases—even those in which the controlling substantive law is that of a state—are the Federal Rules of Civil Procedure." *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1260 (11th Cir. 2015) (quotation omitted). The federal pleading requirements control here.

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[19] Citigroup contends that Copernico and ICE's allegations are insufficient because they did "not specify by whom" the relevant bond documents were "reviewed." And while Waypoint identified the reviewer, it "fail[ed] to explain what the claimed review entailed."

We reject these verbal gymnastics. Citigroup cites *Ambrosia Coal & Construction Co. v. Pages*, but that case differs from this one in meaningful ways. 482 F.3d 1309 (11th Cir. 2007). In *Ambrosia Coal*, the plaintiff's reliance claim foundered because he failed to "specify[] the content or manner in which the statements misled" him. *Id.* at 1317 n.12. But that's not the situation we confront here. Plaintiff Waypoint, for example, pleads a direct link between its decision to maintain its investment in OSA and the misleading financial projections and material omissions contained in the Pareto Materials.

This is not a case where the plaintiffs have provided no details about which alleged misstatements and omissions they relied on. Nor do the plaintiffs levy "bare allegation[s] of reliance on alleged misrepresentations" that are "bereft of any additional detail." *Wilding*, 941 F.3d at 1128. The complaint outlines—consistent with Rule 9(b)—that "but for the alleged misrepresentation or nondisclosure, the party would not have entered the transaction." *Humana*, 728 So. 2d at 265.[20]

* * *

In sum, the complaint pleads that Citigroup and its agents made misrepresentations or omissions on which the plaintiffs relied to their detriment. Citigroup's awareness of the fraud and assistance in the distribution of certain investment materials renders it liable for third-party

[20] In dismissing this count, the district court singled out Plaintiff HBK as the closest to alleging reliance, but said its pleading failed because it "d[id] not allege that its reliance was *justifiable*." *Otto Candies*, 2023 U.S. Dist. LEXIS 168612, 2023 WL 6418135, at *4 (emphasis added). To start, it is unclear whether "justifiable" reliance is required under Florida law. *Compare Butler*, 44 So. 3d at 105 ("Justifiable reliance is not a necessary element of fraudulent misrepresentation."), *with Royal Typewriter Co., a Div. of Litton Bus. Sys. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1103 (11th Cir. 1983) (plaintiff must show "consequent injury to the party acting in justifiable reliance on the representation"), *and First Union Disc. Brokerage Servs., Inc. v. Milos*, 997 F.2d 835, 845 (11th Cir. 1993) (plaintiffs must demonstrate "that they justifiably relied on a false statement of material fact knowingly made" by the defendant). But even if so, HBK and the other plaintiffs have made that showing here. After all, the alleged fraud evaded the detection of Citigroup—not to mention American and Mexican financial regulators—"for years due to the falsification of documentation."

misrepresentations, too. We reverse the district court's dismissal of this count.

2. RICO

Next, the plaintiffs claim that Citigroup violated the Racketeer Influenced and Corrupt Organizations Act. *See* 18 U.S.C. § 1964(c). A plaintiff suing under the "civil provisions of RICO must plausibly allege six elements: that the defendants (1) operated or managed (2) an enterprise (3) through a pattern (4) of racketeering activity that included at least two predicate acts of racketeering, which (5) caused (6) injury to the business or property of the plaintiff." *Cisneros v. Petland, Inc.*, 972 F.3d 1204, 1211 (11th Cir. 2020). The RICO statute is to "be liberally construed to effectuate its remedial purposes." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) (quoting Pub. L. 91-452, § 904(a), 84 Stat. 947).

Section 1962(c)—the subsection under which the plaintiffs bring their claim—makes it unlawful "for any person employed by or associated with any enterprise engaged in . . . interstate or foreign commerce" to "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." The term "racketeering activity," in turn, covers multiple predicate acts, including "any act which is indictable under . . . section 1343." 18 U.S.C. § 1961(1)(B). And Section 1343 prohibits so-called wire fraud, which "occurs when a person (1) intentionally participates in a scheme to defraud another of money or property" and (2) uses the wires to further that scheme. *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (quotation omitted).

The plaintiffs here contend that Citigroup and OSA formed a RICO enterprise for two common purposes, mirroring their general fraud allegations: (1) to defraud Pemex, and (2) to fraudulently induce the plaintiffs to invest, or maintain their investments, in OSA. The scheme was intended to increase both cash flow to OSA and interest payments to Citigroup. To that end, Citigroup and OSA duped investors into "believing that OSA was financially healthy and had access to reliable liquid capital when, in reality, neither of those facts were true." And members of the enterprise "communicated with each other about the fraudulent scheme" through telephone calls and emails sent to and from the United States, establishing a pattern of predicate acts of wire fraud in violation of 18 U.S.C. § 1343.

Because their substantive RICO claim is predicated on allegations of wire fraud, the plaintiffs must "comply not only with the plausibility criteria articulated in *Twombly* and *Iqbal* but also with Fed. R. Civ. P. 9(b)'s heightened pleading standard" as to the "alleged predicate acts." *Id.* at 1291; *Cisneros*, 972 F.3d at 1216. Still, a plaintiff "need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentations." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 661, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008).[21]

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[21] For RICO purposes, mail and wire fraud are treated interchangeably. *See Douglas Asphalt Co. v. QORE, Inc.*, 657 F.3d 1146, 1151 (11th Cir. 2011) (explaining that in *Bridge*, the Supreme Court "held that plaintiffs who had not themselves relied on the misrepresentations could bring a civil RICO claim based on mail *or* wire fraud" (emphasis added)).

The district court assessed the plaintiffs' substantive RICO claim alongside the common-law fraud count. The court found that because the plaintiffs provided "no details about the specific misrepresentations that they relied on or—as in *Fernau*—how their reliance was justifiable," the RICO count failed to satisfy Rule 9(b). *Otto Candies*, 2023 U.S. Dist. LEXIS 168612, 2023 WL 6418135, at *4.

That was error. As discussed, the plaintiffs adequately alleged the misrepresentations and omissions on which they relied. They have thus satisfied their burden under Rule 9(b).[22] Because the district court dismissed this count on pleading grounds, it did not address whether the plaintiffs sufficiently pleaded the elements of a civil RICO claim. The court instead explained that it would not address "whether Plaintiffs adequately allege a domestic injury and whether the Plaintiffs' RICO claim is barred by Section 107 of the PSLRA." 2023 U.S. Dist. LEXIS 168612, [WL] at *4 n.5. We therefore remand to the district court to determine in the first instance whether the plaintiffs have otherwise pleaded the elements of a civil violation under the RICO statute. For now, we address Citigroup's two alternative arguments for affirmance. Neither is persuasive.

First, Citigroup contends that the alleged predicate acts cannot establish a RICO claim because if true they would also constitute securities fraud. True, "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish

[22] We note too that a plaintiff need not show reliance under the RICO statute when the alleged predicate acts are wire fraud. *See Bridge*, 553 U.S. at 661.

a violation of section 1962." 18 U.S.C. § 1964(c). Plaintiffs' RICO claims, Citigroup argues, are barred because they are actionable as securities fraud.[23]

Not so. The shipping and leasing plaintiffs allege that Citigroup's misrepresentations and omissions induced them to lease, sell, and maintain vessels for OSA's benefit. That conduct is not itself securities fraud. Plaintiff Rabobank alleges that Citigroup duped it into continuing to supply credit to OSA despite its precarious "financial condition" and inability to "consistently pay its debt." Again, not securities fraud.

Citigroup also hits a snag with the plaintiff bondholders. Citigroup acknowledges the Supreme Court's conclusion that "holding" an investment—maintaining one's stake in company X—does not offer grounds to sue under the federal securities laws. *See* 17 C.F.R. § 240.10b-5; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 735-36, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975). So the plaintiff bondholders who merely held their investments in OSA because of the fraud cannot sue under the securities laws. It's unclear, then, why the PSLRA would foreclose these claims. We decline Citigroup's invitation to weaponize the PSLRA bar at the pleading stage in a case where the allegations have little to do with securities fraud in the first place.

Second, Citigroup contends that the plaintiffs have insufficiently pleaded the continuity element of RICO. As

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[23] We understand why Citigroup makes this attempt. After all, if the alleged misconduct were actionable under the federal securities laws, Citigroup would secure two victories for the price of one: plaintiffs' RICO allegations would fail, and the even higher pleading standards of the PSLRA would apply to the plaintiffs' other claims.

relevant here, to prove a "pattern" of racketeering activity, a plaintiff must show "at least two acts of racketeering activity" within ten years. 18 U.S.C. § 1961(5); *see Am. Dental*, 605 F.3d at 1290-91. These predicate acts must, in turn, "amount to or pose a threat of continued criminal activity." *Am. Dental*, 605 F.3d at 1291. Continuity comes in two flavors: open-ended and closed-ended. Open-ended continuity involves "past conduct that by its nature projects into the future with a threat of repetition," and closed-ended continuity refers to a "closed period of repeated conduct." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989).

Citigroup argues that the plaintiffs have only pleaded a 150-day period of fraudulent activity from September 2013 through February 2014. That would not satisfy the continuity requirement because "closed-ended continuity cannot be met with allegations of schemes lasting less than a year." *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1266 (11th Cir. 2004). And because the plaintiffs' closed-ended continuity claims were alleged on "information and belief," Citigroup asserts that they are "not adequately pleaded."

Once again, we disagree. Citigroup ignores allegations in the complaint dating back as far as 2008—which, if taken as true, establish that Citigroup knew about the fraud for years. These allegations include (1) Banamex's failure to validate invoices in 2009; (2) Pemex's refusal to pay invoices in 2010; (3) Citigroup's secret Regulatory Contract with OSA in 2012; and (4) Citigroup firing an employee for receiving bribes from OSA in 2012. In December 2009, for instance, the SEC determined that

"Banamex had already lost $1 million" via the cash-advance facility. Citigroup Inc., Exchange Act Release No. 83,858, 2018 SEC LEXIS 2009, 2018 WL 3913653, at *6 (Aug. 16, 2018). When it attempted to process an invoice "without properly validating the documents with Pemex," Pemex then "refused to pay the invoices." *Id.*

The SEC's 2018 release went on to note that "[o]ver the period *between 2008 and February of 2014*, Banamex loaned billions of dollars on the basis of invoices and work estimates" based on "documents received from OSA, amounting to about $400 million, [that] were fraudulent and included forged signatures." 2018 SEC LEXIS 2009, [WL] at *1 (emphasis added). The complaint also points to "OSA's consolidated 2011 and 2012 financial statements," which reveal "that Banamex and OSA entered into a factoring agreement establishing the cash advance facility on February 27, 2008." These allegations render Citigroup's continuity rebuttal unconvincing. They also make the plaintiffs' "theoretically viable claim[s] plausible," and—even if pleaded on information and belief—sufficient to survive Rule 9(b). *In re Rockefeller Ctr. Props., Inc. Secs. Litig.*, 311 F.3d 198, 216 (3d Cir. 2002) (emphasis deleted and quotation omitted).

3. VICARIOUS LIABILITY

We turn next to the plaintiffs' vicarious liability claims. As alternatives to their direct fraud claims, the plaintiffs pleaded that Citigroup is liable for the acts of its agents, Banamex and Citibank.[24] They rely on theories of actual and apparent agency. Because Citigroup "does

[24] As a reminder, Banamex is a wholly owned Mexican subsidiary of Citigroup that provided banking services for Citigroup. Citibank functions as Citigroup's "primary U.S. lending and banking entity."

not dispute the existence of an actual or apparent agency relationship between Citigroup, as principal, and Banamex and Citibank, as its agents," we consider any contrary argument forfeited. *Otto Candies*, 2023 U.S. Dist. LEXIS 168612, 2023 WL 6418135, at *10; *see also Am. Builders Ins. Co. v. S.-Owners Ins. Co.*, 71 F.4th 847, 856-57 n.1 (11th Cir. 2023).

The plaintiffs' vicarious liability claims therefore turn on whether they sufficiently pleaded Citigroup's liability for fraudulent misrepresentations and omissions by Banamex and Citibank.[25] In other words, the complaint must adequately allege that Citibank or Banamex (1) made "a false statement concerning a material fact"; (2) knew that the representation was false; (3) intended the misrepresentation to induce reliance; and (4) caused injury from the other party's reliance. *Lance v. Wade*, 457 So. 2d 1008, 1011 (Fla. 1984). Once again, the allegations must satisfy Rule 9(b).

The district court dismissed the vicarious liability counts, saying the plaintiffs failed to satisfy Rule 9(b). The court explained that the plaintiffs offered "no allegations in support of their vicarious liability claim for fraudulent misrepresentation based on actual agency." *Otto Candies*, 2023 U.S. Dist. LEXIS 168612, 2023 WL 6418135, at *12. Referencing two summary paragraphs at the end of the complaint, the district court stated that the plaintiffs failed to "identify the purported fraudulent misrepresentations,

[25] As the district court pointed out, the plaintiffs were not required to show "that Citigroup's agents' wrongdoing was done in furtherance of Citigroup's interests." *Otto Candies*, 2023 U.S. Dist. LEXIS 168612, 2023 WL 6418135, at *11 n.15.

the individuals who made them, or the time, location, or manner of the fraudulent misrepresentations." *Id.* In essence, then, the court disposed of the actual and apparent agency counts for the same reason it dismissed the common-law fraud and RICO counts—a lack of specificity in alleging misrepresentations and reliance. We have already explained why this conclusion was incorrect there, and we reach the same result here.

We agree with the plaintiffs that the district court erred by ignoring the complaint's express incorporation of the preceding factual allegations in alleging their vicarious liability claims. Though this Court has dismissed complaints where "each count adopts the allegations of all preceding counts," we have permitted adoptions—like the plaintiffs'—containing "extensive details and factual allegations." *Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1321 & n.11 (11th Cir. 2015); *Williamson v. Travelport, LP*, 953 F.3d 1278, 1299 (11th Cir. 2020).[26]

That flexibility is important in cases like this one. Rather than contain the "irrelevant factual allegations and legal conclusions" characteristic of a shotgun pleading, the complaint pleads a transnational scheme with multiple players. *Strategic Income Fund, L.L.C. v. Spear, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1295 (11th Cir. 2002). The

[26] At the hearing on Citigroup's motion to dismiss the second amended complaint, the district court labeled it a "shotgun pleading" because "each count improperly incorporates all the paragraphs preceding." Nowhere did the court label the third amended complaint—the operative complaint—a shotgun pleading. That is because the plaintiffs amended the complaint to reincorporate only the factual allegations rather than each individual count.

factual allegations naturally relate to multiple counts and "lengthy descriptions" are required to flesh out the plaintiffs' claims. *Williamson*, 953 F.3d at 1299. Put differently, though "the facts are voluminous, overall they are not conclusory, vague, and immaterial." *Id.* (quotation omitted).

To accommodate the volume of the allegations, the plaintiffs organized the complaint in a manageable way. *First*, the complaint describes the relationships between the relevant parties, the structure of the scheme, and the fallout from its discovery. *Second*, the complaint specifies how the fraud injured the plaintiff bondholders through the bond issuances, among other ways. *Third*, the complaint chronicles how Citigroup's misrepresentations and omissions injured the shipping and leasing plaintiffs. *Fourth*, the complaint addresses Rabobank's injuries. And *finally*, the complaint pleads the seven causes of action.

By circumscribing its review of the plaintiffs' vicarious liability counts to several summary paragraphs while neglecting literally hundreds of others, the district court adopted too narrow a lens. In the process, the court again overlooked allegations of misrepresentations satisfying the pleading standard. As we've already explained, Plaintiffs Moneda, Otto Candies, and MADISA sufficiently alleged misrepresentations or omissions by Banamex or Citibank. *See supra*, at 33-35, 51-53. And we underscore several more here:

- ***ICE***. Communications between Citibank Vice President Louis Piscitelli (yes, him again) and Aneesh Partap from Plaintiff ICE on February 23, 2011. In email correspondence, Piscitelli

provided Partnap with OSA's audited financial statements. This information contained embedded misrepresentations and omissions about OSA's true financial condition, of which Citigroup and its agents "were aware." ICE pleaded that it relied on such misrepresentations in deciding to "retain[] bonds from the 2008 Bond Issuance," of which Citigroup was a "trustee and collateral agent." ICE therefore alleged (1) a false statement; (2) the agent's knowledge that the statement was false; (3) the agent's intention for the plaintiff's reliance; and (4) the plaintiff's actual reliance.

- ***Rabobank***. On or around July 27, 2011, OSA's external financial consultant introduced Rabobank representatives to the "Head of Banamex factoring," Jose Antonio Ortega-Rivera. Ortega-Rivera and a Rabobank employee, Edwin Sieswerda, discussed the 2011 trust agreement. In the process, Banamex representatives told Sieswerda that Banamex—not OSA—"was responsible for validating and verifying OSA's" cash-advance requests. But this was untrue given the secret Regulatory Contract between Citigroup and OSA. In amending the Rabobank Trust and renegotiating the terms of OSA's loans, Rabobank relied on Banamex's statements.

These are two examples among many pleaded in the complaint.

As should be clear by now, Rule 9(b) is demanding. But it is not a straitjacket. To "carry any water," pleading under a heightened standard "must mean that an essential allegation and circumstance of fraudulent conduct cannot be alleged" in a "conclusory fashion." *United States ex*

rel. Clausen v. Lab'y Corp. of Am., 290 F.3d 1301, 1313 (11th Cir. 2002). And yet "[w]hen Rule 9(b) applies to a complaint, a plaintiff is not expected to actually *prove* his allegations." *Id.*

The district court's order hews to the wrong side of that line. The court failed to engage with the totality of the plaintiffs' allegations, ignored certain claims altogether, and flipped the presumption at the pleading stage on its head by reading inferences and uncertainties against the plaintiffs. The result was that rather than evaluating whether the plaintiffs had sufficiently pleaded their claims, the court effectively asked whether the plaintiffs had proven them. That's not the standard at the motion-to-dismiss stage. The plaintiffs have sufficiently pleaded their vicarious liability claims, so we reverse the district court's dismissal of these counts.

C. CONSPIRACY

We turn last to the plaintiffs' claims for conspiracy to violate the RICO statute and conspiracy to commit fraud. Because the district court dismissed both claims for similar and overlapping reasons—a lack of particularized allegations regarding an agreement to join the conspiracy—we treat them together, beginning with the conspiracy to violate RICO count.

1. CONSPIRACY TO VIOLATE RICO

Though "a bare assertion of conspiracy will not suffice" to prove a RICO conspiracy, plaintiffs "need not offer direct evidence of a RICO agreement; the existence of conspiracy may be inferred from the conduct of the participants." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,

556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *Am. Dental*, 605 F.3d at 1293 (quotation omitted). Circumstantial evidence of a RICO scheme can also be enough. *See Cisneros*, 972 F.3d at 1220.

While Rule 9(b) governs the predicate acts of the plaintiffs' substantive RICO claim, the general plausibility standards of Rule 8(a) control the agreement element of their RICO conspiracy claim.[27] *See* 5 Wright & Miller, § 1233. Because "federal courts have recognized that the nature of conspiracies often makes it impossible for the plaintiff to provide details at the pleading stage," courts have concluded that "the pleader should be allowed to resort to the discovery process and not be subjected to a dismissal of his complaint." *Id.*; *see also Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1126 (10th Cir. 1994).

There are two paths to establishing a RICO conspiracy claim: (1) "showing that the defendant agreed to the overall objective of the conspiracy"; or (2) "showing that the defendant agreed to commit two predicate acts." *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 950 (11th Cir. 1997). Here, the district court concluded that the plaintiffs satisfied neither. *First*, it found that because Citigroup lacked knowledge of the fraud, it could not have conspired with OSA to defraud the plaintiffs. *Second*, it determined that the plaintiffs had insufficiently pleaded that Citigroup agreed to commit two predicate acts in furtherance of the conspiracy. We disagree with the district court's first conclusion, so we need not address the second.

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[27] We note that even if the more rigorous Rule 9(b) standard governed the agreement element of the plaintiffs' RICO conspiracy claim, the plaintiffs have satisfied that standard here.

The plaintiffs pleaded six factors to allege that Citigroup agreed to conspire with OSA to engage in a pattern of racketeering activity: (1) Citigroup and OSA's "business relationship"; (2) their mutual financial gain from the racketeering activity; (3) their joint fraudulent misrepresentations and omissions; (4) their dependency on each other's fraudulent conduct to prolong the scheme; (5) Citigroup's then-CEO's "admission" that certain employees were "criminally involved" in the scheme; and (6) Mexican regulators' conclusion that Citigroup employees or agents "knowingly engaged in a fraudulent scheme with OSA."

As already explained, the district court reached the wrong conclusion because it imposed the incorrect "strong inference" standard for pleading Citigroup's knowledge. *See supra*, at 18-26. That analysis controls here. What's more, a RICO conspiracy may be inferred from the "conduct of the alleged participants *or* from circumstantial evidence of a scheme." *Cisneros*, 972 F.3d at 1220 (emphasis added and quotation omitted). The six factors listed above demonstrate that the plaintiffs pleaded ample circumstantial evidence to support their allegations. Indeed, each plaintiff alleges several ways in which Citigroup plausibly agreed to the conspiracy.

To take one example, bondholding plaintiff GPF II alleges that Citigroup conspired to make—and knew that OSA was making—fraudulent misrepresentations and omissions to OSA's investors. In GPF II's case, these misrepresentations and omissions came via two sources: (1) a February 21, 2014, telephone conference call between Citigroup and Plaintiffs Ashmore, GPF II,

ICE, and Moneda, and (2) a plethora of financial material circulated to investors, such as marketing documents related to the 2008 bond issuance, the Pareto Materials, and the OSA investor site, "www.oceanografia.com.mx." The materials were, in turn, "based on information provided by Citigroup," which the bank recognized "would be disseminated to OSA's creditors, vendors, and bondholders." GPF II contends that the close ties between Citigroup and OSA—not to mention the similar experiences of the other plaintiffs—permit a reasonable inference of agreement.

The other plaintiffs levy similar allegations of agreement between Citigroup and OSA throughout the complaint. Plaintiff Rabobank, for example, points to a July 27, 2011, meeting where OSA introduced a Banamex employee and "tout[ed] OSA's close relationship and contacts with Citigroup." Or consider Plaintiff Gulf. On April 5, 2011, Gulf's predecessor-in-interest met with OSA principals and their consultant to discuss a lease agreement. During the meeting—at OSA's headquarters—the consultant "summoned" a Citigroup ICG executive, Emilio Granja, from an adjoining room. It "appeared" that Granja "had an office within OSA and was working there full-time." Granja told Gulf's predecessor that Banamex "supported Oceanografía's finances" and not to worry: "all Oceanografía payments were coming through them." To the predecessor, this remark meant that the cash-advance facility was "stable, reliable and controlled by Citigroup." It also creates the reasonable inference that Citigroup, OSA, and the financial consultant had agreed to conspire to commit the alleged fraud.

If the allegations in the complaint were not clear enough, the plaintiffs summarized their RICO and

common-law conspiracy allegations in a chart. One section outlines specifically how Citigroup agreed with OSA to further the RICO enterprise. The conspiracy chart lists (1) the date and location of the alleged misstatement or omission; (2) the source of the misstatement or omission; (3) the relevant misrepresentation or omission by OSA or its agents; (4) each plaintiff's reliance; (5) Citigroup's alleged agreement with OSA; (6) the acts in furtherance of the conspiracy; and (7) each plaintiff's injury.

We thus find it hard to conclude, as the district court did, that the plaintiffs' claims are "unsupported by any factual allegations." *O'Malley v. O'Neill*, 887 F.2d 1557, 1560 (11th Cir. 1989). The complaint does not "allege at most" that Citigroup "knew about" the fraud. *Id.* And it does not—as the district court found—allege that Citigroup merely "should have known" about the fraud. *Otto Candies*, 2023 U.S. Dist. LEXIS 168612, 2023 WL 6418135, at *6. To take a step back, we confront a scheme where Citigroup—with knowledge of OSA's fraud—allegedly participated in the RICO conspiracy by:

- approving false documentation submitted to ICG employees by OSA;
- violating its own internal controls relating to the cash-advance facility;
- permitting OSA to control that facility;
- providing cash advances that far exceeded the value of the underlying contracts that justified those advances; and
- failing to correct OSA's false financial projections.

All the while, the bank possessed a "direct financial incentive to participate in the conspiracy" by stockpiling higher interest payments. And on the back end, American and foreign regulators found Citigroup either criminally or civilly liable for events stemming from the fraud.

Unlike in *Republic of Panama v. BCCI Holdings*, a case on which the district court relied, there are "facts in the complaint" that "allow us to infer" an "agreement to engage in the scheme." 119 F.3d at 950. Because when alleging a RICO conspiracy "it is sufficient to show that [a defendant] had knowledge of the essential nature of the plan," the plaintiffs have met their pleading burden here. *United States v. Kopituk*, 690 F.2d 1289, 1323 (11th Cir. 1982) (quotation omitted).

We therefore disagree with the district court's conclusion that the plaintiff's allegations are so "vague" and "conclusory" that they "do not support an inference that Citigroup knowingly agreed to participate in the RICO conspiracy." *Otto Candies*, 2023 U.S. Dist. LEXIS 168612, 2023 WL 6418135, at *5 (quotation omitted).

We add that the district court made an additional mistake when it dismissed the RICO conspiracy count. The court appeared to assume that because, in its view, the plaintiffs' substantive RICO allegation did "not comply with Rule 9(b)," its RICO conspiracy claim necessarily failed. *Id.* The court noted that "[i]f the underlying cause of action is not viable, the conspiracy claim must also fail." *Id.* (quoting *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1199 (11th Cir. 2004)). But that language was drawn from an Alabama state-court decision construing state-law conspiracy claims—not the federal

RICO statute. *See Brown & Williamson Tobacco Corp.*, 363 F.3d at 1199 (quoting *Allied Supply Co. v. Brown*, 585 So. 2d 33, 36 (Ala. 1991)).

This Circuit has not "expressly stated" that "if a plaintiff fails to state a claim of a primary RICO violation, then the plaintiff's civil RICO conspiracy claim necessarily fails." *Am. Dental*, 605 F.3d at 1296 n.6; *see also Beck v. Prupis*, 529 U.S. 494, 506 n.10, 120 S. Ct. 1608, 146 L. Ed. 2d 561 (2000). While "parties must have agreed to commit an act that is itself illegal" in order "[t]o be guilty of conspiracy," the plaintiffs' wire-fraud allegations suffice. *United States v. Vaghela*, 169 F.3d 729, 732 (11th Cir. 1999). Thus, even if the plaintiffs had not pleaded a viable substantive RICO claim, their conspiracy allegation could independently survive. Only where a RICO conspiracy claim "adds nothing" to a substantive RICO allegation should the conspiracy claim be dismissed outright. *See Jackson*, 372 F.3d at 1269.

In any event, the plaintiffs' RICO conspiracy claim "adds something" here—that Citigroup and OSA worked together for several years to "fraudulently induc[e] and lur[e]" the plaintiffs into investing in OSA. To successfully plead this count, the plaintiffs need only "plausibly allege facts showing that a [RICO] conspiracy created the alleged scheme." *Am. Dental*, 605 F.3d at 1291. They have done so.

2. CONSPIRACY TO COMMIT COMMON-LAW FRAUD

We turn next to the plaintiffs' allegation that Citigroup conspired with OSA to commit common-law fraud. To plead a civil conspiracy under Florida law, a plaintiff must allege: "(a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c)

the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff[s] as a result of the acts done under the conspiracy." *Raimi v. Furlong*, 702 So. 2d 1273, 1284 (Fla. Dist. Ct. App. 1997). "Each coconspirator need not act to further a conspiracy; each need only know of the scheme and assist in it in some way to be held responsible for all of the acts of his coconspirators." *Charles v. Fla. Foreclosure Placement Ctr., LLC*, 988 So. 2d 1157, 1160 (Fla. Dist. Ct. App. 2008) (quotation omitted). Rule 9(b) governs the plaintiffs' fraud claims.

It is undisputed that the alleged scheme is unlawful. *See Raimi*, 702 So. 2d at 1284. And the plaintiffs suffered injuries—"damages totaling over $1 billion" in losses from 2008 to 2014. But the district court dismissed this count because as "with Plaintiffs' RICO and RICO conspiracy claims," the complaint failed to allege "with particularity who made the agreement, when the agreement was made, or how Citigroup made the purported agreement with OSA." *Otto Candies*, 2023 U.S. Dist. LEXIS 168612, 2023 WL 6418135, at *10. The court also found that the plaintiffs failed "to show that Citigroup had actual knowledge of OSA's misrepresentations and omissions" and did not adequately allege an "overt act taken by Citigroup showing its intent to defraud Plaintiffs." 2023 U.S. Dist. LEXIS 168612, [WL] at *9. We have already rejected the district court's first two conclusions earlier in this opinion, and we now reject its third.

The plaintiffs have pleaded that Citigroup and OSA committed overt acts in furtherance of the conspiracy. These include:

- Knowingly "advanc[ing] funds to OSA that were (1)

inconsistent with OSA's contracts with Pemex; and (2) based on fraudulent documentation containing forged Pemex signatures." The plaintiffs allege that Citigroup submitted or accepted "at least 166 fraudulent cash advances." Consider that between 2011 and 2014, "OSA requested cash advances of (1) approximately $126 million on a contract that only paid $39 million annually; (2) approximately $110 million on a contract that only paid $23 million annually; (3) approximately $88 million on a contract that only paid $32 million annually; (4) approximately $44 million on a contract that only paid $16 million; and (5) approximately $75 million on a contract that only paid $51 million."

- Falsely representing to multiple plaintiffs, including Otto Candies and Rabobank, that "Citigroup and OSA had implemented a new control system for the cash advance facility, with the acknowledgement and approval of Pemex," when that was not in fact the case.
- Jointly signing the secret 2012 Regulatory Contract in which "Citigroup attempted to absolve itself of any responsibility for validating and authenticating documents submitted by OSA." The contract, signed by OSA and Banamex, "effectively gutted" Citigroup's established policies and procedures so that "OSA, not Citigroup" possessed "sole responsibility for implementing the control system for its own cash advance facility."
- Knowingly contributing to and distributing OSA's false financial statements and projections to investors. In the process, Citigroup failed to correct

> or revise the information contained in disclosures, even though it realized that they were incorrect and even though it recognized that the plaintiffs would rely on those disclosures.

These allegations touched each of the plaintiffs, from the shipping and leasing entities who relied on the stability of the cash-advance facility, to the bondholding plaintiffs who invested based on the Pareto Materials. We reject the district court's findings that the plaintiffs did not sufficiently plead the "overt acts" requirement of this count.

We also disagree with the district court on the agreement element of the conspiracy tort. Just as with the RICO conspiracy count, the plaintiffs adequately pleaded that Citigroup and OSA agreed to conspire to commit common-law fraud. The plaintiffs allege that the agreement between Citigroup and OSA was evident from Citigroup's "(1) degree of knowledge of the conspiracy's objective; (2) acts committed in furtherance of the conspiracy; (3) close association with OSA; and (4) direct financial incentives." Taken together, the plaintiffs say these factors show Citigroup's agreement "to participate in the fraud." We agree.

We do not recount in detail each allegation of agreement here because of the overlap with those discussed under the plaintiffs' RICO conspiracy claim. For now, it is sufficient to cite to the relevant portions of the complaint. *See, e.g.*, Doc. 187 ¶¶ 396-97, 404-07 (Adar); 508-10 (Ashmore); 536, 559-62 (Copernico); 683-86 (GPF II); 712, 763-66 (HBK); 890-93 (ICE); 971-72, 1027-30, 1031(g) (Moneda); 1096-99 (Nordic Trustee); 1163-66 (Waypoint); 1296-99

(Otto Candies); 1357, 1368-72 (Coastline); 1467-71 (De Hoop); 1488-1507 (Gulf); 1536, 1566-69 (Halani); 1608-11 (MADISA); 1702-05 (Rabobank); Doc. 194-3 ("Plaintiff by Plaintiff Examples of Conspiracy Claims").

The district court thought otherwise. But the caselaw it relied on does not support its conclusion. In one case the district court cited, "there [was] no evidence of any kind to support Plaintiffs' allegations." *Jaffe v. Bank of Am., N.A.*, 667 F. Supp. 2d 1299, 1323 (S.D. Fla. 2009). The word "evidence" is the first clue that the case does not apply here. And for good reason—the court's determination came after a full bench trial, not at the pleading stage. *See id.* By contrast, no evidence is required here, only allegations.

In another case cited by the district court, the plaintiffs' "conclusory and unsupported assertions of an agreement" did not "provide any factual predicate" for their claims. *Meridian Tr. Co. v. Batista*, No. 17-23051, 2018 U.S. Dist. LEXIS 166556, 2018 WL 4693533, at *6 (S.D. Fla. Sept. 26, 2018) (unpublished). To find that the plaintiffs failed to "provide any factual predicate" for their allegations, or that there was "no evidence of any kind to support" their claims, strains credulity. To quote the pleading standard, plaintiffs have not leveled "conclusory allegation[s] of agreement at some unidentified point" that Citigroup conspired to commit fraud. *Twombly*, 550 U.S. at 557. Rather, we confront allegations of a multipronged, transnational scheme in which:

- a major financial institution has conceded that it terminated an employee it "believe[d] was directly involved in the fraud," in addition to "four Managing

Directors";

- foreign regulators have determined that Citigroup employees were criminally liable;
- the SEC fined Citigroup nearly $5 million for violating the bank's own internal controls related to the fraud;
- the sheer volume of the discrepancies between the cash advances and the underlying contracts suggests a degree of acquiescence; and
- a "revolving door" of senior executives shifted between Citigroup and OSA, including OSA hiring an employee terminated by Citigroup for accepting bribes and kickbacks.

To be sure, the plaintiffs' conspiracy allegations require some degree of inference. But rather than reading plausible inferences in the plaintiffs' favor—as it was obligated to do at this stage of the case—the district court disregarded them altogether. In a scheme as complex as this one, there is often no smoking gun, particularly before discovery. And that's especially true when information remains peculiarly within a defendant's knowledge or control—as is the case here. So even when Rule 9(b) applies, plaintiffs with "substantial prediscovery evidence"—as shown by these plaintiffs' "detailed complaint and accompanying exhibits"—can proceed past the motion-to-dismiss stage. *Gose v. Native Am. Servs. Corp.*, 109 F.4th 1297, 1319 (11th Cir. 2024). Nine years and four complaints later, we conclude that Citigroup "has been made aware of the particular circumstances for which [it] will have to prepare a defense at trial," a traditional justification for

mandating particularity in pleading fraud. *Id.* at 1318 (quotation omitted).

Finally, the complaint does not impermissibly "rely on the actions of OSA" to plead a conspiracy. *Otto Candies*, 2023 U.S. Dist. LEXIS 168612, 2023 WL 6418135, at *10. There are myriad examples of Citigroup's active participation in the fraud, both directly and through its agents. Plus, under Florida law, "[e]ach coconspirator need not act to further a conspiracy" but "need only know of the scheme and assist in it in some way to be held responsible for all of the acts of his coconspirators." *Charles*, 988 So. 2d at 1160 (quotation omitted). So even if we agreed with the district court's cramped characterization of the allegations for this count, Citigroup could still be held responsible for OSA's actions because Citigroup both knew of the scheme and "assist[ed] in it in some way." *Id.* (quotation omitted).

* * *

Because we conclude that the district court erred in dismissing the plaintiffs' RICO and common-law conspiracy claims, we reverse its dismissal of those counts.

D. REQUEST FOR REASSIGNMENT

Finally, the plaintiffs ask us to reassign this case to a new judge on remand. Though we appreciate their frustration, we decline the invitation.

It is true—"reassigning a case to a different district judge falls within our authority." *Stargel v. SunTrust Banks, Inc.*, 791 F.3d 1309, 1311 (11th Cir. 2015); *see* 28 U.S.C. § 2106. But though we can take that action, it is a "severe remedy." *Stargel*, 791 F.3d at 1311 (quotation omitted). And reassignment is "only appropriate where the

trial judge has engaged in conduct that gives rise to the appearance of impropriety or a lack of impartiality in the mind of a reasonable member of the public." *Comparelli v. Republica Bolivariana de Venezuela*, 891 F.3d 1311, 1328 (11th Cir. 2018) (quotation omitted). To determine whether reassignment is appropriate, this Court examines three factors: "(1) whether the original judge would have difficulty putting his previous views and findings aside; (2) whether reassignment is appropriate to preserve the appearance of justice; (3) whether reassignment would entail waste and duplication out of proportion to the gains realized from reassignment." *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 (11th Cir. 1997) (quotation omitted).

Here, we do not think the balance points toward reassignment. Though the district court erred in dismissing the plaintiffs' complaint, first for *forum non conveniens* and now for failure to state a claim, that's not enough. In *Chudasama*, for example, we reassigned the case following revelations that the judge delegated "the task of drafting sensitive, dispositive orders to plaintiffs' counsel, and then uncritically adopt[ed] his proposed orders nearly verbatim." *Id.* The judge also permitted "excessive and dilatory discovery tactics" and imposed "draconian sanctions," but only after "over a year and a half " in what was "really a simple products liability case." *Id.* at 1356, 1374. But the district court's missteps here were more "garden-variety errors of law than the kind of direct defiance" or "willful or malicious" conduct that would warrant reassignment. *AcryliCon USA, LLC v. Silikal GMBH*, 46 F.4th 1317, 1331 (11th Cir. 2022) (quotation omitted).

We have full confidence that on remand the district court will evaluate this case impartially and in a timely fashion, so we decline to reassign the case.

* * *

Pared to its core, this case is factually complicated but legally straightforward. The plaintiffs allege that Citigroup conspired and participated in a vast fraudulent scheme. Citigroup contests those allegations. There are quarrels over which employee worked for which company, what Citigroup's then-CEO *really* admitted to, and whether Citigroup knew about the fraud at all. But those factual disputes are best left for another day.

At this stage, the plaintiffs have met their burden—even under the heightened requirements of Rule 9(b). The district court erred in concluding otherwise. We therefore **REVERSE** its decision regarding each plaintiff as to each count alleged in the complaint and **REMAND** for proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 1:16-cv-20725-DPG

OTTO CANDIES, LLC, *et al.*,

Plaintiffs,

v.

CITIGROUP, INC.,

Defendant.

August 25, 2023, Decided
August 25, 2023, Entered on Docket

ORDER

THIS CAUSE comes before the Court on Defendant Citigroup, Inc.'s Motion to Dismiss the Third Amended Complaint (the "Motion"), [ECF No. 190]. The Court has carefully considered the Third Amended Complaint (the "TAC"), the record, and the applicable law and is otherwise fully advised. For the reasons that follow, the Motion is granted.

BACKGROUND[1]

In this action, Plaintiffs allege a fraudulent scheme carried out by Citigroup, Inc. ("Citigroup") and others not sued in this action. Most of the fraudulent acts occurred in

[1] The Court accepts Plaintiffs' allegations set forth in their TAC, [ECF No. 187], as true for purposes of the motion to dismiss. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997).

Mexico, and most of the key actors are based, and engaged in business, in Mexico.

I. The Parties

Citigroup is a U.S.-based banking and financial institution incorporated in Delaware with its principal place of business in New York, New York. [ECF No. 187 ¶ 48]. Plaintiffs[2] are a diverse group of entities including shipping companies, investment funds, and a bank, located all over the world including in the United States, Mexico, the Caribbean, South America, Europe, and the Middle East. *Id.* ¶¶ 18-47. Plaintiffs bring this action as vendors, creditors, and bondholders of Oceanografía S.A. de C.V. ("OSA"), a now bankrupt Mexican oil and gas services company. *Id.* ¶¶ 1, 206. Petróleos Mexicanos S.A. de C.V.

[2] Otto Candies, LLC; Adar Macro Fund LTD.; Ashmore Emerging Markets Debt and Currency Fund Limited; Ashmore Emerging Markets High Yield Plus Fund Limited; Ashmore Emerging Markets Tri Asset Fund Limited; Ashmore SICAV in respect of Ashmore SICAV Emerging Markets Corporate Debt Fund; Ashmore SICAV in respect of Ashmore SICAV Emerging Markets Debt Fund; Ashmore SICAV in respect of Ashmore SICAV Emerging Markets High Yield Corporate Debt Fund; Coastline Maritime Pte. Ltd.; Coöperative Rabobank U.A.; Copernico Capital Partners (Bermuda) Ltd.; Gulf Investments and Services Ltd.; Halani International Ltd.; HBK Investments L.P.; HBK Master Fund L.P.; Hoop Lobith International B.V.; ICE Canyon LLC; ICE 1 EM CLO Limited; Máquinas Diesel S.A. de C.V.; Marfield Ltd. Inc.; Moneda Deuda Latinoamericana Fondo de Inversion; Moneda International Inc.; Moneda Latin American Corporate Debt; Moneda Renta CLP Fondo de Inversion; Moneda S.A. Administradora General de Fondos; Nordic Trustee ASA; Padstow Financial Corp.; Shanara Maritime International, S.A.; Shipyard De Hoop B.V.; and Waypoint Asset Management LLC.

("Pemex") is Mexico's state-owned oil and gas company and, at one time, one of the largest customers of OSA's offshore drilling services. *Id.* ¶¶ 4, 51. Banco Nacional de México («Banamex») is Citigroup›s wholly owned Mexican subsidiary. *Id.* ¶¶ 3, 49. Plaintiffs bring this action to recover the losses sustained from their investments and business dealings with OSA. *Id.* ¶¶ 15-16.

II. The Alleged Cash Advance Scheme

According to the TAC, Citigroup, through its Mexican subsidiary Banamex, established credit facilities to provide cash advances to contractors of Pemex, including OSA. *Id.* ¶ 73. OSA allegedly used the cash advances to fund its ongoing projects with Pemex. *Id.* ¶ 74. Over the life of the Banamex cash facility, Citigroup advanced over $3.3 billion to OSA, charging OSA substantial interest on every cash advance. *Id.* ¶¶ 4, 73, 74, 113. Additionally, conditioned on continuing its short-term credits to OSA, Citigroup was guaranteed repayment of the cash advances directly from Pemex. *Id.* ¶ 116. Because repayment was guaranteed by Pemex (i.e., the Mexican government), Plaintiffs allege that Citigroup, through or in conjunction with Banamex, repeatedly increased OSA's cash advance limit to earn millions in risk-free profit. ¶¶ 116-18.

Plaintiffs assert that because of Pemex's payment guarantee, Citigroup advanced amounts to OSA that Citigroup knew greatly exceeded any amount OSA could earn under its service contracts with Pemex. *Id.* ¶ 118-21. Plaintiffs allege that Citigroup knowingly advanced hundreds of millions of dollars to OSA that far exceed the value of the underlying Pemex contract by using documents and information it knew was either

false or included forged Pemex signatures. *Id.* ¶¶ 122-37. Plaintiffs contend that the continued cash injections into OSA resulted in OSA›s financials appearing more attractive to prospective investors, such as Plaintiffs. *Id.* ¶¶ 8, 10-12. These misrepresentations led Plaintiffs and others into believing that OSA was a financially attractive company for investment, which ultimately led Plaintiffs to: (1) invest and maintain their investments in OSA; (2) restructure their debts with OSA; and (3) enter into financial agreements with OSA. *Id.* ¶ 8.

In late-February 2014, the fraud involving OSA was uncovered by the Mexican government in connection with an unrelated investigation of OSA's insurance policies. *Id.* ¶ 15. OSA was seized and put into restructuring proceedings by Mexican prosecutors in March 2014, which triggered its collapse. *Id.* As a result of the fraud, Plaintiffs allegedly incurred more than $1 billion in losses. *Id.* Plaintiffs first initiated this action on March 26, 2016. [ECF No. 1]. After amending their pleadings twice, Plaintiffs filed the instant TAC on February 25, 2022.[3] [ECF No. 187]. In the TAC, Plaintiffs assert the following claims against Citigroup: Violation of RICO, 18 U.S.C. §1962(c) ("Count I"); Conspiracy to Violate RICO, 18 U.S.C. §1962(d) ("Count II"); Common Law Fraud ("Count III"); Common Law Aiding and Abetting Fraud ("Count IV"); Common Law Conspiracy to Commit Fraud ("Count V"); Vicarious Liability Based on Actual Agency ("Count VI"); and Vicarious Liability Based on Apparent Agency ("Count VII"). *Id.* ¶¶ 1709-1977.

[3] The Third Amended Complaint is 541 pages long, with 1,977 paragraphs of allegations.

Citigroup has moved to dismiss this action arguing that: (1) Plaintiffs fail to allege a cognizable injury; (2) Plaintiffs fail to allege a cognizable RICO predicate act; (3) Plaintiff Nordic Trustee fails to plead an injury; (4) Plaintiffs fail to satisfy the Federal Rule of Civil Procedure 9(b) pleading standard as to their RICO and common law fraud-based claims; (5) Plaintiffs' RICO claims fail to plead scienter; (6) Plaintiffs' RICO claims are barred by Section 107 of the Private Securities Litigation Reform Act ("PSLRA"); (7) Plaintiffs fail to state a claim for each of the common law fraud-based claims; (8) Plaintiffs' vicarious liability claims fail to show that OSA acted in furtherance of Citigroup's interests; (9) Plaintiffs' vicarious liability claims are time-barred; and (10) Plaintiffs should be judicially estopped from now asserting their vicarious liability claims. [ECF No. 190 at 20-54].

LEGAL STANDARD

To survive a motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6), a claim "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" meaning that it must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). While a court must accept well-pleaded factual allegations as true, "conclusory allegations . . . are not entitled to an assumption of truth—legal conclusions must be supported by factual allegations." *Randall v. Scott*, 610 F.3d 701,

709-10 (11th Cir. 2010). "[T]he pleadings are construed broadly," *Levine v. World Fin. Network Nat'l Bank*, 437 F.3d 1118, 1120 (11th Cir. 2006), and the allegations in the complaint are viewed in the light most favorable to the plaintiff. *Bishop v. Ross Earle & Bonan, P.A.*, 817 F.3d 1268, 1270 (11th Cir. 2016). At bottom, the question is not whether the Plaintiffs "will ultimately prevail . . . but whether [their] complaint [is] sufficient to cross the federal court's threshold." *Skinner v. Switzer*, 562 U.S. 521, 530, 131 S. Ct. 1289, 179 L. Ed. 2d 233 (2011) (internal quotation and citation omitted).

DICUSSION

I. Counts I and III — Plaintiffs' RICO and Common Law Fraud Claims

Plaintiffs' RICO and common law fraud claims are subjected to a heightened pleading standard. Rule 9(b) of the Federal Rules of Civil Procedure requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b); *see, e.g., Inman v. Am. Paramount Fin.*, 517 F. App'x 744, 748 (11th Cir. 2013). The particularity rule alerts "defendants to the 'precise misconduct with which they are charged' and protect[s] defendants 'against spurious charges of immoral and fraudulent behavior.'" *Durham v. Bus. Mgmt. Assocs.*, 847 F.2d 1505, 1511 (11th Cir. 1988) (quoting *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984)). "The application of the rule, however, must not abrogate the concept of notice pleading." *Id.* Rule 9(b) is satisfied if the complaint states:

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.

See Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1371 (11th Cir. 1997) (internal quotation marks omitted). Furthermore, "[a] bare allegation of reliance on alleged misrepresentations, bereft of any additional detail, will not suffice under Rule 9(b)." *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1128 (11th Cir. 2019) (affirming the district court's dismissal of the plaintiffs' fraud claims because they "failed to allege with particularity the manner in which they relied on the defendants' statements").

Here, Citigroup argues that Plaintiffs' fraud-based claims fail because they do not adequately plead one or more of the heightened requirements: that Citigroup made any statement to them concerning a material fact, that any such statement was false, or that any such statement was relied on to their detriment. [ECF No. 190 at 29-39]. The Court agrees. Plaintiffs mostly offer vague and conclusory statements that they suffered damages/injuries because they relied on Citigroup's alleged misrepresentations. *See* [ECF No. 187 ¶¶ 408-11, 512-17, 563-71, 687-92, 894-99, 1100-11, 1031-35, 1167-71, 1300-02, 1372-78, 1472-74,

1508-14, 1570-73, 1612-15, 1706-08]. In some form or another, Plaintiffs allege that: (1) they relied on Citigroup's misrepresentations via OSA or OSA's financial consultant and Pareto[4]; and (2) they would not have invested in OSA, renegotiated the terms of their loans to OSA, or entered into an agreement with OSA, had they been privy to (i) OSA's false financial projections, (ii) the false documents submitted by OSA to Citigroup's Institutional Client's Group ("ICG") employees, and (iii) the ongoing fraud. *Id.* However, none of the Plaintiffs (with the possible exception of Plaintiff HBK Investments L.P. ("HBK")) allege with specificity the exact misrepresentations they relied on to induce them to either invest in OSA, renegotiate the terms of their loans to OSA, or enter into an agreement with OSA. Nor do Plaintiffs state how any misrepresentations informed their decision to invest in OSA. *See Fernau v. Enchante Beauty Prods., Inc.*, 847 F. App'x 612, 622 (11th Cir. 2021) (noting that these sorts of broad statements "[provide] no information about which of the specifically alleged misrepresentations and omissions, if any, induced them to purchase shares . . . or even whether they read the materials [] provided").

In *Fernau*, the district court held that while the plaintiffs met their burden by pleading with specificity the misrepresentations and omissions the defendants made to induce them to invest, the plaintiffs did not expressly state that they relied on those misrepresentations and omissions. *See Fernau*, No. 18-20866, 2020 U.S. Dist. LEXIS 89862, 2020 WL 2569300, at * 2 (S.D. Fla. May

[4] Pareto consists of Pareto Securities AS, Pareto Securities Pte. Ltd., and Pareto Securities, Inc. *See* [ECF No. 187 ¶¶ 302-03].

21, 2020) (adopting the report and recommendation at *Fernau*, 18-20866, 2020 U.S. Dist. LEXIS 90171, 2020 WL 5371297, at * 4 (S.D. Fla. Mar. 11, 2020)). Nor did the plaintiffs explain how the reliance was justifiable. *Id.* The Eleventh Circuit ultimately affirmed the district court's dismissal of the plaintiffs' fraud claims for failure to state a claim, finding the broad statements the plaintiffs made in their complaint regarding reliance insufficient. *See Fernau*, 847 F. App'x at 623-24 ("The plaintiffs have not satisfied Rule 9(b)'s heightened pleading requirements for their fraud claims because they have failed to allege with particularity the manner in which they relied on the defendants' statements and omissions." (citing *Wilding*, 941 F.3d at 1128 (quotations omitted))).

In the instant action, Plaintiffs provide no details about the specific misrepresentations that they relied on or—as in *Fernau*—how their reliance was justifiable. The only Plaintiff that provides additional detail regarding their alleged reliance is HBK. *See* [ECF No. 187 ¶¶ 767-72]. Specifically, HBK alleges that it relied on the fact that "(1) OSA had access to liquidity through a factoring facility; (2) OSA was 'in business with a reputable bank' and (3) Citigroup served as trustee and collateral agent of the 2008 Bonds and OSA's banker." *Id.* ¶ 768. HBK's allegations of reliance go much further than other Plaintiffs' allegations. Even so, HBK's pleadings also fail because it does not allege that its reliance was justifiable. *See In re Sahlen & Assocs., Inc. Sec. Litig.*, 773 F. Supp. 342, 352 (S.D. Fla. 1991); *see also HCM High Yield Opportunity Fund, LP v. Skandinaviska Enskilda Banken AB*, No. 99-1350-CIV, 2001 U.S. Dist. LEXIS 26999, 2001 WL 36186526, at *11 (S.D. Fla. Dec. 14, 2001) ("The plaintiffs must allege

that they actually relied on a particular document or misrepresentation and that such reliance was justifiable, meaning that they would not have discovered the truth even by exercising reasonable diligence."). As each of the Plaintiffs fail to meet the heightened Rule 9(b) pleading requirements, Counts I[5] and III shall be dismissed.

II. Count II — Plaintiffs' RICO Conspiracy Claim

"A plaintiff can establish a RICO conspiracy claim in one of two ways: (1) by showing that the defendant agreed to the overall objective of the conspiracy; or (2) by showing that the defendant agreed to commit two predicate acts." *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1293 (11th Cir. 2010) (citations omitted). "The Eleventh Circuit has affirmed the dismissal of RICO claims where the allegations of conspiracy were merely conclusory and unsupported by any factual allegations." *Solomon v. Blue Cross and Value Shield Ass'n*, 574 F. Supp. 2d 1288, 1291-92 (S.D. Fla. 2008) (citing *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 950 (11th Cir. 1997)) (quotations omitted). Further, the United States Supreme Court in *Twombly*, "add[ed] a new bite to the RICO requirement that the Plaintiffs describe the agreement to conspire in the complaint." *Id.* at 1292 ("The Supreme Court explained that without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. . . . The Supreme Court observed that

[5] Because Plaintiffs' RICO claim fails to meet the requisite pleading standard, the Court need not address whether Plaintiffs adequately allege a domestic injury and whether the Plaintiffs' RICO claim is barred by Section 107 of the PSLRA.

the complaint mentioned no specific time, place, or person involved in the alleged conspiracies leaving the defendants little idea where to begin in formulating their answers.") (citations and quotations omitted).

In the instant action, Citigroup argues that Plaintiffs' RICO conspiracy claim fails because: (1) it is barred by Section 107 of the PSLRA; and (2) Plaintiffs fail to plead with specificity that Citigroup agreed to the overall objective of the conspiracy or that it agreed to commit two predicate acts. [ECF No. 190 at 49-50]. Irrespective of whether Plaintiffs' RICO conspiracy claim is barred by Section 107 of the PSLRA, the Court agrees that Plaintiffs' TAC does not sufficiently plead an agreement to the overall objective of the alleged conspiracy or an agreement to commit two predicate acts.

To show an agreement between the alleged co-conspirators, Plaintiffs allege that Citigroup's agreement with OSA to engage in a pattern of racketeering activity can be reasonably inferred from:

> (1) their business relationship; (2) their mutual financial gain resulting from the pattern of racketeering activity; (3) Citigroup's and OSA's fraudulent misrepresentations and material omissions to Plaintiffs regarding OSA's financial attractiveness as an investment; (4) the dependency of the fraudulent acts of each on the fraudulent acts of the others for the success of the fraudulent scheme; (5) Citigroup's CEO's admission that at least one of Citigroup's employees was "criminally involved" in the fraudulent scheme, and that Citigroup had

> terminated approximately a dozen employees, both "inside and outside" of Mexico, who participated in the fraud; and (6) the findings of the Mexican authorities, including the CNBV, that Citigroup's agents, employees or representatives knowingly engaged in a fraudulent scheme with OSA.

[ECF No. 187 ¶ 1841]. However, the TAC falls short of the pleading standard specified by the Eleventh Circuit in *Am. Dental Ass'n* and the Supreme Court in *Twombly*.

A. Agreement to the overall objective of the conspiracy

According to the TAC, the purpose and objective of the alleged RICO activity were to "defraud[] Pemex through the submission of fraudulent and forged receipts and fraudulently induc[e] and lur[e] Plaintiffs to invest, and maintain their investment in, OSA in order to increase (1) cash flows to OSA; and (2) interest payments to Citigroup." *Id.* ¶ 1721. As the Court addressed above, Plaintiffs fail to sufficiently plead fraud because the allegations do not comply with Rule 9(b). Plaintiffs' conspiracy claim also fails, in part, on the same grounds—because Plaintiffs have not sufficiently alleged any misrepresentations by Citigroup on which they relied. *See Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1269 (11th Cir. 2004) ("We have already found that the complaint failed to state a substantive RICO claim, and the RICO conspiracy adds nothing. . . . Because of this fatal pleading defect, the plaintiffs' RICO conspiracy claims are likewise unable to survive the defendants' motion to dismiss."); *see also Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d

1183, 1199 (11th Cir. 2004) ("If the underlying cause of action is not viable, the conspiracy claim must also fail."); *Am. Heritage Enters., Inc. v. Am. Paramount Fin., Inc.*, No. 10-cv-80921, 2011 U.S. Dist. LEXIS 169093, 2011 WL 13225180, at *6 (S. D. Fla. July 5, 2011) ("As noted above, plaintiff's fraud allegations directed at [the defendant] are insufficient because they do not comply with Rule 9(b). [The plaintiff's] RICO claim is also deficient for the reasons noted above. Without particular allegations, the Court cannot infer that [the defendant] either committed fraud or agreed to commit fraud.").

Further, the Court cannot reasonably infer Citigroup's agreement to the overall objective of the alleged conspiracy based on the six (6) "activities" Plaintiffs reference. While the existence of a conspiracy "can be inferred from the conduct of the alleged participants or from circumstantial evidence of the scheme," *United States v. LeQuire*, 943 F.2d 1554, 1562 (11th Cir. 1991) (citations and quotations omitted), none of the activities referenced in Plaintiffs' TAC allow the Court to draw such an inference. Specifically, the first four of the six activities[6] are vague, conclusory, and do not support an inference that Citigroup "knowingly agreed to participate in the RICO conspiracy." *See Republic of Panama v. BCCI Holdings*

[6] Alleging that an agreement between Citigroup and OSA can be reasonably inferred from: (1) their business relationship; (2) their mutual financial gain resulting from the pattern of racketeering activity; (3) Citigroup's and OSA's fraudulent misrepresentations and material omissions to Plaintiffs regarding OSA's financial attractiveness as an investment; and (4) the dependency of the fraudulent acts of each on the fraudulent acts of the others for the success of the fraudulent scheme. [ECF No. 187 ¶ 1841].

(Luxembourg) S.A., 119 F.3d 935, 950-51 (11th Cir. 1997) (citing *O'Malley v. O'Neill*, 887 F.2d 1557, 1560 (11th Cir. 1989) (upholding the district court's dismissal of the plaintiff's RICO conspiracy claim because "there [were] no facts alleged that would indicate that [the defendants] were willing participants in a conspiracy"), *cert. denied*, 496 U.S. 926, 110 S. Ct. 2620, 110 L. Ed. 2d 641 (1990)); *Davidson v. Wilson*, 763 F. Supp. 1470, 1472 n.3 (D. Minn. 1991) (noting mere affiliation between corporate defendants is insufficient to establish agreement under § 1962(d)), *aff'd*, 973 F.2d 1391 (8th Cir. 1992)).

At best, all six of the alleged activities show that Citigroup should have known of the alleged scheme, not that it actually knew about or otherwise agreed to participate in it. For example, Plaintiffs rely on Citigroup's purported admission, via its then-CEO Michael Corbat, that at least one of Citigroup's employees was "criminally involved" in the fraudulent scheme and that additional employees "who participated in the fraud" were terminated. [ECF No. 187 ¶ 1841]; *see also* [ECF No. 83-4] (Memorandum from Michael Corbat). However, Plaintiffs' summary of Mr. Corbat's statement is misleading. His statement was that Citigroup terminated one employee "who [it] **believe[d] was directly involved in the fraud**."[7] [ECF No. 83-4 at 2] (emphasis added); *but see* [ECF No. 187 ¶ 172] (alleging that Citigroup fired the employee because he was "criminally involved" in the fraudulent scheme). Citigroup terminated eleven (11) other employees "whose

[7] Plaintiffs consistently misquote, and therefore mischaracterize, this passage throughout their TAC and Response to the Motion to Dismiss. *See* [ECF Nos. 187 ¶¶ 172, 1727, 1841, 1912, 1952; 194 at 17, 20, and 21].

actions or **inactions failed to protect [the] company** from [the] fraud." *Id.* (emphasis added). Corbat did not state that Citigroup employees were active participants in the fraud or that they knew their actions facilitated fraud. While Plaintiffs refer to and rely on a limited part of Corbat's statement, he also stated that "[w]e also said we would hold accountable any employee who enabled it, whether through lax supervision, circumvention of our controls, violations of our Code of Conduct, or otherwise." *Id.* Therefore, Corbat's statement does not clearly constitute an admission by Citigroup and Plaintiffs have not sufficiently pled that Citigroup agreed to the overall objective of the alleged conspiracy.

B. Two predicate acts

To establish that Citigroup committed two predicate acts in furtherance of the conspiracy, Plaintiffs allege that Citigroup submitted and accepted at least 166 fraudulent cash advances and made fraudulent misrepresentations and material omissions to Plaintiffs. [ECF No. 187 ¶¶ 1843-45]. However, Plaintiffs do not plead with particularity any material omissions or what fraudulent misrepresentations were made, by whom, where, when, or how. *See Brooks*, 116 F.3d at 1371; *see also Solomon*, 574 F. Supp. 2d at 1293 ("All of Plaintiffs' allegations regarding the agreement to conspire to commit mail and wire fraud are conclusory. The Complaint contains no date when an agreement took place. . . . The Complaint and RICO Case Statement contain no other allegations about who made the agreement, when the agreement was made, or how the Defendants made the agreement."); *Twombly*, 550 U.S. at 556-57 ("[A]n allegation of parallel

conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."). Instead, Plaintiffs reference nearly 460 pages of allegations[8], leaving the Court to discern the relevant allegations of misrepresentations and omissions. Plaintiffs' allegations are also vague and conclusory because they do not go beyond general allegations of fraudulent misrepresentations and material omissions. Moreover, they rely heavily on the actions of OSA and fail to specify the actions of Citigroup as to each Plaintiff.

Therefore, because Plaintiffs have not sufficiently pled that Citigroup agreed to commit two predicate acts or that Citigroup agreed to the overall objective of the alleged conspiracy, Plaintiffs fail to state a cognizable claim for RICO conspiracy. Accordingly, Count II shall be dismissed.

III. Count IV — Plaintiffs' Common Law Aiding and Abetting Fraud Claim

"Under Florida law, to successfully plead the claim of aiding and abetting fraud, the plaintiff must allege the: (1) the existence of the underlying fraud; (2) knowledge of the fraud; and (3) the defendant provided substantial assistance to the commission of the fraud." *Codeventures, LLC v. Vital Motion Inc.*, 20-21574-CIV, 2021 U.S. Dist. LEXIS 56182, 2021 WL 1131531, at * 5 (S.D. Fla. Mar. 24, 2021) (citing *Gilison v. Flagler Bank*, 303 So. 3d 999, 1002 (Fla. 4th DCA 2020) (quotations and brackets omitted). In the instant action, the parties do not dispute

[8] Plaintiffs repeat and reallege paragraphs 1 through 1708 (pages 1-459) into Count II. [ECF No. 187 ¶ 1835].

the existence of the underlying fraud. Thus, Plaintiffs' aiding and abetting claim turns on whether Citigroup had knowledge of the fraud and provided substantial assistance to the commission of the fraud. The Court addresses each in turn.

A. Actual knowledge

As to the second element, "[i]n order for a claim of aiding and abetting to survive a motion to dismiss, the plaintiff must allege that the defendant had actual knowledge of the underlying wrongdoing. *Lamm v. State St. Bank & Tr. Co.*, 889 F. Supp. 2d 1321, 1332 (S.D. Fla. 2012) (hereinafter *Lamm I*), *aff'd sub nom. Lamm v. State St. Bank & Tr.*, 749 F.3d 938 (11th Cir. 2014) (hereinafter *Lamm II*). Plaintiffs allege that Citigroup had actual knowledge of the fraud because: (1) it knowingly approved false documentation submitted by OSA to Citigroup's ICG; (2) it had actual knowledge that OSA was making fraudulent misrepresentations and material omissions to its creditors, bondholders, and vendors; (3) it knowingly participated in OSA's fraud; (4) it admitted that it was responsible for the fraudulent scheme, showing that it agreed with OSA to commit fraud by making fraudulent misrepresentations and material omissions to its vendors, creditors, and bondholders; (5) CNBV[9] found that ten of Citigroup's employees had violated Mexican criminal law by extending loans its officers knew the recipient(s) could not repay and because OSA's CEO and employees submitted forged documents to obtain cash advances from Citigroup; and (6) a Mexican criminal court issued

[9] CNBV is the Mexican banking regulator, the *Comision Nacional Bancaria y de Valores. See* [ECF No. 187 ¶ 7].

arrest warrants against three Citigroup employees for the violations detailed in the CNBV report. [ECF No. 187 ¶¶ 1908-14]. Contrarily, Citigroup argues that Plaintiffs' pleadings merely suggest that Citigroup "disregarded red flags or atypical activities or transactions or that because of its relationship with OSA it must or should have known about the OSA fraud." [ECF No. 190 at 51] (quotations omitted).

The Court agrees that Plaintiffs' TAC does not sufficiently allege that Citigroup had actual knowledge of the underlying fraud. "[W]hile the element of actual knowledge may be alleged generally, the plaintiff still must accompany that general allegation with allegations of specific 'facts that give rise to a strong inference of actual knowledge regarding the underlying fraud.'" *Lamm I*, 889 F. Supp. at 1332 (citation omitted). While Plaintiffs' aiding and abetting fraud claims provides *some* particularity, the pleadings still fall short of alleging facts that would give rise to a strong inference that Citigroup had actual knowledge of the underlying fraud.

For example, Plaintiffs allege that Citigroup approved false documentation submitted by OSA to Citigroup's ICG as support for actual knowledge, but fail to allege *how* Citigroup knew the documents to be false or were otherwise forged, *when* such approvals occurred, *which* Citigroup employees approved the documents, etc. The same is true for Plaintiffs' argument that Citigroup actually knew that OSA's representations or omissions were fraudulent. Plaintiffs do not allege *how* or *when* Citigroup became aware of OSA's misrepresentations or omissions. Other than conclusory statements that

Citigroup had actual knowledge, the pleadings suggest that Citigroup *should have known* that the documents were forged or that OSA's representations and material omissions were fraudulent, which does not satisfy the standard for aiding and abetting. *See id.* ("Conclusory statements that a defendant 'actually knew' [are] insufficient to support an aiding and abetting claim where the facts in the complaint only suggest that the defendant 'should have known that something was amiss.'") (quoting *Platinum Ests., Inc. v. TD Bank, N.A.*, No. 11-60670-CIV, 2012 U.S. Dist. LEXIS 30684, 2012 WL 760791, at *3 (S.D. Fla. Mar. 8, 2012)).

Further, as the Court addressed in the preceding section, Plaintiffs' account of Citigroup's purported admission (that it was responsible for the fraudulent scheme via Corbat's message to Citigroup employees) is misleading. *See* [ECF No. 83-4]. While Corbat states that Citigroup terminated one employee, "who [it] **believe[d] was directly involved in the fraud**," he did not state that the employee had knowledge of the fraud. *Id.* at 2 (emphasis added). In fact, in the following sentence, Corbat states that "[Citigroup] would hold accountable any employee who enabled it, whether through lax supervision, circumvention of [the company's] controls, violations of [its] Code of Conduct, or otherwise." *Id.* While Plaintiffs point to this statement as an admission of fraud, it is not clear that it is so. As noted above, when read in its full context, a reasonable person could infer that Citigroup may have terminated employees because of their failure to identify the presence of fraud by properly enforcing or applying the safeguards Citigroup had in place. Therefore,

the allegations do not lead this Court to draw a strong inference that Plaintiff had knowledge of the underlying fraud.

The Court is also unpersuaded by Plaintiffs' arguments regarding the Mexican government and CNBV's conclusions surrounding Citigroup employees' culpability with respect to Mexican criminal law. Mexican law does not necessarily mirror the standard this Court must apply. Thus, Plaintiff cannot merely rely on the conclusions of the Mexican government regarding Citigroup's knowledge of the underlying fraud and scheme. This Court must come to its own conclusion based on the allegations in the TAC and Florida and federal law. That said, for the reasons noted above and based upon the pleadings, this Court is unable to draw an inference that Citigroup—whether through its agents or employees—had actual knowledge of the underlying fraud.

B. Substantial assistance

As to the third element, the Court finds that Plaintiffs do not adequately allege that Citigroup provided substantial assistance to advance the commission of the fraud. "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." *Chang v. JPMorgan Chase Bank, N.A.*, 845 F.3d 1087, 1098 (11th Cir. 2017) (citation omitted). Citigroup argues, albeit without elaboration, that Plaintiffs have not sufficiently shown that it rendered substantial assistance because: (1) liability can only exist if the defendant knowingly renders substantial assistance; (2) providing basic

banking services does not suffice; (3) Citigroup did not owe Plaintiffs a duty of disclosure; and (4) only scienter of the high conscious intent suffices. [ECF No. 190 at 51-52]. Contrarily, Plaintiffs argue that Citigroup's substantial assistance consisted of: (1) knowingly approving false documentation OSA submitted to the ICG; (2) violating its own internal controls relating to the cash advance facility; (3) allowing OSA to control the cash advance facility in violation of its own internal policies and procedures; (4) providing cash advances that exceeded the amounts of the underlying Pemex contracts; (5) increasing OSA's cash advance limits in violation of its internal policies and procedures; and (6) sanctioning OSA's false financial projections in financial statements, the Pareto Materials[10], and other communications and materials. [ECF No. 187 ¶ 1916].

[T]o establish that a bank substantially assisted a fraudulent scheme . . . knowledge of the underlying fraud is the crucial element." *Chang*, 845 F.3d at 1098. As the Court has already noted above, Plaintiffs insufficiently plead or otherwise show that Citigroup had actual knowledge of the underlying fraud. Despite Plaintiffs' contention that Citigroup had a "duty to disclose material omitted information, and correct misstatements made

[10] "To solicit a trustee and investors for the 2013 Bond Issuance, Pareto prepared materials for distribution among potential trustees and investors. . . . The Pareto Materials include but are not limited to the presentations, credit models, term sheet, and offering memorandums discussed [throughout the TAC]." [ECF No. 187 ¶ 311].

by others about which it was aware, regarding OSA's financial condition to Plaintiffs," [ECF No. 194 at 31], the Court cannot conclude that any such duty existed here. *See Chang*, 845 F.3d at 1098 (finding that the bank owed a fiduciary duty to the plaintiff because it *knew* of the funds being held in escrow and *of the underlying fraud*.). Further, Plaintiffs' argument that Citigroup failed to follow its own policies and procedures is also insufficient to establish knowledge. *See Isaiah v. JPMorgan Chase Bank, N.A.*, No. 16-CIV-21771, 2017 U.S. Dist. LEXIS 190051, 2017 WL 5514370, at *3 (S.D. Fla. Nov. 15, 2017) ("Allegations that a bank failed to adhere to an appropriate standard of care or to follow relevant policies, procedures, or regulations are likewise insufficient to demonstrate actual knowledge for the purposes of an aiding and abetting claim.") (citing *Groom v. Bank of Am.*, No. 08-CV-2567, 2012 U.S. Dist. LEXIS 2374, 2012 WL 50250, at *1 (M.D. Fla. Jan. 9, 2012)).

Accordingly, as Plaintiffs insufficiently plead the second and third elements for aiding and abetting—that Citigroup had actual knowledge of the underlying fraud and provided substantial assistance—Count IV shall be dismissed.

IV. Count V — Plaintiffs' Conspiracy to Commit Fraud Claim

To state a claim for conspiracy to commit fraud under Florida law, Plaintiffs must establish: "(a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and

(d) damage to plaintiff[s] as a result of the acts done under the conspiracy." *Cordell Consultant, Inc. Money Purchase Plan and Trust v. Abbott*, 561 F. App'x 882, 886 (11th Cir. 2014) (citing *Raimi v. Furlong*, 702 So. 2d 1273, 1284 (Fla. Dist. Ct. App. 1997)). Despite arising under Florida law, Plaintiffs' civil conspiracy claim is subject to Rule 9(b)'s heightened pleading standard. *See Meridian Tr. Co. v. Batista*, No. 17-23051, 2018 U.S. Dist. LEXIS 166556, 2018 WL 4693533, at *6 (S.D. Fla. Sep. 26, 2018) ("Conspiracy claims sounding in fraud must also meet Rule 9(b)'s heightened particularity requirements.") (citation and brackets omitted). Furthermore, "[g]eneral allegations of conspiracy are inadequate. A complaint must set forth clear, positive, and specific allegations of civil conspiracy." *Id.* (citing *Eagletech Commc'ns, Inc. v. Bryn Mawr Inv. Grp., Inc.*, 79 So. 3d 855, 863 (Fla. 4th DCA 2012) (quotations omitted).

Here, Citigroup argues that Plaintiffs do not sufficiently state a cause of action for conspiracy to commit fraud under Florida law because the TAC fails to plead specific facts supporting Plaintiffs' allegations that it agreed with OSA to defraud Plaintiffs. [ECF No. 190 at 52]. Plaintiffs argue that the Court should assume or infer that the parties agreed to commit the underlying fraud based on the "extensive allegations showing that [Citigroup] was an active participant in the fraud and [Citigroup's] knowledge of and participation in the fraud." [ECF No. 194 at 26]. Plaintiffs argue that this "necessarily constitutes an agreement to participate in the fraud against Plaintiffs with OSA." *Id.*

In further support of their argument, Plaintiffs cite to *Cordell*. *See* 561 F. App'x at 886. There, the Eleventh Circuit found that the plaintiff sufficiently stated particularized allegations that satisfied both the agreement and overt act elements when it alleged that: (1) two of the defendants advised the client to obtain a $7 million loan from the plaintiff knowing that the client would use false financial statements; (2) the client agreed and implemented the advice; and (3) the client joined the remaining two defendants—partners of the initial two defendants—who helped the client prepare and jointly submit false loan documents to the plaintiff in order to induce the loan. *Id.* Notwithstanding this Court's earlier finding that Plaintiffs insufficiently plead an agreement between Citigroup and OSA with respect to the underlying fraud, the allegations in the TAC do not rise to the level articulated by the Eleventh Circuit in *Cordell*. Plaintiffs have not adequately alleged an agreement or overt act taken by Citigroup showing its intent to defraud Plaintiffs. Unlike *Cordell*, Plaintiffs fail to show that Citigroup had actual knowledge of OSA's misrepresentations and omissions. Instead, Plaintiffs state that the agreement can be inferred from Citigroup's: (1) degree of knowledge of the conspiracy's objective[11]; (2) acts committed in furtherance of the conspiracy[12]; (3) close association with

[11] As the Court has noted throughout, Plaintiffs have not sufficiently shown that Citigroup had knowledge of the underlying fraud.

[12] Each of the purported acts in furtherance of the conspiracy were alleged under Plaintiffs' aiding and abetting claim. *See* [ECF No. 187 ¶¶ 1915, 1951]. The Court found these alleged acts be insufficient to show that Citigroup substantially assisted in the underlying fraud.

OSA[13]; and (4) direct financial incentives. [ECF No. 184 ¶ 1951].

As with Plaintiffs' RICO and RICO conspiracy claims, the TAC's allegations for common law conspiracy to commit fraud do not satisfy Rule 9(b)'s heightened pleading requirements because Plaintiffs fail to allege with particularity who made the agreement, when the agreement was made, or how Citigroup made the purported agreement with OSA. *See Meridian Tr. Co.*, 2018 U.S. Dist. LEXIS 166556, 2018 WL 4693533, at *9 (dismissing the plaintiff's civil conspiracy claims for failure to meet the heightened pleading requirements under Rule 9(b): "Aside from Plaintiffs' conclusory and unsupported assertions of an agreement, nowhere in the allegations cited above or in the Complaint do Plaintiffs provide any factual predicate to demonstrate that Itau 'agreed' with other defendants to defraud Plaintiffs"); *see also Jaffe v. Bank of Am., N.A.*, 667 F. Supp. 2d 1299, 1323 (S.D. Fla. 2009) ("Plaintiffs cannot prevail on their civil conspiracy theory because there is no evidence of any kind to support Plaintiffs' allegations that BoA and ABC entered into an agreement to defraud the Plaintiffs of money they put up to purchase a yacht.").

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[13] As the Court referenced under the analysis as to Plaintiffs' federal RICO conspiracy claim, mere affiliation between corporate defendants is insufficient to establish an agreement under 18 U.S.C. § 1962(d)). *See Davidson*, 763 F. Supp. at 1472 n.3; *see also Ferrell v. Durbin*, 311 F. App'x 253, 256 n.5 (11th Cir. 2009) ("[T]he Florida RICO statute is patterned after the Federal RICO statute and Florida RICO cases follow Federal RICO cases. Thus, the analysis of the Federal RICO claims is equally applicable to the Florida RICO claims.") (citing *Jackson*, 372 F.3d at 1263-64).

Finally, the bulk of Plaintiffs' allegations primarily rely on the actions of OSA. The Court addressed this very issue during its hearing on Citigroup's Motion to Dismiss the Second Amended Complaint. *See* [ECF No. 184]. Upon dismissing Plaintiffs' Second Amended Complaint, the Court noted that Plaintiffs must do a better job at alleging Citigroup's culpability based on its own actions, not just OSA's actions, and that it must provide specific details regarding Citigroup's actions as to each of the Plaintiffs. *Id.* at 48-49. Even so, Plaintiffs' pleadings fail yet again for this very reason. Accordingly, Count V shall be dismissed.

V. Counts VI and VII — Plaintiffs' Vicarious Liability Claims

"To state a claim based on vicarious liability, a plaintiff must set forth any ultimate facts that establish either actual or apparent agency." *Honig v. Kornfeld*, 339 F. Supp. 3d 1323, 1347 (S.D. Fla. 2018) (citation omitted). "Essential to the existence of an actual agency relationship is (1) acknowledgment by the principal that the agent will act for [them], (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent. . . . Conversely, apparent agency liability requires finding three essential elements: first, a representation by the principal to the plaintiff, which, second, causes the plaintiff reasonably to believe that the alleged agent is authorized to act for the principal's benefit, and which, third, induces the plaintiffs detrimental, justifiable reliance upon the appearance of agency." *Id.* at 1347-48 (citing *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1252 (11th Cir. 2014)) (quotations omitted). "To hold a principal liable for the [tort] of either an actual or apparent agent,

a plaintiff must sufficiently allege the elements of agency in addition to the elements of the underlying [] act of the agent for which the plaintiff seeks to hold the principal liable." *Id.* at 1348 (citation and quotations omitted).

Plaintiffs argue that Citigroup is vicariously liable for Banamex and Citibank N.A.'s ("Citibank")[14] fraudulent misrepresentations and material omissions. [ECF No. 187 ¶¶ 1961, 1973]. Citigroup does not dispute the existence of an actual or apparent agency relationship between Citigroup, as principal, and Banamex and Citibank, as its agents. Thus, the sufficiency of Plaintiffs' vicarious liability claims turns on whether Plaintiffs have sufficiently pled Citigroup's liability for the actions of Banamex and Citibank. Citigroup seeks dismissal of the two counts of vicarious liability under actual and apparent agency theories arguing: (1) Plaintiffs fail to show that OSA acted in furtherance of Citigroup's interests; (2) they are time-barred; and (3) Plaintiffs should be judicially estopped from now asserting their vicarious liability claims.

As noted above, Plaintiffs have sufficiently alleged an agency relationship between Citigroup, Banamex, and Citibank. Therefore, to survive the instant Motion to Dismiss, Plaintiffs need only allege the elements of the underlying acts of Banamex and Citibank for which they seek to hold Citigroup liable.[15] *See Honig*, 399 F. Supp. 3d

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[14] Citibank, Citigroup's primary U.S. lending and banking entity, acted as trustee for the 2008 Bond Issuance. [ECF No. ¶ 26]. The 2008 Bond Plaintiffs consist of Plaintiffs Adar, Ashmore, Copernico, HBK, ICE, Moneda, and Waypont. *Id.* ¶ 264.

[15] The Court rejects Defendant's suggestion that Plaintiffs must show that Citigroup's agents' wrongdoing was done in furtherance

at 1348 (citation omitted). Because Plaintiffs raise common law fraudulent misrepresentation claims, "[they] must allege facts which, if proven, are sufficient to show: (1) that the [agents] made a false statement concerning a specific material fact; (2) that the [agents] knew the statement was false; (3) that the [agents] intended the plaintiff[s] to [rely] on the statement; and (4) that the plaintiff[s] did rely on the statement to [their] detriment." *Meredith & Sons Lumber Co., Inc. v. Weyerhaeuser Co.*, No. 3:04CV283/RV, 2005 U.S. Dist. LEXIS 54461, 2005 WL 8163302, at *3 (S.D. Fla. Oct. 26, 2005).

Again, Plaintiffs' fraud claims are subject to Rule 9(b)'s heightened pleading requirements. Thus, Plaintiffs must "identify (1) the precise statements, documents or misrepresentations made; (2) the time and place of and persons responsible for the statement[s]; (3) the content and manner in which the statements misled the plaintiff[s]; and (4) what the [agents] [gain] by the alleged fraud." *W. Coast Roofing and Waterproofing, Inc. v. Johns Manville, Inc.*, 287 F. App'x 81, 86 (11th Cir. 2008) (citations omitted). In support of Count VII, The TAC alleges the following:

> Citigroup, particularly Citigroup employees such as Emilio Granja and Alfonso Ortega-Brehm, two senior ICG executives, and Louis Pisctelli, trustee of the 2008 Bond Issuance, made representations to Plaintiffs which caused Plaintiffs to reasonably believe that Citigroup's

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of Citigroup's interests. While perhaps applicable in the employment context, as was the case in *Brown v. Zav*eri, 164 F. Supp. 2d 1354, 1361 (S.D. Fla. 2001), that is simply not the standard the Court must apply here.

> agents—employees of Banamex and Citibank—were authorized to act for Citigroup's benefit, including by introducing those employees as working for both Citigroup and Banamex or Citibank (e.g., supra ¶ 1491) and using joint Banamex/Citigroup letterhead and email signatures (supra ¶¶ 63-64). On information and belief, Citigroup intended for Plaintiffs to hold such reasonable belief.

[ECF No. 187 ¶ 1974]. To show reliance, the TAC further alleges the following:

> These representations by Citigroup induced Plaintiffs' reasonable and justifiable reliance upon the appearance of agency between (1) Citigroup as principal, which Plaintiffs recognized as a major international financial institution; and (2) Banamex and Citibank as agents. Plaintiffs further reasonably and justifiably relied on Banamex's and Citibank's fraudulent misrepresentations and material omissions through their employees and agents by deciding to do business or continue doing business with OSA.

Id. ¶ 1976. These allegations are insufficient because Plaintiffs fail to identify: (1) the fraudulent misrepresentations Banamex and/or Citibank made as agents of Citigroup; (2) the time and place of those misrepresentations; and (3) the specific misrepresentations on which Plaintiffs relied. *See Fernau*, 847 F. App'x at 622 (noting that plaintiffs' statements "[provide] no information about which of the specifically alleged

misrepresentations and omissions, if any, induced them to purchase . . . or even whether they read the materials [] provided"); *see also Wilding*, 941 F.3d at 1128 (11th Cir. 2019) ("A bare allegation of reliance on alleged misrepresentations, bereft of any additional detail, will not suffice under Rule 9(b)."). Therefore, Plaintiffs fail to sufficiently allege one or more of the heightened pleading requirements for Count VII.

As to Count VI, Plaintiffs offer no allegations in support of their vicarious liability claim for fraudulent misrepresentation based on actual agency. *See id.* ¶¶ 1959-70. Instead, Plaintiffs use most of the allegations in support of Count VI to establish an actual agency relationship between Citigroup, Banamex, and Citibank. *Id.* ¶¶ 1962-68. None of the allegations clearly identify the purported fraudulent misrepresentations, the individuals who made them, or the time, location, or manner of the fraudulent misrepresentations. Thus, Plaintiffs also fail to meet the heightened pleading requirements for Count VI.

Because Plaintiffs' vicarious liability claims for fraudulent misrepresentation based on actual and apparent agency fail to satisfy Rule 9(b)'s heightened pleading requirements, Counts VI and VII shall be dismissed. Thus, the Court need not address Citigroup's arguments regarding the applicable statute of limitations and judicial estoppel.

CONCLUSION

Based on the foregoing, it is **ORDERED AND ADJUDGED** that Defendant Citigroup, Inc.'s Motion to Dismiss, [ECF No. 190], is **GRANTED** as follows:

(1) This action is **DISMISSED WITHOUT PREJUDICE.**[16]

(2) This action shall be **CLOSED**, and all pending motions, are **DENIED AS MOOT**.

DONE AND ORDERED in Chambers at Miami, Florida, this 25th day of August, 2023.

/s/ Darrin P. Gayles
DARRIN P. GAYLES
UNITED STATES
DISTRICT JUDGE

[16] There may be a sufficient basis to dismiss this action with prejudice since the Court previously dismissed the Second Amended Complaint because of similar pleading deficiencies. *See* [ECF No. 183]; *see also Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1057 (11th Cir. 2015) ("Three attempts at proper pleading are enough."). However, the Court will consider granting leave to amend upon the filing of a motion accompanied by a proposed Fourth Amended Complaint that cures the deficiencies outline in this Order. Leave must be requested within twenty (20) days of this Order. Should the Court grant leave to file a Fourth Amended Complaint, Plaintiffs must do so "discretely and succinctly." *Weiland v. Palm Beach Cnty. Sheriffs Off.*, 792 F.3d 1313, 1320 (11th Cir. 2015) (quoting *T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520, 1544 n.14 (11th Cir. 1985) (Tjoflat, J., dissenting)). Moreover, because the Court finds that dismissal is warranted as to all the Plaintiffs, the Court need not address Citigroup's argument regarding Plaintiff Nordic Trustee's standing.

APPENDIX C

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-13152

OTTO CANDIES, LLC, ADAR MACRO FUND LTD., ASHMORE EMERGING MARKETS DEBT AND CURRENCY FUND LIMITED, ASHMORE EMERGING MARKETS HIGH YIELD PLUS FUND LIMITED, *et al.*,

Plaintiffs-Appellants,

versus

CITIGROUP INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:16-cv-20725-DPG

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before JILL PRYOR, BRANCH, and GRANT, *Circuit Judges.*

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 40. The Petition for Panel Rehearing also is DENIED. FRAP 40.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-12663

D.C. Docket No. 1:16-cv-20725-DPG

OTTO CANDIES, LLC, *et al.*,

Plaintiffs-Appellants,

versus

CITIGROUP, INC.,

Defendant-Appellee.

Filed July 1, 2020

Appeal from the United States District Court
for the Southern District of Florida

Before JORDAN and NEWSOM, *Circuit Judges*, and HALL,[1] *District Judge.*

JORDAN, *Circuit Judge*:

Two American plaintiffs. Thirty-seven foreign plaintiffs. One American defendant. A fraudulent scheme allegedly taking place here and in Mexico, with the American defendant allegedly engaging in fraudulent activity in the United States. Assumptions, but no evidence, about where the key documents and witnesses are located.

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[1] Honorable James Randal Hall, Chief United States District Judge for the Southern District of Georgia, sitting by designation.

The district court, faced with this paradigm, granted the American defendant's motion to dismiss for *forum non conveniens*. After reviewing the record, and with the benefit of oral argument, we reverse and remand for further proceedings. First, the district court mistakenly gave only "reduced" deference to the American plaintiffs' choice of forum. Second, the American defendant—which had the burden of persuasion—did not support its claims that most of the relevant documents and witnesses are located in Mexico.

I

In reviewing a motion to dismiss for *forum non conveniens*, we accept as true the factual allegations in the complaint to the extent they are uncontroverted by affidavits or other evidence, or have not been challenged in the context of an evidentiary hearing. We also draw all reasonable inferences in favor of the plaintiffs. *See Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 845 (11th Cir. 1988) (reviewing Rule 12(b) motions to dismiss for ineffective service of process, lack of personal jurisdiction, and improper venue). *See also Shi v. New Mighty U.S. Tr.*, 918 F.3d 944, 948, 440 U.S. App. D.C. 105 (D.C. Cir. 2019) (accepting the plaintiffs' allegations of facts as true on a motion to dismiss for *forum non conveniens*); *Aguas Lenders Recovery Grp. v. Suez, S.A.*, 585 F.3d 696, 697 (2d Cir. 2009) (explaining that, on appeal from a *forum non conveniens* dismissal without a factual hearing, the court accepts the plaintiff's facts as true). The following facts are taken from the plaintiffs' amended complaint and have not been contested by affidavits or other evidence. We set them out in detail because of their importance.

A

Oceanografía S.A. de C.V., a now-bankrupt Mexican company, provided oil drilling services to Petròleos Mexicanos S.A. ("Pemex" for short), Mexico's state-owned oil and gas company. Grupo Financiero Banamex S.A. de C.V. (the "Banamex Group") is a wholly owned subsidiary of Citigroup and has its principal place of business in Mexico. Banco Nacional de México, S.A. ("Banamex" for short), also based in Mexico, is a wholly owned subsidiary of the Banamex Group. Banamex is therefore an indirect subsidiary of Citigroup.

In 2008, Citigroup established credit facilities within Banamex to provide cash advances to Oceanografía and fund its operations with Pemex. A division of Citigroup based in New York, called the Institutional Clients Group, was responsible for developing and overseeing the credit facilities, and Citigroup supervised the entire arrangement. In exchange for the cash advances, Citigroup charged Oceanografía a high interest rate and obtained the right to collect repayment directly from Pemex. Because Pemex is state-owned (and perhaps unlikely to default), Citigroup's credit facility was profitable and low risk. Citigroup increased its cash advances on several occasions, bloating Oceanografía with debt up to half of its annual net revenues and far exceeding the value of the underlying Pemex contracts.

Citigroup was aware that Oceanografía was overleveraged because Oceanografía sent audited financial statements and documents detailing its operational and financial condition. For each increase of the credit facility, Citigroup prepared a memorandum based on credit

application forms that Oceanografía provided. The forms included work estimates for the Pemex contracts, as well as Pemex's signed authorizations, and were supposed to be subject to Citigroup's internal review procedures. Citigroup did not perform the review procedures, however, and granted advances knowing they were based on authorization documents with forged Pemex signatures.

Citigroup saved Oceanografía's credit forms to its internal network. Because Citigroup and Oceanografía communicated directly through Citigroup's servers in the United States, the falsified Pemex documents and related communications are also located in the United States and are in Citigroup's possession. Several Citigroup employees who oversaw the program and approved the cash advances are (or were) located in Miami and New York.

Citigroup knew about Oceanografía's unstable financial condition not only through the cash advance program, but also because it became intimately involved in other aspects of Oceanografía's business. Citigroup acted as the trustee and paying agent on Oceanografía's 2008 bond issuance, advised Oceanografía on plans to acquire assets, represented the company in pursuing investors, and supervised the creation of payment trusts for the benefit of its trade creditors.

In 2014, the Mexican government discovered that Oceanografía had failed to provide insurance policies for its Pemex contracts and banned it from executing new contracts with Pemex. The government then learned of the cash advance scheme and investigated further. Mexican banking regulators found that ten Citigroup employees had violated Mexican criminal laws, and

Mexican authorities pursued charges against Citigroup employees for causing Banamex to violate banking laws.

The scandal began to unfold in Mexico but reverberated in the United States. It prompted Citigroup to conduct an internal review of its cash advance program, and Samuel Libnic, based in Miami as Citigroup's head of legal matters for Latin America, led the project with support from at least one other Miami-based employee. Citigroup publicly admitted that some its employees had been criminally involved in the fraudulent scheme and announced that it had terminated employees both "inside and outside" of Mexico.

The scandal also led the SEC and the Justice Department to open domestic investigations into Citigroup. Citigroup disclosed these investigations in its SEC annual report, stating that they had "included requests for documents and witness testimony." Several plaintiffs have now filed civil actions in the United States related to the fraudulent scheme.

B

In this case, thirty-nine plaintiffs—two American and thirty-seven foreign—sued Citigroup (and only Citigroup) in federal court. They claim that the fraudulent cash advances lured them into investing in or contracting with Oceanografía and that "Citigroup and/or Oceanografía" knowingly misrepresented Oceanografía's financial stability. They assert substantive and conspiracy claims under the RICO Act, 18 U.S.C. §§ 1962(c)-(d), as well as state-law claims for fraud, aiding and abetting fraud, conspiring to commit fraud, and breach of fiduciary duty. The plaintiffs allege that some of the misrepresentations

were made during meetings in the United States, on telephone calls to and from the United States, in emails located on servers in the United States, and in written materials reviewed, revised, or approved by Citigroup personnel in the United States.

Some of the plaintiffs are shipping companies which leased vessels to Oceanografía. They allege that Citigroup's fraudulent misrepresentations and omissions induced them to transact with Oceanografía while it was financially unstable, causing them to lose substantial amounts of money on their leases. One of those shipping lessors, Otto Candies, LLC, is a citizen of the United States and alleges that it received fraudulent communications in Louisiana.

Another group of plaintiffs comprises Oceanografía bondholders. They claim that Citigroup's fraudulent misrepresentations and omissions induced them to purchase Oceanografía bonds issued in the United States on which Oceanografía eventually defaulted. One of those bondholders, Waypoint Asset Management LLC, is an investment company based in the United States. It acquired bonds in part based on allegedly fraudulent communications made in New York.

Citigroup moved to dismiss the original complaint for *forum non conveniens* or, in the alternative, under Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. In response, the plaintiffs moved for limited discovery concerning factual allegations that Citigroup had made in its motion—namely, that all of the witnesses and evidence germane to the claims are located in Mexico, that the cash advance contracts were negotiated and executed

in Mexico, and that none of the alleged misconduct took place in the United States. The plaintiffs argued that Citigroup's assertions contradicted or misrepresented the allegations in the complaint or were not supported by evidence. Citigroup opposed discovery, arguing that its grounds for *forum non conveniens* dismissal were based entirely on information in the complaint. The district court denied the plaintiffs' motion, concluding that the plaintiffs failed to establish good cause for discovery and that their requests were overbroad.

The plaintiffs then filed an amended complaint, and Citigroup again moved to dismiss on the same grounds. The district court heard argument and granted Citigroup's motion to dismiss for *forum non conveniens*.

II

Forum non conveniens, a common law doctrine, provides that a district court has inherent power to decline to hear a case in which there is proper jurisdiction and venue. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507, 67 S. Ct. 839, 91 L. Ed. 1055 (1947). It is a flexible tool, used to prevent litigation that would "establish oppressiveness and vexation to a defendant out of all proportion to [the] plaintiff's convenience" or that is unsuitable for the domestic forum because of "the court's own administrative and legal problems." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981) (quoting *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524, 67 S. Ct. 828, 91 L. Ed. 1067 (1947)) (alterations omitted).

Because the plaintiff's forum choice "should rarely be disturbed," *Gulf Oil*, 330 U.S. at 508, a *forum non conveniens* dismissal is subject to three conditions. First,

as a threshold matter, a court should not dismiss an action for *forum non conveniens* unless there is an adequate and available alternative forum. *See Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1310-11 (11th Cir. 2001). Second, the balance of the relative private and public interests must weigh in favor of dismissal to justify invocation of the doctrine. *See id.* Private interests include the parties' relative ease of access to sources of proof, access to witnesses, ability to compel testimony, the possibility of viewing the premises, and the enforceability of a judgment. *See Gulf Oil*, 330 U.S. at 508. Public interests include a sovereign's interests in deciding the dispute, the administrative burdens posed by trial, and the need to apply foreign law. *See id.* at 508-09. Third, the plaintiffs must be able to reinstate their suit in the alternative forum without undue inconvenience or delay. *See Leon*, 251 F.3d at 1310-11. "A defendant has the burden of persuasion as to all elements of a *forum non conveniens* motion[.]" *Id.* at 1311.[2]

With respect to the private interests, courts begin with the presumption that a domestic plaintiff has chosen a sufficiently convenient forum, and it is therefore incumbent upon the defendant "to prove vexation and oppressiveness that are out of all proportion to the plaintiff's convenience." *Id.* at 1314 (internal quotation marks and citation omitted). A defendant invoking *forum non conveniens* with respect to a domestic plaintiff therefore "bears a heavy burden in opposing the plaintiff's chosen forum." *Sinochem*

[2] The district court concluded that Mexico was an adequate and available alternative forum, and that the plaintiffs would not be subject to undue inconvenience or delay if they had to refile there. The plaintiffs do not challenge these conclusions on appeal, so we do not address them further.

Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 430, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007). The defendant must offer "positive evidence of unusually extreme circumstances," and the district court must be "thoroughly convinced that material injustice is manifest before exercising any such discretion as may exist to deny a United States citizen access to the courts of this country." *SME Racks, Inc. v. Sistemas Mecánicos Para Electrónica*, 382 F.3d 1097, 1101 (11th Cir. 2004) (quoting *Burt v. Isthmus Dev. Co.*, 218 F.2d 353, 357 (5th Cir. 1955)).

Foreign plaintiffs are also entitled to a presumption in favor of their forum choice, albeit a presumption that "applies with less force." *Sinochem Int'l*, 549 U.S. at 430 (quoting *Piper Aircraft*, 454 U.S. at 255-56). Reduced deference is "not an invitation to accord a foreign plaintiff's selection of an American forum *no* deference since dismissal for *forum non conveniens* is the exception rather than the rule." *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 45-46 (3d Cir. 1988) (citation omitted). *Accord R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 168 (2d Cir. 1991).[3]

We review a *forum non conveniens* dismissal for abuse of discretion, recognizing that a district court has

[3] The initial presumption is an important mooring for an otherwise flexible doctrine. *See Simon v. Republic of Hungary*, 911 F.3d 1172, 1182, 439 U.S. App. D.C. 147 (D.C. Cir. 2018) ("The *forum non conveniens* doctrine comes with ground rules. The starting point is a strong presumption in favor of the plaintiff's choice of the forum in which to press her suit."); 14D Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, & Richard D. Freer, Federal Practice and Procedure § 3828 (4th ed. 2013) ("Without knowing the level of deference to accord the plaintiff's choice of forum, it is not clear how one would assess whether the *Gulf Oil* factors outweigh the plaintiff's choice.") (italics added).

wide latitude to assess the relevant private and public interest factors. *See Piper Aircraft*, 454 U.S. at 257. We may reverse when the district court makes a clear error of judgment or applies the wrong legal standard, such as an incorrect presumption regarding the plaintiff's forum choice. *See SME Racks*, 382 F.3d at 1102 (reversing *forum non conveniens* dismissal because the district court "failed to articulate the relevant standards and failed to apply any presumption in its analysis").

III

Before assessing the private and public interest factors in this case, the district court acknowledged that the two American plaintiffs ordinarily would be entitled to a strong presumption in favor of their forum choice, whereas the remaining thirty-seven foreign plaintiffs would not be entitled to the same level of deference. But because all the plaintiffs had decided to invest in Oceanografía, a Mexican company doing business in Mexico, the district court determined that the plaintiffs could not "feign surprise at potentially having to litigate a resulting dispute in Mexico." It therefore applied only a "reduced" deference to the two domestic plaintiffs' forum choice, just as it did for the foreign plaintiffs. This, we conclude, was incorrect.

A

The deference owed to the forum choice of domestic plaintiffs cannot be reduced solely because they chose to invest in a foreign entity and may have expected to litigate abroad on certain matters. Neither the Supreme Court nor the Eleventh Circuit has adopted a "foreign investment" standard, and such a rule would be in tension with existing precedent. After all, "the central purpose

of any *forum non conveniens* inquiry is to ensure that the trial is convenient[.]" *Piper Aircraft*, 454 U.S. at 256. *See also King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1383 (11th Cir. 2009) ("[T]he appropriate inquiry is indeed convenience.").

A court begins with the reasonable assumption that "[w]hen the plaintiff has chosen the home forum . . . this choice is convenient." *Piper Aircraft*, 454 U.S. at 255-56. That a plaintiff invested in a foreign entity or country does not mean that the chosen domestic forum will be inconvenient, or even that it should be presumed to be inconvenient. It is possible that the most significant events giving rise to the plaintiff's claims took place in the United States or that most of the relevant documents or witnesses would be located here, even though foreign investment is involved. *See* 14D Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, & Richard D. Freer, Federal Practice and Procedure § 3828 (4th ed. 2013) ("In some instances, controversies that at first blush appear to be foreign actually have a meaningful connection with the United States or its domestic policies because there have been relevant transnational contacts."). In short, investment in a foreign entity or country alone is not enough to dilute the threshold presumption that an American citizen has chosen the most convenient forum. And—except where there is a valid forum-selection clause, *see Atl. Marine Constr. Co. v. U.S. Dist. Court*, 571 U.S. 49, 63, 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013)—the plaintiff's reasonable expectations are beside the point.

We acknowledge that at least one case supports the proposition which the district court applied and which Citigroup now urges us to adopt. In *EIG Energy Fund*

XIV, L.P. v. Petróleo Brasileiro S.A., 246 F. Supp. 3d 52, 78 (D.D.C. 2017), the district court discounted the presumption in favor of the forum choice of domestic plaintiffs because their decision to invest abroad "put them on notice that they might be required to litigate disputes in a foreign forum," such that litigation abroad was "reasonably foreseeable." Nevertheless, the court ultimately denied the defendants' motion to dismiss for *forum non conveniens*. *See id.* at 83.

In our view, the district court in *EIG* misread prior cases in deducing a broad rule that "plaintiffs involved in disputes arising from international commerce receive less choice-of-forum deference than plaintiffs engaging in domestic transactions." *Id.* at 78 (citing *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 795 (5th Cir. 2007), *Intec USA, LLC v Engle*, 467 F.3d 1038, 1040 (7th Cir. 2006), and *Guidi v. Inter—Continental Hotels Corp.*, 224 F.3d 142, 147 (2d Cir. 2000)). Of the cases relied on by the district court in *EIG*, the Fifth Circuit's decision in *DTEX* is the only one arguably on point, and even that case did not reduce the deference given to the domestic plaintiff's forum choice solely because of foreign investment.[4]

In *DTEX*, the operative fact was not that the plaintiff

[4] The two other cases cited in *EIG* are not on point. The Second Circuit in *Guidi* reversed a *forum non conveniens* dismissal in part because the "failure to grant [the plaintiff's] choice of an American forum significant deference was unsound." 224 F.3d at 146. The Seventh Circuit in *Intec USA* offered some thoughts about *forum non conveniens* and expressed "doubt" that the threshold deference "has controlling force in litigation among firms all of which trade worldwide," but it ultimately vacated the *forum non conveniens* dismissal because the district court lacked subject-matter jurisdiction. *See* 467 F.3d at 1040, 1044.

did business with a foreign entity, but that it sued for an "injury occurring in a foreign country" and that the "alleged torts all occurred in Mexico." 508 F.3d at 795, 802. This is an important distinction, and one that appears in other international commerce cases.

For example, in *Sussman v. Bank of Israel*, 801 F. Supp. 1068 (S.D.N.Y. 1992), *aff'd*, 990 F.2d 71 (2d Cir. 1993), the district court explained that "[w]here an American plaintiff chooses to invest in a foreign country *and then complains of fraudulent acts occurring primarily in that country*, the plaintiff's ability to rely upon citizenship as a talisman against *forum non conveniens* dismissal is diminished." *Id.* at 1073 (emphasis added). In that case, the plaintiffs invested in an Israeli financial institution, alleged that they were defrauded "in Jerusalem" by the Israeli defendants, and "[a]ccording to [the] plaintiffs' theory, it was in Israel that the defendants hatched their illegal scheme," notwithstanding some "peripheral" activities in the United States. *See id.* at 1071, 1074. Given these allegations, the plaintiffs' citizenship and residence "d[id] not constitute the powerful, near-decisive factors for which they contend[ed]," although the ultimate burden of persuasion still rested with the defendant. *See id.* at 1074. *See also Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944, 951 (1st Cir. 1991) (because the "relevant events" surrounding the plaintiff's claims took place in Canada, it was "not surprising" that most of the documents and witnesses were in Canada as well); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1395 (8th Cir. 1991) ("When an American corporation doing extensive foreign business brings an action for injury occurring in a foreign country, many courts have partially discounted the plaintiff's United

States citizenship."). The rule described in cases like *Sussman* is therefore narrower and more nuanced than the one which Citigroup asks us to adopt.

As Citigroup acknowledges, moreover, neither the Supreme Court nor the Eleventh Circuit has squarely addressed whether it would be appropriate to reduce deference to a domestic plaintiff's forum choice in cases like *Sussman*. Nor have we considered whether some form of intermediate deference is ever permissible for American plaintiffs. *Compare Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1228 (9th Cir. 2011) (rejecting intermediate deference), *with Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001) (establishing "sliding scale" deference).

We need not answer those questions here. Although Citigroup vigorously argues that the claims here "arise from" foreign business dealings, the plaintiffs do not complain of conduct or injuries occurring primarily in Mexico. Taking the plaintiffs' allegations as true, Citigroup directed a scheme and engaged in acts in furtherance of that scheme from the United States, where it is based. The Institutional Clients Group was responsible for administering the allegedly fraudulent cash advance program from New York. Several employees involved in the alleged fraud were based in New York or Miami. And several of the allegedly fraudulent communications occurred in meetings on United States soil or in emails or calls directed to or maintained in the United States. As we read the complaint, this is a dispute focused on Citigroup's conduct in the United States, and so one would presume—at least initially—that a trial here would be more convenient (or would at least not be inconvenient).

Citigroup argues that the fraud against the plaintiffs was really perpetrated by Mexican entities in Mexico. But Citigroup did not present any evidence to support this contention, and its argument mischaracterizes the complaint, the thrust of which is, again, that Citigroup directed the scheme and caused the plaintiffs' injuries from its offices in the United States. Accepting that Banamex and Oceanografía were key players in the scheme, the plaintiffs still allege that the Institutional Clients Group "developed and oversaw" the credit facility program, approved fraudulent credit applications with knowledge of the risks, and circumvented internal review procedures—all in the United States.

Citigroup points to obscurities in the complaint regarding who committed certain acts, noting that the plaintiffs frequently allege that Citigroup "and/or" Oceanografía made fraudulent misrepresentations. Citigroup argues that the more specific allegations in the complaint confirm that Oceanografía and its controlling shareholder, Amado Yáñez, made "nearly all of the alleged misrepresentations." With respect to the domestic plaintiffs, Citigroup points out that they allege that "Mr. Yáñez and/or other Oceanografía principals traveled on dozens of occasions to Louisiana" to make the fraudulent misrepresentations to Otto Candies. Citigroup also submits that Waypoint's claims are "overwhelmingly directed towards" Oceanografía and Mr. Yáñez.

These points have some force, but the complaint's primary allegations are about Citigroup's involvement in the scheme *qua* administrator and supervisor. And, as Citigroup concedes, there are allegations in the complaint

that Citigroup communicated directly with some of the plaintiffs in the United States. For example, the plaintiffs allege that Citigroup and Otto Candies discussed over email the mechanics of the cash advance facility and that Citigroup misrepresented Oceanografía's financial situation in those communications. The plaintiffs also allege that Citigroup misrepresented Oceanografía's financial situation to other plaintiffs and, for example, induced them to renegotiate their loans with Oceanografía. Citigroup's response is that the specific allegations about its conduct are not relevant to the causes of action and therefore immaterial to the *forum non conveniens* analysis. For reasons we explain later, however, we have no basis at this stage to assess which allegations are material and which are superfluous.

Significantly, the plaintiffs chose to sue Citigroup—and no one else—for its alleged role in the fraud. They did not sue Mexican nationals—Banamex or Oceanografía, or their respective employees or agents—who *according to Citigroup* caused their injuries. We take no position on Citigroup's alternative grounds for dismissal under Rules 9(b) and 12(b)(6), but we note that when Citigroup argues for *forum non conveniens* dismissal because the complaint "directly implicate[s] an alleged fraud carried out by Mexican nationals in Mexico," it improperly assumes that it did not carry out the fraud. This is an argument on the merits, and not necessarily on whether the facts *as alleged* should be litigated in the United States.

Admittedly, it can sometimes be difficult to disentangle the merits of a complaint from a *forum non conveniens* inquiry. Whoever is ultimately responsible for the plaintiffs' alleged injuries may be a strong indicator

of where the most convenient forum is. If Citigroup is correct that in the end only the Mexican entities can be liable, then the plaintiffs should have sued those entities instead, in which case Mexico would have been the presumptively most convenient forum. But, again, the plaintiffs sued Citigroup, and not the Mexican entities. *Cf.* 7 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1623 (3d ed. 2019) (explaining that plaintiffs may sue one or more joint tortfeasors without joining others, and need not join every coconspirator if joinder is not feasible). If, on the other hand, the plaintiffs are correct that Citigroup is independently liable for its alleged role in overseeing, directing, or participating in the scheme, then presumably the United States would be the most convenient forum. Because at this stage we accept the complaint's allegations as true, we determine the applicable presumption from the plaintiffs' perspective, and not Citigroup's. *See Delong Equip.*, 840 F.2d at 845; *Shi*, 918 F.3d at 948.

Even as the parties quarrel over the nature of the complaint and the locus of events, there remains an elephant in the room—Citigroup. It is the only defendant in this case, and it is based in the United States. Not only that, it has offices in Miami and conducts substantial activities throughout the United States, including New York—where the Institutional Clients Group is based. One would therefore think that it would be more convenient for Citigroup to litigate in the Southern District of Florida than in Mexico.

This is yet another reason to leave the presumption for the plaintiffs' chosen forum in place and require that

Citigroup demonstrate—with positive evidence—why litigating on its home turf would be so oppressive and vexatious that a federal court should decline jurisdiction. When an American plaintiff sues an American defendant for conduct allegedly occurring in the United States, it should not be easy for the defendant to obtain a *forum non conveniens* dismissal. *See*, *e.g.*, *Galustian v. Peter*, 591 F.3d 724, 732 (4th Cir. 2010) (providing greater deference in favor of a domestic forum where "the defendant is a resident and citizen of the forum he seeks to have declared inconvenient for litigation"); *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 46 (2d Cir. 1996) (in weighing the *Gulf Oil* factors, "the court starts with a presumption in favor of the plaintiff's choice of forum, especially if the defendant resides in the chosen forum, as here"); *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 608 (3d Cir. 1991) ("This case is puzzling in that frequently the *forum non conveniens* issue is raised by a defendant sued away from home who seeks to convince the court that the balance of relevant factors should be tipped against requiring it to defend in a forum far from its home jurisdiction."). *Cf. Piper Aircraft*, 454 at 256 n.24 (citing *Pain v. United Techs. Corp.*, 637 F.2d 775, 797, 205 U.S. App. D.C. 229 (D.C. Cir. 1980), for the proposition that "citizenship and residence are proxies for convenience").

B

We now turn to Citigroup's argument that "where foreign plaintiffs significantly outnumber domestic plaintiffs, diminished deference should be applied to all of the plaintiffs' forum choice." Appellee's Br. at 17. Though addressed preemptively by the plaintiffs in their

initial brief, the district court did not reduce deference to the American plaintiffs based on the presence of foreign plaintiffs. It was only because the American plaintiffs invested in a foreign entity that the district court discounted the initial deference and placed them on par with their foreign counterparts. Because that was error, the district court on remand will need to afford the requisite deference to the American plaintiffs. It will then have to deal with a mixed group of foreign and domestic plaintiffs, potentially turning Citigroup's argument into a live issue. We therefore provide a few observations.

We have not found any cases holding that reduced deference to American plaintiffs is warranted when they sue alongside foreigners, but we have located a couple that state the opposite. In *Carijano*, 643 F.3d at 1228, the Ninth Circuit rejected the argument that *Piper Aircraft* stands for the proposition that "when both domestic and foreign plaintiffs are present, the strong presumption in favor of the domestic plaintiff's choice of forum is somehow lessened." And in *Simon*, 911 F.3d at 1183, the D.C. Circuit explained that "the addition of foreign plaintiffs does not render for naught the weighty interest of Americans seeking justice in their own courts." Citigroup cites two unpublished district court cases in support of its argument, but neither is convincing.[5]

[5] In *Takiguchi v. MRI Int'l, Inc.*, No. 2:13-cv-01183, 2015 U.S. Dist. LEXIS 147770, 2015 WL 6661479, at *3 (D. Nev. Oct. 29, 2015), the plaintiffs were entitled to limited deference not because the foreign plaintiffs outnumbered the American plaintiffs, but because the latter conceded that they were actually residents of Japan and Canada, and that one was a resident of Texas (not of Nevada, where the district court was located). The district court, in

There also does not appear to be any practical or doctrinal basis to reduce deference to domestic plaintiffs who sue alongside foreign plaintiffs, particularly when they all sue a single American defendant for conduct that they allege occurred in the United States. For one, the presence of foreign plaintiffs does not change the otherwise domestic nature of a complaint—here, that Citigroup committed wrongs in or from the United States, where it is based. *Cf. In re Air Crash Off Long Island, N.Y., on July 17, 1996*, 65 F. Supp. 2d 207, 217 (S.D.N.Y. 1999) (acknowledging that "the presence of foreign plaintiffs (who chose to sue in the United States) [did] not change the essentially American character of [the] case, which involve[d] a flight originating in the United States, a United States carrier, United States manufacturing defendants, and predominantly United States domiciliaries as passengers").

In addition, the purpose of *forum non conveniens* is to prevent the defendant from facing harassing and vexatious litigation out of all proportion to the plaintiffs' convenience. From Citigroup's perspective, then, the presence of

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any event, denied the motion to dismiss for *forum non conveniens*.

In *Fasano v. Juoqing Li*, No. 16-cv-8759, 2017 U.S. Dist. LEXIS 213555, 2017 WL 6764692, at *6 (S.D.N.Y. Dec. 29, 2017), *vacated and remanded sub nom., Fasano v. Yu Yu*, 921 F.3d 333 (2d Cir. 2019), the district court stated that "[b]ecause the foreign plaintiffs outnumber the domestic plaintiff, and because their financial interest in the action is much greater than the domestic plaintiff's interest, the Court accords diminished deference to Plaintiffs' choice of forum." But the *Fasano* district court did not cite any cases in support of that proposition, and its decision was vacated and remanded for failure to consider a forum selection clause in the contract at issue.

numerous foreign plaintiffs may not make the case more difficult to litigate in the United States. Citigroup may wish to take numerous depositions because of the sheer number of plaintiffs, but that would be true if there were thirty-nine American plaintiffs. What is significant for our purposes is that the presence of foreign plaintiffs would not necessarily lead to unwarranted burdens or additional travel for Citigroup to depose those plaintiffs. The district court has broad discretion over the location of depositions, *see DeepGulf, Inc. v. Moszkowski*, 330 F.R.D. 600, 609 (N.D. Fla. 2019) (collecting cases), and the general rule is that plaintiffs are required to make themselves available for examination in the district in which they bring suit. *See* 8A Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, Federal Practice and Procedure § 2112 (3d ed. 2010) (collecting cases). At the same time, the foreign plaintiffs will not be able to drag Citigroup to all corners of the globe to take corporate depositions, as there is a presumption that a defendant will be deposed in the district of its residence or principal place of business. *See DeepGulf*, 330 F.R.D. at 607 (collecting cases). All else being equal, the ratio of domestic to foreign plaintiffs does not necessarily have a bearing on Citigroup's convenience.[6]

There may be instances of blatant gamesmanship—for example, where a domestic plaintiff is added at the eleventh hour to strengthen the other plaintiffs' connections to the United States—such that reduced deference may be appropriate for all the plaintiffs. *See Vivendi SA v. T-Mobile USA Inc.*, 586 F.3d 689, 694-96

[6] We say "necessarily" because at this point Citigroup has not put forward any evidence to the contrary.

(9th Cir. 2009). But at this juncture, we see no evidence of improper forum shopping. Indeed, it would be ironic to fault the foreign plaintiffs for their willingness to travel to the United States to sue Citigroup in its country of citizenship.

Rather than reduce or enhance the deference owed to domestic or foreign plaintiffs, some courts have conducted a separate *forum non conveniens* analysis for each group. A bifurcated analysis may be appropriate, for example, where foreign and domestic plaintiffs filed separate lawsuits that were consolidated for administrative purposes, or where parties can be dropped or claims can be severed under Rule 21. *See Kolawole v. Sellers*, 863 F.3d 1361, 1372 (11th Cir. 2017); *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1335 (11th Cir. 2011); *King*, 562 F.3d at 1383-84; *Banco Latino v. Gomez Lopez*, 17 F. Supp. 2d 1327, 1333 (S.D. Fla. 1998).

We leave it to the district court to determine whether a bifurcated analysis is permissible or warranted in this case once the domestic and foreign plaintiffs are afforded their appropriate deference on remand. But we note that—procedural issues aside—a split analysis might be problematic in some respects. If the domestic plaintiffs are permitted to move forward in the district court, then dismissing the foreign plaintiffs would force Citigroup to defend against two actions (assuming the foreign plaintiffs refile in Mexico). That could defeat the purpose of *forum non conveniens*, particularly if the parties intend to rely on the same documents and witnesses in both countries. *See In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 370 (S.D.N.Y. 2002) (declining

to dismiss a foreign plaintiff with no *bona fide* connection to the chosen forum because the domestic plaintiffs in the consolidated action were permitted to move forward, and therefore the bulk of evidence would already be in the United States). Then again, this potential problem would be moot if the claims of the domestic plaintiffs are dismissed for *forum non conveniens*. These matters are for the district court to consider on remand.

Finally, we address and reject Citigroup's argument that the two American plaintiffs are only "nominal" litigants entitled to reduced deference. The district court found that these two plaintiffs were American citizens for purposes of its *forum non conveniens* analysis and said no more about whether their role in the lawsuit was legitimate. There has not been discovery on this issue and there is no evidence that these entities are not real parties-in-interest or that they otherwise lack standing to assert their claims.

C

In sum, it was inappropriate for the district court to discount or reduce the deference owed to the chosen forum of the American plaintiffs based on their decision to invest or transact business abroad. Nor was there any other reason to deviate from the normal rule that an American plaintiff suing in the United States is presumed to have chosen the most convenient forum. A remand is therefore warranted. *See SME Racks*, 382 F.3d at 1102 (reversing a *forum non conveniens* dismissal due to the district court's failure to afford the proper deference owed to domestic plaintiffs).

Our decision today does not guarantee that plaintiffs can avoid *forum non conveniens* dismissal by making vague allegations, or by strategically joining foreign plaintiffs together with domestic ones and suing a single domestic defendant. The plaintiff-friendly, facial reading of the complaint leads only to an *initial* presumption. That presumption is not dispositive, and a defendant can always marshal positive evidence to overcome it. *See*, *e.g.*, *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1449 (9th Cir. 1990) ("Although a defendant must meet an almost impossible burden in order to deny a citizen access to the courts of this country, the cases demonstrate that defendants frequently rise to the challenge.") (internal quotation marks and citation omitted). Citigroup had the opportunity to engage in limited discovery related to *forum non conveniens* and to present evidence in support of its motion. But, as explained below, Citigroup opposed discovery and failed to carry its burden.

IV

We now consider the *Gulf Oil* private and public interest factors. Although the district court had wide latitude to weigh the evidence and determine whether those factors pointed clearly toward dismissal, the threshold error on the deference owed to the domestic plaintiffs tainted its analysis. The error in effect switched the burden of persuasion and allowed Citigroup to obtain a *forum non conveniens* dismissal without presenting any evidence on these factors.

As noted earlier, Citigroup bore the burden of persuasion on all elements of its *forum non conveniens* motion. *See Leon*, 251 F.3d at 1311. A strong presumption in favor of the American plaintiffs should have forced

Citigroup to offer "positive evidence of unusually extreme circumstances" and "material injustice" to oust those plaintiffs from their chosen domestic forum. *See SME Racks*, 382 F.3d at 1101 (quoting *Burt*, 218 F.2d at 357). Yet Citigroup opposed discovery and offered no evidence on the private interest factors.

The district court also erred with respect to the foreign plaintiffs. Even though they were entitled to "somewhat" less deference than their domestic counterparts, that lesser degree of deference should not have removed Citigroup's burden entirely. By failing to proffer *any* positive evidence of private inconvenience, Citigroup failed to carry its burden as to both the domestic and foreign plaintiffs.

A

We begin with *Piper Aircraft*, which involved only foreign plaintiffs and therefore established the floor of a defendant's *forum non conveniens* burden. That case arose from a plane crash in Scotland. *See* 454 U.S. at 238-39. The plane was subject to Scottish air traffic control and operated through a Scottish air taxi service, and the pilot and passengers were all Scottish subjects and residents. *See id.* at 239. The Supreme Court held that, under these circumstances, the defendant's burden to demonstrate private inconvenience was not particularly heavy; the defendant was not required to "submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum." *Id.* at 258. At the same time, the defendant was required to "provide enough information to enable the [d]istrict [c]ourt to balance the

parties' interests." *Id.* The Supreme Court did not explain what would constitute "enough" information, so it is useful to examine the facts and history of the case to better delineate its holding.

Before the case reached the Supreme Court, the Third Circuit had reversed the district court's dismissal for *forum non conveniens*, concluding that the defendant did not "set[] forth the requisite specific information" of private inconvenience. *See Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 161 (3d Cir. 1980), *rev'd*, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981). But the district court had in fact relied on affidavits, including one that attested to the defendant's witnesses and their testimony on certain topics, albeit in broad strokes. *See Piper Aircraft*, 454 U.S. at 259 & n.27. The relevant affidavit did not identify witnesses by name, but offered general categories of witnesses—for example, by occupation or by role in the incident in question—as well as some expected topics of testimony. *See id. See also* Petition for Writ of Certiorari, *Piper Aircraft Co. v. Reyno*, Nos. 80-848 & 80-883 (filed Nov. 25, 1980), at Ex. F (Affidavit of Charles J. McKelvey). On that record, the Supreme Court held that "sufficient information was provided" to allow the district court to assess the relevant interests. *See Piper Aircraft*, 454 U.S. at 258-59. We therefore do not read *Piper Aircraft* as holding that any less information would have sufficed under the circumstances.[7]

[7] The affidavit provided, for example, that the defendant "would call as witnesses the owners and employees of the Scottish air-taxi company which owned and operated the aircraft and hired the pilot," that their testimony "would concern the cause of and liability for this accident," and that all "such persons are

When American plaintiffs sue in federal court, the defendant's burden is heavier. As we have long held, a defendant must come forward with "positive evidence of unusually extreme circumstances" such that the district court is "thoroughly convinced that material injustice is manifest before exercising any such discretion as may exist to deny a United States citizen access to the courts of this country." *SME Racks*, 382 F.3d at 1101 (quoting *Burt*, 218 F.2d at 357).[8]

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residents and citizens of Scotland." The affidavit also provided that the defendant "would call as witnesses the persons who were responsible for the training and licensing of the pilot of this aircraft," that their testimony "would concern the cause of the accident and the liability thereof," and that those witnesses also were residents and citizens of Scotland. The affidavit continued like this for five categories of witnesses. *See* Petition for Certiorari, *Piper Aircraft Co. v. Reyno*, Nos. 80-848 & 80-883 (filed Nov. 25, 1980), at Ex. F.

[8] For cases reversing *forum non conveniens* dismissals because the defendant failed to proffer sufficient evidence in light of the circumstances of the case, see *Lacey*, 862 F.2d at 44 (holding that the evidence was insufficient because the defendants "submitted no evidence to support their contentions," whereas the plaintiff produced a report that the cause of a crash was a defective product manufactured in the United States, and submitted affidavits "that various witnesses on the product liability issue are located in Pennsylvania and throughout the United States and are available to testify here"), and *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1550 (5th Cir. 1991) (rejecting bare allegations of private inconvenience and holding that "in order to fulfill the requirements of *Gulf Oil*, a more detailed presentation must be made by the defendants concerning the private interest factors").

For cases holding that there was sufficient evidence of inconvenience, see *Interface Partners Int'l Ltd. v. Hananel*, 575

We have not set out strict rules on what constitutes "unusually extreme circumstances," and it probably does not make sense to do so. That is because the quantum and quality of evidence needed will depend on the unique facts and circumstances of the given case. *See*, *e.g.*, *Lacey*, 862 F.2d at 44 (holding that "on the particular facts of this case, the defendants did not submit sufficient information to allow the district court properly to undertake the *forum non conveniens* analysis"). In complex commercial cases—with elaborate legal claims and allegations involving transnational communications, or with multiple international and domestic parties—the locus of events may be difficult to pinpoint.

B

Because this is a complex commercial dispute with domestic and foreign plaintiffs, Citigroup should have offered some evidence of inconvenience and certainly no less than what the defendant provided in *Piper Aircraft*. After a thorough review of the record, we find very little

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F.3d 97, 105 (1st Cir. 2009) (affirming *forum non conveniens* dismissal where the defendant "adequately identified the twenty-nine witnesses he intend[ed] to call in the proceedings[,] . . . indicated the relevance of at least ten" of those witnesses, and offered "affidavits from those ten" witnesses that they would testify to "various facts disputing the allegations of misconduct asserted"), *Delta Air Lines, Inc. v. Chimet, S.p.A.*, 619 F.3d 288, 300 (3d Cir. 2010) (affirming a *forum non conveniens* dismissal because the defendant "identified the witnesses it intended to depose and proffered in oral argument the information that it expected to obtain"), and *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 610 (10th Cir. 1998) (holding that the defendants, who "c[a]me forward with documentary evidence," offered the "bare minimum of evidence necessary," although the court "certainly would have benefitted from additional evidence in the record").

if any positive evidence of Citigroup's inconvenience, especially regarding the location of documents and witnesses.

In its *forum non conveniens* motion, Citigroup argued that "key individuals identified in the [amended complaint] that would be critical to Citigroup's defense include former Banamex employees located in Mexico." But it did not identify any of the former Banamex employees by name or position, attest to their residence in Mexico with affidavits, anticipate the basic topics of their testimony, or explain how these unidentified witnesses would be critical to its case. Citigroup also asserted that its defense would be based on corporate and banking records and communications in Mexico, including documents belonging to Citigroup's alleged Mexican co-conspirators. Again, however, it did not identify these documents, generally or specifically. Citigroup also speculated—again without details or evidence—that "[t]here is no reason to doubt that equally critical witnesses from [Oceanografía] and Pemex . . . are also located in Mexico."

The plaintiffs, on the other hand, allege that Citigroup employees involved in the cash advance program are in the United States and identify some of these employees by name. The plaintiffs also refer to Citigroup's public statement that it fired individuals involved in the fraud both "inside and outside" of the United States. We not only accept these allegations as true at this stage, we also draw from them appropriate reasonable inferences. *See Delong Equip.*, 840 F.2d at 845; *Shi*, 918 F.3d at 948. One reasonable inference is that these domestic witnesses have material information and are available or subject to

compulsory process in the United States.

Citigroup made some factual assertions in its motion, but it did so by either misconstruing the complaint or by contradicting the plaintiffs' allegations without discrete evidentiary support. For example, Citigroup argued that "Mexico is where the cash advance contracts were negotiated and executed," which implies that material evidence will be located there. The paragraph of the complaint to which Citigroup cited, however, alleges that "Citigroup, through Banamex, and Oceanografía entered into a Cash Advance Contract in September 2012." Nowhere do the plaintiffs allege that the cash advance program was negotiated and executed exclusively in Mexico. Indeed, they sought discovery on that very point (and others). Citigroup may be correct, but it had the burden to rebut the plaintiffs' allegations on these matters with positive evidence. No evidence, by definition, is an absence of positive evidence.

Even if we were to accept its unsupported factual claim that the cash advance program was negotiated and executed in Mexico, Citigroup did not rebut the plaintiffs' plausible allegations that it would have collected and stored the relevant documents during the SEC and Justice Department investigations. The plaintiffs, we note, allege that a Citigroup employee in Miami led an internal audit into the cash advance program. Citigroup did not contest this factual allegation with an affidavit from a corporate representative or otherwise explain why documents from that audit would not be available in the United States.

Citigroup argued below that "Mexico is where [Oceanografía's] alleged falsification of Pemex work

estimates and authorizations took place." This may be true, but the plaintiffs allege that the ordinary business practice was for Oceanografía to send those work estimate documents to Citigroup in the United States. Based on this unrebutted allegation, it is not clear why Citigroup does not already have—or could not easily access—the allegedly falsified work estimates and authorization documents, even if they were originally created in Mexico. The plaintiffs also plausibly allege that Citigroup controls all the email servers of its subsidiaries, including Banamex, from the United States. Given the absence of evidence to the contrary, it should be relatively easy for Citigroup to access the relevant documents from those servers. If that is not so, Citigroup should explain why not. *See Simon*, 911 F.3d at 1186 (explaining that "[d]igitization . . . has eased the burden of transcontinental document production and has increasingly become the norm in global litigation"); Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. Rev. 390, 414 (2017) (arguing that, because of modern technology and digitization, "transnational evidence collection is far less burdensome today than it was even at the time of *Piper*," such that the defendant's burden of proving hardship should be harder to meet).

Citigroup's contentions about the location of key evidence and witnesses may well be plausible. They may even be correct. But Citigroup failed to support those contentions with positive evidence on the *Gulf Oil* private interest factors, and therefore failed to carry its burden.[9]

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[9] Citigroup did provide some positive evidence at the *forum non conveniens* stage, but its evidence did not speak to the location of documents and witnesses.

First, Citigroup cited to an expert affidavit and a copy of a complaint that a Mexican affiliate of Otto Candies had filed in

C

Citigroup makes a more sweeping argument on appeal. It contends that the district court viewed the complaint

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Mexico against Banamex and Citibank, N.A. (a subsidiary of Citigroup not named in this case). Those documents tended to show that Mexico was an adequate and available forum. As noted above, the plaintiffs do not challenge this conclusion on appeal, and so this evidence is not relevant for our purposes.

Second, Citigroup referred to the same expert affidavit to show that it would be difficult to compel Mexican witnesses to testify in the United States and that Mexican banking laws would prevent Banamex from sharing information absent permission from the Mexican banking regulator. These contentions, however, presuppose (1) that material witnesses are in Mexico, and not in the United States, and (2) that Citigroup does not already have domestic access to the Banamex documents apparently protected by Mexican banking secrecy laws. Citigroup did not offer any evidence to establish these two implicit and necessary premises.

Third, Citigroup submitted various SEC filings to demonstrate that the Institutional Clients Group was a "business segment," not a legal entity, and that the Group had employees all over the world, including at subsidiaries such as Banamex. The district court did not rely on these documents, and it is not clear how the Group's status as a business segment rather than a distinct legal entity changes the *forum non conveniens* analysis. The complaint does not depend on that distinction, and instead focuses on the role that the Group played in developing and overseeing the credit facilities. The fact that the Group is a business segment with employees at Banamex, moreover, could be a double-edged sword. It might make it more plausible that New York-based executives of the Group directed the alleged scheme from the United States through their subordinates in Mexico. That would be consistent with the plaintiffs' claims, and it would also mean that evidence of the fraudulent conduct would be accessible in the United States.

as a whole and reasonably concluded that the relevant evidence would be in Mexico. Citigroup relies on *Ford v. Brown*, 319 F.3d 1302, 1308 (11th Cir. 2003), for the proposition that district courts must analyze the elements of the plaintiffs' causes of action, consider what evidence is required to prove and disprove each element, and make a reasoned assessment about the location of relevant evidence.

There are two problems with Citigroup's argument. The first is that the district court did not delineate the elements of each claim in order to sort through the relevant and irrelevant evidence. The second is that the court did not have positive evidence to sort through in the first place. This case is therefore similar to *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1306-07, 1310 (11th Cir. 1983), where we reversed a *forum non conveniens* dismissal because the district court "did not attempt to go beyond [the] representations of counsel to ascertain the underlying facts of the case" and "did not attempt to pin counsel down to their theories of the case, and the facts that would support their theories." Likewise, the district court here stated—without further explanation—that it would be necessary for the plaintiffs to establish the "underlying fraud" in Mexico. It also accepted the contention of Citigroup that its defense would require documents in Mexico, even though Citigroup did not describe with any particularity the defense or the evidence necessary to establish it.

Citigroup assumes that the district court must have "appreciated" which facts would be relevant to the litigation, and therefore tries to reconstruct what it sees as the court's implicit reasoning. But that is not enough for us evaluate the factual and legal issues of the case.

See id. at 1308 ("Without delineating the elements of the claims and the defenses thereto, we simply cannot know the factual issues raised by these claims, and are left only to speculate as to what witnesses and documents might be relevant and where they might be located.").

Even if we were to accept Citigroup's reconstructed argument—that the RICO claims would require the plaintiffs to establish an "enterprise" with foreign entities and that the aiding and abetting fraud claims would require the plaintiffs to establish an underlying fraud in Mexico—it is still not clear why it wouldn't be just as easy to develop these theories in the United States. First, based on their allegations, it is plausible that the plaintiffs could establish the RICO enterprise and underlying fraud with documents already in Citigroup's possession. Indeed, the plaintiffs contend that there is no real dispute concerning the events in Mexico, so it seems they believe they can prove their case without resorting to additional documents or witnesses there. Second, the plaintiffs intend to prove that Citigroup controlled and directed the enterprise from the United States, so it is not clear why the bulk of evidence wouldn't be in the United States, even if some documents tending to establish the global enterprise could also be found in Mexico. Third, Citigroup's argument ignores the plaintiffs' direct fraud and fiduciary duty claims, which appear at first glance to require investigation into Citigroup's conduct in the United States. In any event, no matter how we try to dissect the various claims, this is a "fragmentary record" on which it is "impossible to make a sound determination of relative convenience." That requires us to remand for further development. *See id.*

The district court erred in concluding that the "ease of access to evidence" factor supported dismissal. That conclusion was based on unsupported findings that the material documents and evidence "are all located in Mexico," and that "all of the key players in this dispute . . . will be available in Mexico." The court also erred in concluding that the "availability of witnesses and compulsory process" factor favors dismissal. That conclusion was based on the unsupported contention of Citigroup that it needed to rely on witnesses in Mexico for its defense. On this record, these errors were fatal to the *Gulf Oil* private interest analysis. *See Ford*, 319 F.3d at 1308 ("Perhaps the most important 'private interest' of the litigants is access to evidence."); 17 James Wm. Moore et al., Moore's Federal Practice § 111.74[3][c][iii] (3d ed. 2020) ("Of all the private interest factors . . . the relative ability of the forums to compel the attendance of significant unwilling witnesses at trial often is considered the most important factor, because the presentation of live testimony often is 'essential to a fair trial.'").

D

The district court also concluded that the public interest factors weighed in favor of litigation in Mexico. Although Citigroup is the only named defendant, the case involved "four primary players, three of which are unquestionably Mexican entities"—Banamex, Oceanografía, and Pemex. The court reasoned that Mexico "clearly has a substantial interest in this case being litigated in Mexico as evidenced by numerous parallel proceedings underway and the fact that one of the key players in this dispute is owned by the Mexican government."

The district court did not ultimately find "such meaningful connections between any of the parties and [the Southern District of Florida] that would outweigh the clear interest Mexico has over this litigation." But that conclusion is questionable because the plaintiffs allege that Citigroup conducts substantial business in the Southern District of Florida and that two of its Miami-based employees audited the cash advance program after the scandal unfolded in Mexico. There is therefore some local interest in the case. On the other hand, there does not appear to be any local need to have the case dismissed. The district court did not cite, for example, any administrative difficulties or docket congestion in the Southern District that warranted a *forum non conveniens* dismissal.

But even if the district court adequately considered the administrative interests of the Southern District, it failed to consider the sovereign interests of the United States. *See SME Racks*, 382 F.3d at 1104 (explaining that although the district court "recognized that Florida had in interest in [that case], it failed to recognize any federal interest"). The United States has a stake in this litigation, and that should factor into the public interest analysis. *See Republic of Panama, v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 953 (11th Cir.1997) ("Relevant public interest factors include the sovereigns' interests in deciding the dispute[.]").

As explained above, the plaintiffs opted to sue Citigroup for its alleged role in the fraud. If they succeed in proving the facts and legal claims, as alleged, then Citigroup—a United States corporation—would be liable to two American plaintiffs for causing them injuries

from its United States offices. We have observed that "a sovereign has a very strong interest when its citizens are allegedly victims and the injury occurs on home soil." *SME Racks*, 382 F.3d at 1104. *See also Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1311 (11th Cir. 2002) ("There is a strong federal interest in making sure that plaintiffs who are United States citizens generally get to choose an American forum for bringing suit, rather than having their case relegated to a foreign jurisdiction."). As further evidence that the United States has a substantial interest in this case, the Justice Department and SEC conducted domestic investigations into Citigroup for the cash advance program at issue. *See Carijano*, 643 F.3d at 1232 (explaining that the United States has a "significant interest in providing a forum for those harmed by the actions of its corporate citizens"). On remand, the district court must consider the interests of the United States in analyzing the *Gulf Oil* public interest factors.

V

We now turn to the discovery conditions that the district court imposed in its order, as the parties dispute their propriety and efficacy. Because we are reversing on other grounds, we do not directly address whether the conditions, as phrased, were appropriate. But we provide some thoughts for the district court and the parties to consider on remand.

In *Piper Aircraft*, the Supreme Court suggested that, in order to mitigate the practical difficulties of *forum non conveniens* dismissals, "district courts might dismiss subject to the condition that defendant corporations agree to provide the records relevant to the plaintiff's claims."

454 U.S. at 257 n.25. The Supreme Court did not explain, however, how district courts should enforce discovery conditions as litigation proceeded abroad. Nonetheless, following the *Piper Aircraft* decision, it became common practice for courts to include stipulations, not only regarding discovery, but also involving the defendant's consent to foreign jurisdiction and final judgment, and the defendant's waiver of foreign statutes of limitation.

With respect to discovery, district courts have imposed conditions that range from the parties having to make "relevant" documents and witnesses available to the parties consenting to abide by the Federal Rules of Civil Procedure. We have approved of these types of discovery conditions and have even held that the imposition of such conditions supported the finding of an adequate, alternative forum. *See Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001) (affirming the district court's finding that the foreign court was adequate in part because the defendant "agree[d] to conduct all discovery in accordance with the Federal Rules of Civil Procedure"); *Magnin v. Teledyne Cont'l Motors*, 91 F.3d 1424, 1430-31 (11th Cir. 1996) (affirming a *forum non conveniens* dismissal in part based on the condition that any domestic discovery "be done in accordance with the Federal Rules of Civil Procedure").[10]

In this case, the district court required Citigroup to "reasonably make available all relevant documents and

[10] Cases involving similar discovery conditions are voluminous. *See*, *e.g.*, *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1358 (1st Cir. 1992); *Stewart v. Dow Chem. Co.*, 865 F.2d 103, 104-05 (6th Cir. 1989); *Oto v. Airline Training Ctr. Arizona, Inc.*, 247 F. Supp. 3d 1098, 1109 (D. Ariz. 2017).

witnesses within its control," and the plaintiffs would have been able "to move to reinstate the action within ninety (90) days of [Citigroup] failing to comply" with that or any other condition. Given our precedent, we do not fault the district court for imposing such a typical condition in its order. But we urge the parties and the court to re-evaluate the limits and contours of that condition in case the district court again dismisses for *forum non conveniens*.

For starters, what rules would govern the scope of "reasonableness," "relevance," and "control"? Would those concepts be defined by Mexican law or by the Federal Rules of Civil Procedure? The plaintiffs urge the latter, arguing that we have "emphasized" dismissals conditioned on compliance with U.S. discovery rules. Although we have sanctioned that type of condition, we have also approved of a condition that only required disclosure of "relevant" documents without reference to the Federal Rules. *See Tazoe*, 631 F.3d at 1330.

Either type of condition could present problems. As the plaintiffs note, the required disclosure of "relevant" evidence is open-ended. If foreign law governs relevance, the condition subjects the parties to some uncertainty and to the idiosyncrasies of the foreign court, which to some extent undermines the purpose of *forum non conveniens*. *See* Maggie Gardner, *Parochial Procedure*, 69 Stan. L. Rev. 941, 987 (2017) (arguing that "it is hard for judges to forecast whether the alternative foreign forum will resolve the defendants evidentiary concerns" or "whether the foreign court's jurisdiction over evidence will actually translate into party access"). Requiring the parties to follow the Federal Rules, on the other hand, may provide them with more clarity about their ongoing

obligations. But we have not given much more thought to what mechanisms, or legal authority, the district court has at its disposal to ensure compliance with the Federal Rules while a dismissed case is being litigated in a foreign court. What permits the district court to adjudicate discovery disputes in a case that it has already dismissed? Does the court need to retain some sort of jurisdiction? And what happens if those disputes are also pending before a Mexican court?[11]

As noted, the district court included a "return jurisdiction" clause, which permits the plaintiffs to refile in the Southern District of Florida in the event of a breach of a condition and perhaps would encourage Citigroup's compliance with the discovery conditions. We have modified dismissal orders to *add* return jurisdiction clauses—at least where there was some indication that the foreign court would not assume jurisdiction. *See Leon*, 251 F.3d at 1316; *King*, 562 F.3d at 1384. But with the understanding that a return jurisdiction clause is permissible, we still foresee possible practical difficulties.

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[11] Other courts have noted some of these issues in passing. *See In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*, 809 F.2d 195, 205 (2d Cir. 1987) (explaining that a discovery stipulation would be "subject to such approval as may be required of the [foreign] court," and otherwise "the parties will be limited by the applicable discovery rules of the [foreign] court in which the claims will be pending"); *Pinder v. Moscetti*, 666 F. Supp. 2d 1313, 1321 (S.D. Fla. 2008) (requiring the defendants to provide all relevant evidence within their custody and control, but recognizing that such a condition "d[id] not extend the discovery allowed under the Federal Rules of Civil Procedure to litigation in the Bahamas," as discovery "shall be governed by the applicable discovery rules of the Bahamas court").

As one commentator has explained, the efficacy of a return jurisdiction clause depends on a "herculean conception of [the] plaintiffs' patience, litigiousness, and financial resources." Gardner, *Parochial Procedure*, 69 Stan. L. Rev. at 990. Some plaintiffs may not have the resources or appetite to refile and start anew in federal court, especially after protracted litigation abroad. That presupposes that the plaintiffs even had the resources to travel to and refile in the foreign court in the first place. *See* Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 Tul. L. Rev. 309, 319 (2002) (explaining that "few plaintiffs even bother to pursue their claim in the alternative foreign forum following *forum non conveniens* dismissal from a U.S. court.") (italics added).

For plaintiffs who do have resources for further litigation, they may actually seek out or manufacture disputes in the hopes that even a minor discovery disagreement could trigger a return jurisdiction clause and reopen the doors to federal court. The plaintiffs here, for example, might want to seek extremely broad discovery and then refile in the district court the moment that Citigroup withholds a document on relevance grounds.

Accordingly, on remand, the district court should consider whether a single breach would permit the plaintiffs to reinstitute their case in federal court, and whether a breach must be material. If so, what would constitute a "material" breach, and under whose law? Moreover, could Citigroup "cure" a breach if the plaintiffs file a discovery motion and the district court concludes that the withheld documents were relevant? That is, if the district court resumes jurisdiction and resolves a discovery dispute in the plaintiffs' favor, could Citigroup

agree to produce the withheld documents and then simply return to the Mexican court? Or does Citigroup, like Julius Caesar, cross the Rubicon once it improperly withholds a relevant document? Without considering these questions (and perhaps others), the district court may face practical problems down the road which could make litigation *less* convenient for everyone involved.

VI

The district court did not apply the deference owed to the domestic plaintiffs, and it erred in weighing the *Gulf Oil* private interest factors as to all the plaintiffs because Citigroup did not satisfy its burden. We therefore reverse and remand for further proceedings, including consideration of the United States' interests under the public interest factors.

The district court may in its discretion permit limited discovery, hold an evidentiary hearing, or accept additional evidence and supplemental briefing from the parties on the private and public interest factors. Because the plaintiffs have not challenged the district court's findings that Mexico is an adequate and available forum, or that they would not be subject to undue inconvenience or delay if they had to reinstate their case in Mexico, those findings stand. We also leave in place the district court's unchallenged findings with respect to the enforceability of the foreign judgment, though we take no view on the weight of this fact in the district court's *Gulf Oil* analysis on remand.

We do not address at this time whether the district court erred in its understandable attempt to ensure that Citigroup would provide adequate discovery in Mexico. We also do not take any view on Citigroup's alternative

arguments for dismissal, which the district court did not reach.

REVERSED AND REMANDED.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-cv-20725-GAYLES

OTTO CANDIES, LLC, *et al.*,

Plaintiffs,

v.

CITIGROUP, INC.,

Defendant.

AMENDED ORDER[1]

THIS CAUSE comes before the Court on Defendant Citigroup, Inc.'s, Motion to Dismiss the Amended Complaint (the "Motion") [ECF No. 80]. The Court held a hearing on the Motion on November 29, 2017. The Court has carefully considered the Amended Complaint ("Complaint"), the record, and the applicable law and is otherwise fully advised. For the reasons that follow, the Motion is granted.

I. BACKGROUND

This action involves a purported fraudulent scheme carried out by Citigroup, Inc. ("Citigroup" or "Defendant"), and other alleged conspirators who have not been sued in this action. The bulk of the fraudulent acts in this

[1] The Court enters this Amended Order following entry of its Order [ECF No. 138] granting in part Plaintiffs' Motion to Alter or Amend the Judgment.

purported scheme occurred in Mexico. The majority of the key players in the fraudulent scheme are based in, and engaged in business in, Mexico.

A. The Parties

Defendant Citigroup is a U.S.-based banking and financial institution incorporated in Delaware with its principal place of business in New York, New York. Plaintiffs[2] are a diverse group of entities including

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[2] Otto Candies, LLC;

Candies Mexican Investments S. de R.L. de C.V.;

Calvi Shipping C.V.;

Blue Marine Shipping II, S.A. de C.V.;

Ocean Mexicana, S.A. de C.V.;

Coastline Maritime Pte. Ltd.;

Marfield Ltd. Inc.;

Shanara Maritime International, S.A.;

Gulf Investments and Services Ltd.;

Halani International Ltd.;

Shipyard De Hoop B.V.;

Hoop Lobith International B.V.;

Maquinas Diesel S.A. de C.V.;

Nordic Trustee ASA;

EIG Management Company, LLC;

EIG Global Project Fund II, Ltd.;

ICE 1 EM CLO Limited;

ICE Global Credit (DCAM) Master Fund Limited;

ICE Focus EM Credit Master Fund Limited;

shipping companies, investment funds, and a bank, located all over the world including in the United States, Mexico, the Caribbean, South America, Europe, and the Middle

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ICE Global Credit Alpha Master Fund Limited;

ICE Oryx Alpha Master Fund Limited;

Waypoint Asset Management LLC;

Ashmore Emerging Markets Corporate High Yield Fund Limited;

Ashmore Emerging Markets High Yield Plus Fund Limited;

Ashmore Emerging Markets Tri Asset Fund Limited;

Ashmore Emerging Markets Debt and Currency Fund Limited;

Ashmore Emerging Markets Special Situations Opportunities Fund Limited Partnership, acting through its general partner, Ashmore Emerging Markets Special Situations Opportunities Fund (GP) Limited;

Ashmore SICAV in respect of Ashmore SICAV Emerging Markets Debt Fund;

Ashmore SICAV in respect of Ashmore SICAV Emerging Markets High Yield Corporate Debt Fund;

Copernico Capital Partners (Bermuda) Ltd.;

Larrain Vial S.A. Sociedad Administradora de Fondos de Inversion;

Moneda International Inc.;

Moneda Latin American Corporate Debt;

Padstow Financial Corp.;

Moneda S.A. Administradora General de Fondos;

Moneda Deuda Latinoamericana Fondo de Inversion;

Moneda Renta CLP Fondo de Inversion;

Cooperative Rabobank U.A.

East. Plaintiffs bring this action as vendors, creditors, and bondholders of Oceanografía S.A. de C.V. ("OSA"), a now bankrupt Mexican oil and gas services company. Petróleos Mexicanos S.A. de C.V. ("Pemex") is Mexico's state-owned oil and gas company and, at one time, one of the largest customers of OSA's offshore drilling services. Banco Nacional de México ("Citibanamex" or "Banamex") is Citigroup's wholly-owned Mexican subsidiary. Plaintiffs bring this action to recover the losses sustained from their investments and business dealings with OSA.

B. The Alleged Cash Advance Scheme

According to the Complaint, Citigroup, through its Mexican subsidiary Citibanamex, established a credit facility for OSA and provided it with hundreds of millions of dollars in cash advances. OSA allegedly used the cash advances to fund its ongoing projects with Pemex. Citigroup charged OSA substantial interest on every cash advance. In addition, Citigroup entered into an agreement whereby it was guaranteed repayment of the cash advances directly from Pemex. Because repayment was guaranteed by Pemex, *i.e.*, the Mexican government, Plaintiffs allege that Citigroup, through or in conjunction with Citibanamex, repeatedly increased OSA's cash advance limit in order to earn millions in risk-free profit.

Plaintiffs assert that because of the payment guarantee with Pemex, Citigroup advanced amounts to OSA that Citigroup knew greatly exceeded any amount OSA could earn under its service contracts with Pemex. Plaintiffs allege that Citigroup's continued cash injections into OSA resulted in OSA's financials appearing more "rosy" to outside investors, such as Plaintiffs. In addition, Plaintiffs

allege Citigroup made false representations regarding the financial health of OSA in order to deceive Plaintiffs into believing that OSA was a financially attractive company for investment. Citigroup's misrepresentations allegedly lured Plaintiffs into extending credit and making investments in OSA, which in turn allowed OSA to continue to seek cash advances from Citigroup, which in turn allowed Citigroup to collect its risk-free profit.

In the Complaint, Plaintiffs assert the following claims against Citigroup: Violation of RICO, 18 U.S.C. §1962(c); Conspiracy to Violate RICO, 18 U.S.C. §1962(d); Common Law Fraud; Aiding and Abetting Fraud; Conspiracy to Commit Fraud; Common Law Fraud (only by Plaintiffs Rabobank and Blue Marine); and Breach of Fiduciary Duty (only by Plaintiffs Rabobank and Blue Marine).

Citigroup has moved to dismiss this action on *forum non conveniens* grounds, contending that Mexico is the more appropriate forum. Alternatively, Citigroup seeks dismissal of each count under Federal Rules of Civil Procedure 9(b) and 12(b)(6) for failure to state a claim.

II. FORUM NON CONVENIENS

A. Legal Standard

"Under the doctrine of *forum non conveniens*, a district court has the inherent power to decline to exercise jurisdiction even when venue is proper," *Jiangsu Hongyuan Pharm. Co. v. DI Glob. Logistics, Inc.*, 159 F. Supp. 3d 1316, 1322 (S.D. Fla. 2016) (citation omitted), *appeal dismissed*, No. 16-10781 (11th Cir. May 9, 2016), "on the ground that a court abroad is the more appropriate and convenient forum for adjudicating the controversy,"

Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 425 (2007). To obtain dismissal for *forum non conveniens*, the moving party must demonstrate that (1) an adequate alternative forum is available; (2) the relevant private interest factors favor the alternative forum, weighing in the balance a strong presumption against disturbing a plaintiff's initial forum choice; (3) if the balance of private interests is at or near equipoise, the relevant public interest factors favor the alternative forum; and (4) the plaintiff can reinstate its suit in the alternative forum without undue inconvenience or prejudice. *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1288 (11th Cir. 2009).

Although a court may consider matters outside the pleadings in ruling on a motion to dismiss based on *forum non conveniens*, if it rules on the motion without an evidentiary hearing, it must draw all reasonable inferences and resolve all factual conflicts in favor of the plaintiff. *See Jiangsu*, 159 F. Supp. 3d at 1322.

B. Discussion

1. Adequacy and Availability of the Alternative Forum

The first factor in the *forum non conveniens* analysis involves two inquiries, each of which "warrant[s] separate consideration." *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001). The Court must determine whether the alternative forum is "adequate" and whether the alternative forum is "available." *Aldana*, 578 F.3d at 1290.

a. Adequacy

"An alternative forum is adequate if it provides for litigation of the subject matter of the dispute and

potentially offers redress for plaintiffs' injuries." *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1382 (11th Cir. 2009) (per curiam). "An adequate forum need not be a perfect forum." *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001). Rather, an "alternative forum will be considered adequate so long as it could provide some relief for the plaintiffs' claims," even if the foreign forum is less favorable to the plaintiffs than the current forum. *Tyco Fire & Sec., LLC v. Alcocer*, 218 F. App'x 860, 865 (11th Cir. 2007); *see also DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 796 (5th Cir. 2007) ("A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy . . . all the benefits of an American court. . . . "). An alternative forum is inadequate "if the remedy provided by th[at] alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 (1981). But it is only in "rare circumstances" that "the remedy offered by the forum [is so] clearly unsatisfactory" that the alternative forum would be considered inadequate. *Aldana*, 578 F.2d at 1290.

In support of a finding of adequacy, Citigroup has proffered a declaration of Dr. Oscar Cruz Barney ("Dr. Cruz"), an attorney and law professor in Mexico, as an expert on Mexican law. Dr. Cruz's declaration provides an in-depth overview of the Mexican legal system and applicable substantive and procedural law. *See generally* Cruz Decl. [ECF No. 82]. He attests that Mexican law permits joint lawsuits involving commercial disputes sounding in tort, contract, and fraud, and provides remedies for plaintiffs that prevail in such lawsuits. *See id.* ¶¶ 13-24. Plaintiffs do not contend that any of Dr. Cruz's

attestations are incorrect or that he has mischaracterized or erroneously described the Mexican legal landscape. Instead, they rely on an unpublished district court decision finding that Colombia was an inadequate forum in a wholly distinguishable case. *See In re Chiquita Brands Int'l, Inc. Alien Tort Statute and S'holder Derivative Litig.*, No. 08-md-01916 (S.D. Fla. Nov. 28, 2016) [ECF No. 1194].[3] Plaintiff's reliance on *In re Chiquita Brands* is misplaced as the security issues present in that case have no bearing on whether Mexico is an adequate forum in *this* case. As a result, Plaintiffs fail to rebut Dr. Cruz's declaration.

The Plaintiffs also proffer a declaration of their own expert, Dr. Francisco Gonzalez de Cossio ("Dr. Gonzalez"), who attests that litigating a similar case in Mexico, with appeals, "could take approximately 15 years, if not longer." *See* Gonzalez Decl. [ECF No. 85-1] ¶ 67. Dr. Gonzalez arrives at his conclusion by taking the average number of days Mexican courts took in 2015 to decide an *amparo* (a collateral appeal that can be filed against any court decision)—ninety-nine days, excluding appeals of those decisions—and multiplying that number by the number of *amparos* he estimates could be filed in this litigation—fifty. *See id.* ¶ 68. The Court finds Dr. Gonzalez's estimate unpersuasive. Dr. Gonzalez fails to substantiate the premises underlying his conclusion—that *amparos* are

[3] *In re Chiquita Brands* involved claims by the families of victims who were murdered by paramilitary and guerilla groups in Colombia in an alleged conspiracy to suppress labor unrest in the banana industry. The court found that Colombia was an inadequate forum due to the significant possibility that plaintiffs would be severely harmed by members of the paramilitary groups if the case was brought in Colombia. *Id.* at 6-11.

filed consecutively, not concurrently, and that they are decided one at a time. *See* Supp. Cruz Decl. [ECF No. 92] ¶¶ 26-27.

"[W]hile defendants do have the 'ultimate burden of persuasion' to establish adequacy, they bear this burden *only* where the plaintiff *substantiates* its allegations of . . . delay." *Jiangsu*, 159 F. Supp. 3d at 1330. In *Leon*, the Eleventh Circuit explained that if a plaintiff proffers "*significant* evidence documenting the . . . delay (in years) typically associated with the adjudication of similar claims, and these conditions are so severe to call the adequacy of the forum into doubt, then the defendant has the burden to persuade the [court] that the facts are otherwise," but where a plaintiff's allegations are insubstantially supported, the court is "free to reject them without considering any evidence from defendants." *Leon*, 251 F.3d at 1312 (emphasis added). Plaintiffs fail to proffer such significant evidence to support a claim that serious delays would render Mexico an inadequate forum.[4]

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[4] The Court also notes that numerous federal courts, including this one, have found that Mexico is an adequate forum for all manner of litigation, including the claims at issue in this action. *See Ballard v. Maco Caribe, Inc.*, No. 14-21670, 2014 WL 4723144, at *2 (S.D. Fla. Sept. 23, 2014) ("Mexico has frequently been found to provide an adequate alternative forum."); *Ochoa v. Empresas ICA, S.A.B. de C.V.*, 11-23898-CIV, 2013 WL 5674697, at *5 (S.D. Fla. Oct. 17, 2013), *aff'd sub nom. Ochoa v. Empresas ICA, S.A.B. DE CV*, 600 F. App'x 725 (11th Cir. 2015) (finding Mexico to be an adequate forum in a civil RICO action); *see also*, *e.g.*, *Republic of Panama v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 952 (11th Cir. 1997) (holding that "a plaintiff's inability to assert a RICO claim in [a] foreign forum does not preclude *forum non conveniens* dismissal").

In addition, the Court notes that all of the Plaintiffs are currently pursuing various bankruptcy and breach of contract related claims in Mexico that involve substantially the same parties and events that are the subject of this action. *See* Am. Compl. [ECF No. 72] ¶¶ 113-114, 250-252; *see also Banco Latino v. Gomez Lopez*, 17 F. Supp. 2d 1327, 1332 (S.D. Fla. 1998) (noting that parallel proceedings lend support to a finding that the alternative forum is adequate). The Court, therefore, finds that Mexico is an adequate forum for Plaintiffs' claims.

b. Availability

An alternative forum is "available" to a plaintiff "when the foreign court can assert jurisdiction over the litigation sought to be transferred." *Leon*, 251 F.3d at 1311. This requirement will ordinarily be satisfied "when the defendant is 'amenable to process' in the other jurisdiction." *Piper Aircraft*, 454 U.S. at 254 n.22. Whether Mexico is an available alternative forum is a simple inquiry in this instance. Citigroup has stipulated that it will (1) be amenable to suit in Mexico; (2) submit to the jurisdiction of a Mexican court; (3) waive statute of limitations defenses; and (4) be bound by a final judgment entered by a Mexican court. *See* [ECF No. 80, at p.10]. These stipulations suffice to allow the Court to deem Mexico an available forum. *See Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1330 (11th Cir. 2011).

2. Private Interest Factors

The Court must next consider the private interest factors. "Pertinent private interests of the litigants include relative ease of access to evidence in the competing fora, availability of witnesses and compulsory process over them, the cost of obtaining evidence, and the enforceability

of a judgment." *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052, 1056 (11th Cir. 2009) (citation omitted). In weighing the private interest factors, the Court must bear in mind that "[a] defendant invoking *forum non conveniens* ordinarily bears a heavy burden in opposing the plaintiff's chosen forum," but "[w]hen the plaintiff's choice is not its home forum . . . the presumption in the plaintiff's favor 'applies with less force.'" *Sinochem*, 549 U.S. at 430 (quoting *Piper Aircraft*, 454 U.S. at 255-56).[5]

Given that the presumption in favor of a plaintiff's initial forum choice "is at its strongest when the plaintiffs are citizens, residents or corporations of this country," the Eleventh Circuit in such cases requires "positive evidence of unusually extreme circumstances and thoroughly convince [the court] that material injustice is manifest before ousting a domestic plaintiff from this country's courts." *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1101-02 (11th Cir. 2004). That said, "dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. . . . [I]f the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." *Wilson v. Is. Seas Invs., Ltd.*, 590 F.3d 1264, 1270 (11th Cir. 2009) (quoting *Piper Aircraft*, 454 U.S. at 255 n.23). Of the over three dozen Plaintiffs in this action, only two—Otto

[5] "[F]ederal courts, in the *forum non conveniens* context, do not focus on the connection between the case and a particular state, but rather on the connection of the case to the United States as a whole." *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1303 (11th Cir. 2002).

Candies, LLC, and Waypoint Asset Management LLC—are U.S.-based companies.[6] Therefore, in the Court's analysis, the U.S.-based Plaintiffs' choice of forum will receive the presumption outlined above; but the foreign Plaintiffs' will not. *See King*, *supra*, 562 F.3d at 1383 (holding that the district court did not abuse its discretion by simultaneously according less deference to European plaintiffs' choice of forum and more deference to American plaintiffs' choice of forum).

In addition, while courts usually afford deference to a domestic plaintiff's choice of forum, when "an American plaintiff chooses to invest in a foreign country and then complains of fraudulent acts occurring primarily in that country, the plaintiff's ability to rely upon citizenship as a talisman against *forum non conveniens* dismissal is diminished." *Warter v. Bos. Sec., S.A.*, 380 F. Supp. 2d 1299, 1314 (S.D. Fla. 2004) (quoting *Sussman v. Bank of Israel*, 801 F. Supp. 1068, 1073 (S.D.N.Y. 1992), *aff'd*, 990 F.2d 71 (2d Cir. 1993)); *EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro S.A.*, 246 F. Supp. 3d 52, 78 (D.D.C. Mar. 30, 2017) (noting that several circuits have held that

[6] On May 3, 2017, the Court issued an order requiring these two Plaintiffs to file a statement that details the identities and citizenships of the members of each company, in keeping with the Eleventh Circuit's instruction that "a limited liability company is a citizen of any state [or country] of which a member of the company is a citizen." *Rolling Greens, MHP, L.P. v. Comcast SCH Holdings, L.L.C.*, 374 F.3d 1020, 1022 (11th Cir. 2004); *see also* [ECF No. 105]. The Plaintiffs filed a sealed document responsive to the Court's Order; the Court has reviewed this document and concludes that both companies are to be considered citizens of the United States for purposes of this analysis.

"the presumption in favor of [a plaintiff's] choice of forum . . . is diminished because [a plaintiff's] decision to invest abroad [puts] them on notice that they might be required to litigate disputes in a foreign forum.") (collecting cases). As this action arises out of *each* Plaintiff's decision to invest in a Mexican company doing business in Mexico, none of the Plaintiffs, whether U.S.-based or foreign, can feign surprise at potentially having to litigate a resulting dispute in Mexico. Therefore, the Court will also apply reduced deference to the U.S.-based Plaintiffs' choice of forum.

a. Ease of Access to Evidence and Cost

The first factor, ease of access to evidence, supports dismissal. As an initial matter, Plaintiffs contend that litigating this case in Mexico would significantly impair the parties' access to evidence because Mexico does not afford the same type of discovery available in the United States. However, their concerns about the limited scope of pretrial discovery are unavailing because it is not necessary that the alternative forum have comparable procedural safeguards. *Banco Latino*, 17 F. Supp. 2d at 1332 (citing *Proyectos Orchimex de Costa Rica, S.A. v. E.I. duPont de Nemours & Co.*, 896 F. Supp. 1197, 1200 (M.D. Fla. 1995)) (dismissal despite lack of extensive pretrial discovery). Nonetheless, Plaintiffs' concerns are belied by their own expert who concedes that there are multiple ways for parties to obtain documentary evidence during Mexican civil proceedings. *See* Gonzalez Decl. [ECF No. 85-1] ¶¶ 39, 45, 54, 60, 63.

With Defendant voluntarily agreeing to submit itself to Mexican jurisdiction, all of the key players in this

dispute–OSA, Pemex, Citibanamex, and Citigroup–will be available in Mexico and subject to the jurisdiction of its courts. The presence of all of the key players under the jurisdiction of the Mexican courts means that the parties will not need to resort to the costly and time-consuming process of obtaining documents and testimony through letters rogatory and the Hague Convention as would be required if the case was litigated in the United States. *See Warrick v. Carnival Corp.*, 12-61389-CIV, 2013 WL 3333358, at *7 (S.D. Fla. Feb. 4, 2013) (noting that private interest factors weighed in favor of dismissal where the defendants would have to use the Hague Convention to gather evidence; finding the process "unduly time consuming and expensive.") (citations omitted). Litigation in this forum will also make it more challenging to secure documentary evidence from Mexican sources over which Defendant, and perhaps this Court, does not have control. With all of the relevant players located under the jurisdiction of the Mexican courts, a Mexican court will be better able to resolve discovery disputes, particularly those relating to Mexican bank secrecy laws affecting Citibanamex and government transparency laws affecting Pemex.

Finally, the Court notes that the parties are equally entitled to access to the evidence needed to prosecute and defend their respective cases. Here, Plaintiffs contend that there is little need for any evidence located in Mexico because they intend to prove their case solely on the acts of Citigroup from the United States. On the other hand, Defendant argues that documents and testimony related to the alleged underlying fraud are located in Mexico and critical to establishing its defense. Notwithstanding

Plaintiffs' expressed disinterest in obtaining evidence from the key Mexican players in the alleged fraud, Defendant certainly has a right to obtain such evidence for its defense, and those documents and witnesses are all located in Mexico.

In order to assuage Plaintiffs' discovery concerns, the Court will implement the approach taken in *Banco Latino, Satz*, and *Piper Aircraft* and condition dismissal upon Defendant's agreement to make available all relevant documents and witnesses within their control. *Satz*, 244 F.3d at 1283 (noting that the district court conditioned its order of dismissal on the defendant agreeing to conduct all discovery in accordance with the Federal Rules of Civil Procedure and voluntarily producing documents and witnesses within the United States); *Piper Aircraft*, 454 U.S. at 257 n.25 (district courts may dismiss subject to the condition that parties agree to comply with reasonable discovery requests); *Banco Latino*, 17 F. Supp. 2d at 1333 (conditioning dismissal upon defendant filing an affidavit with the court agreeing to "make available all relevant documents and witnesses within their control"). Accordingly, the Court finds that these elements weigh in favor of dismissal.

b. Availability of Witnesses and Compulsory Process

Plaintiffs contend that this case solely concerns Citigroup's actions in the United States. Defendant argues that the underlying facts of this case arise out of an alleged fraudulent scheme carried out in Mexico between three Mexican companies. Defendant argues that the main witnesses it needs to challenge Plaintiffs'

underlying fraud allegations are the employees of OSA, Pemex, and Banamex, who are all located in Mexico. As Plaintiffs will necessarily be required to establish that the underlying fraud between OSA, Pemex, and Banamex actually occurred, it would be a fiction to accept Plaintiffs' contrary contention that the only witnesses needed to try this case are the U.S.-based employees of Citigroup. The Court believes that Defendant would be severely prejudiced in its ability to defend its case in the United States as it would be unable to compel the attendance of any witnesses located in Mexico and would be forced to defend this case on deposition testimony. The Court finds the opposite to be true as to Plaintiffs since Plaintiffs will not need to compel the attendance of their own witnesses in Mexico. As the Supreme Court explained in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) the doctrine of *forum non conveniens* should be applied to avoid these situations: "Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants." *Gulf Oil Corp.*, 330 U.S. at 511; *see also Montgomery v. Oberti*, 945 F. Supp. 2d 1367, 1376 (S.D. Fla. 2013) ("given the importance of these witnesses in assessing the disputed factual issues, the Court finds that no adequate substitute exists for the witnesses' live testimony and that the lack of access to this testimony weighs very strongly in favor of dismissal."); *McLane v. Marriott Int'l, Inc.*, 960 F. Supp. 2d 1351, 1360 (S.D. Fla. 2013) (finding that the "private interest factors also strongly weigh in favor of dismissal because the most critical witnesses concerning

liability cannot be compelled to testify in this Court"), *aff'd*, 547 F. App'x 950 (11th Cir. 2013). Accordingly, the availability of pertinent witnesses weighs in favor of a Mexican forum.

c. Enforceability of Judgment

This final private interest factor weighs in favor of dismissal as Defendant has expressly stipulated that it will be bound by any judgment entered against it in Mexico. *See* Def. Mot. to Dismiss [ECF No. 80, p.10]; Hr. Tr. [ECF No. 125, p.12]. In addition, the Florida Uniform Outof-Country Foreign Money-Judgment Recognition Act, §§ 55.601-55.607, Fla. Stat., allows for a judgment entered against Defendant by a Mexican court to be enforced domestically.

3. Public Interest Factors

"Relevant public interests include the familiarity of the court(s) with the governing law, the interest of any foreign nation in having the dispute litigated in its own courts, and the value of having local controversies litigated locally." *Pierre-Louis*, 584 F.3d at 1056. The Court finds that the relevant public interest factors weigh in favor of this action being litigated in Mexico. As stated above, while Citigroup is the only named Defendant in this action, this case involves four primary players, three of which are unquestionably Mexican entities: (1) Citigroup, who is alleged to have acted in part through its wholly-owned Mexican subsidiary Citibanamex; (2) Citibanamex; (3) OSA, a Mexican oil and gas company; and (4) Pemex, a Mexican state-owned oil company. Mexico clearly has a substantial interest in this case being litigated in Mexico as evidenced by the numerous parallel proceedings already

underway and the fact that one of the key players in this dispute is owned by the Mexican government. Finally, the Court does not find such meaningful connections between any of the parties and this District that would outweigh the clear interest Mexico has over this litigation.

4. Undue Inconvenience or Prejudice

Defendant argues that based on its stipulation to submit to jurisdiction and waive statute of limitations defenses, Plaintiffs can easily reinstate this action in Mexico without undue inconvenience or prejudice. As Plaintiffs do not contest Defendant's representation, the Court finds Defendant's stipulations sufficient to establish that Plaintiffs can reinstate their case in Mexico without undue burden.

III. CONCLUSION

The Court finds that all of the relevant factors weigh in favor of dismissing this action on *forum non conveniens* grounds.[7] Based on the foregoing, it is **ORDERED AND ADJUDGED** that:

(1) Defendant's Motion to Dismiss [ECF No. 80] is **GRANTED**;

(2) this cause is **DISMISSED** without prejudice to Plaintiffs refiling it in the appropriate forum, conditioned on the following:

a. Defendant shall consent to the jurisdiction of the Mexican courts;

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[7] Defendant argues in the alternative that the Amended Complaint be dismissed for failure to state a claim under Federal Rules of Civil Procedure 9(b) and 12(b)(6). Because the Court finds that the *forum non conveniens* issue is dispositive, it will not consider the parties' alternative arguments.

b. Defendant shall waive all applicable statute of limitations defenses[8] attributable to the delay between the filing of this action and any action initiated by Plaintiffs in Mexico within one (1) year of this Order;

c. Defendant shall consent to the enforcement of any final Mexican judgement against it as to its assets in Mexico or the United States; and

d. Defendant shall reasonably make available all relevant documents and witnesses within its control.

Plaintiffs may move to reinstate this action within ninety (90) days of Defendant failing to comply with any of the above conditions.

This action shall be **CLOSED** for administrative purposes, and all pending motions, are **DENIED as moot**.

DONE AND ORDERED in Chambers at Miami, Florida, this 15th day of June, 2018.

/s/ Darrin P. Gayles
DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE

[8] The parties' Joint Stipulation for Extension of Time in Condition (b) of Court's Motion to Dismiss Order [ECF No. 137] is hereby approved and incorporated into this Order by reference.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-cv-20725-GAYLES

OTTO CANDIES, LLC, *et al.*,

Plaintiffs,

v.

CITIGROUP, INC.,

Defendant.

ORDER

THIS CAUSE comes before the Court on Defendant Citigroup, Inc.'s, Motion to Dismiss the Amended Complaint (the "Motion") [ECF No. 80]. The Court held a hearing on the Motion on November 29, 2017. The Court has carefully considered the Amended Complaint ("Complaint"), the record, and the applicable law and is otherwise fully advised. For the reasons that follow, the Motion is granted.

I. BACKGROUND

This action involves a purported fraudulent scheme carried out by Citigroup, Inc. ("Citigroup" or "Defendant"), and other alleged conspirators who have not been sued in this action. The bulk of the fraudulent acts in this purported scheme occurred in Mexico. The majority of the key players in the fraudulent scheme are based in, and engaged in business in, Mexico.

A. The Parties

Defendant Citigroup is a U.S.-based banking and financial institution incorporated in Delaware with its principal place of business in New York, New York. Plaintiffs[1] are a diverse group of entities including

[1] Otto Candies, LLC;

Candies Mexican Investments S. de R.L. de C.V.;

Calvi Shipping C.V.;

Blue Marine Shipping II, S.A. de C.V.;

Ocean Mexicana, S.A. de C.V.;

Coastline Maritime Pte. Ltd.;

Marfield Ltd. Inc.;

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ICE 1 EM CLO Limited;

ICE Global Credit (DCAM) Master Fund Limited;

ICE Focus EM Credit Master Fund Limited;

ICE Global Credit Alpha Master Fund Limited;

ICE Oryx Alpha Master Fund Limited;

Waypoint Asset Management LLC;

shipping companies, investment funds, and a bank, located all over the world including in the United States, Mexico, the Caribbean, South America, Europe, and the Middle East. Plaintiffs bring this action as vendors, creditors, and bondholders of Oceanografía S.A. de C.V. ("OSA"), a now bankrupt Mexican oil and gas services company. Petróleos Mexicanos S.A. de C.V. ("Pemex") is Mexico's

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Ashmore Emerging Markets Corporate High Yield Fund Limited;

Ashmore Emerging Markets High Yield Plus Fund Limited;

Ashmore Emerging Markets Tri Asset Fund Limited;

Ashmore Emerging Markets Debt and Currency Fund Limited;

Ashmore Emerging Markets Special Situations Opportunities Fund Limited Partnership, acting through its general partner, Ashmore Emerging Markets Special Situations Opportunities Fund (GP) Limited;

Ashmore SICAV in respect of Ashmore SICAV Emerging Markets Debt Fund;

Ashmore SICAV in respect of Ashmore SICAV Emerging Markets High Yield Corporate Debt Fund;

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Larrain Vial S.A. Sociedad Administradora de Fondos de Inversion;

Moneda International Inc.;

Moneda Latin American Corporate Debt;

Padstow Financial Corp.;

Moneda S.A. Administradora General de Fondos;

Moneda Deuda Latinoamericana Fondo de Inversion;

Moneda Renta CLP Fondo de Inversion;

Cooperative Rabobank U.A.

state-owned oil and gas company and, at one time, one of the largest customers of OSA's offshore drilling services. Banco Nacional de México ("Citibanamex" or "Banamex") is Citigroup's wholly-owned Mexican subsidiary. Plaintiffs bring this action to recover the losses sustained from their investments and business dealings with OSA.

B. The Alleged Cash Advance Scheme

According to the Complaint, Citigroup, through its Mexican subsidiary Citibanamex, established a credit facility for OSA and provided it with hundreds of millions of dollars in cash advances. OSA allegedly used the cash advances to fund its ongoing projects with Pemex. Citigroup charged OSA substantial interest on every cash advance. In addition, Citigroup entered into an agreement whereby it was guaranteed repayment of the cash advances directly from Pemex. Because repayment was guaranteed by Pemex, *i.e.*, the Mexican government, Plaintiffs allege that Citigroup, through or in conjunction with Citibanamex, repeatedly increased OSA's cash advance limit in order to earn millions in risk-free profit.

Plaintiffs assert that because of the payment guarantee with Pemex, Citigroup advanced amounts to OSA that Citigroup knew greatly exceeded any amount OSA could earn under its service contracts with Pemex. Plaintiffs allege that Citigroup's continued cash injections into OSA resulted in OSA's financials appearing more "rosy" to outside investors, such as Plaintiffs. In addition, Plaintiffs allege Citigroup made false representations regarding the financial health of OSA in order to deceive Plaintiffs into believing that OSA was a financially attractive company for investment. Citigroup's misrepresentations

allegedly lured Plaintiffs into extending credit and making investments in OSA, which in turn allowed OSA to continue to seek cash advances from Citigroup, which in turn allowed Citigroup to collect its risk-free profit.

In the Complaint, Plaintiffs assert the following claims against Citigroup: Violation of RICO, 18 U.S.C. §1962(c); Conspiracy to Violate RICO, 18 U.S.C. §1962(d); Common Law Fraud; Aiding and Abetting Fraud; Conspiracy to Commit Fraud; Common Law Fraud (only by Plaintiffs Rabobank and Blue Marine); and Breach of Fiduciary Duty (only by Plaintiffs Rabobank and Blue Marine).

Citigroup has moved to dismiss this action on *forum non conveniens* grounds, contending that Mexico is the more appropriate forum. Alternatively, Citigroup seeks dismissal of each count under Federal Rules of Civil Procedure 9(b) and 12(b)(6) for failure to state a claim.

II. FORUM NON CONVENIENS

A. Legal Standard

"Under the doctrine of *forum non conveniens*, a district court has the inherent power to decline to exercise jurisdiction even when venue is proper," *Jiangsu Hongyuan Pharm. Co. v. DI Glob. Logistics, Inc.*, 159 F. Supp. 3d 1316, 1322 (S.D. Fla. 2016) (citation omitted), *appeal dismissed*, No. 16-10781 (11th Cir. May 9, 2016), "on the ground that a court abroad is the more appropriate and convenient forum for adjudicating the controversy," *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007). To obtain dismissal for *forum non conveniens*, the moving party must demonstrate that (1) an adequate alternative forum is available; (2) the

relevant private interest factors favor the alternative forum, weighing in the balance a strong presumption against disturbing a plaintiff's initial forum choice; (3) if the balance of private interests is at or near equipoise, the relevant public interest factors favor the alternative forum; and (4) the plaintiff can reinstate its suit in the alternative forum without undue inconvenience or prejudice. *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1288 (11th Cir. 2009).

Although a court may consider matters outside the pleadings in ruling on a motion to dismiss based on *forum non conveniens*, if it rules on the motion without an evidentiary hearing, it must draw all reasonable inferences and resolve all factual conflicts in favor of the plaintiff. *See Jiangsu*, 159 F. Supp. 3d at 1322.

B. Discussion

1. Adequacy and Availability of the Alternative Forum

The first factor in the *forum non conveniens* analysis involves two inquiries, each of which "warrant[s] separate consideration." *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001). The Court must determine whether the alternative forum is "adequate" and whether the alternative forum is "available." *Aldana*, 578 F.3d at 1290.

a. Adequacy

"An alternative forum is adequate if it provides for litigation of the subject matter of the dispute and potentially offers redress for plaintiffs' injuries." *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1382 (11th Cir. 2009) (per curiam). "An adequate forum need not be a perfect

forum." *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001). Rather, an "alternative forum will be considered adequate so long as it could provide some relief for the plaintiffs' claims," even if the foreign forum is less favorable to the plaintiffs than the current forum. *Tyco Fire & Sec., LLC v. Alcocer*, 218 F. App'x 860, 865 (11th Cir. 2007); *see also DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 796 (5th Cir. 2007) ("A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy . . . all the benefits of an American court. . . ."). An alternative forum is inadequate "if the remedy provided by th[at] alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 (1981). But it is only in "rare circumstances" that "the remedy offered by the forum [is so] clearly unsatisfactory" that the alternative forum would be considered inadequate. *Aldana*, 578 F.2d at 1290.

In support of a finding of adequacy, Citigroup has proffered a declaration of Dr. Oscar Cruz Barney ("Dr. Cruz"), an attorney and law professor in Mexico, as an expert on Mexican law. Dr. Cruz's declaration provides an in-depth overview of the Mexican legal system and applicable substantive and procedural law. *See generally* Cruz Decl. [ECF No. 82]. He attests that Mexican law permits joint lawsuits involving commercial disputes sounding in tort, contract, and fraud, and provides remedies for plaintiffs that prevail in such lawsuits. *See id.* ¶¶ 13-24. Plaintiffs do not contend that any of Dr. Cruz's attestations are incorrect or that he has mischaracterized or erroneously described the Mexican legal landscape. Instead, they rely on an unpublished district court decision

finding that Colombia was an inadequate forum in a wholly distinguishable case. *See In re Chiquita Brands Int'l, Inc. Alien Tort Statute and S'holder Derivative Litig.*, No. 08-md-01916 (S.D. Fla. Nov. 28, 2016) [ECF No. 1194].[2] Plaintiff's reliance on *In re Chiquita Brands* is misplaced as the security issues present in that case have no bearing on whether Mexico is an adequate forum in *this* case. As a result, Plaintiffs fail to rebut Dr. Cruz's declaration.

The Plaintiffs also proffer a declaration of their own expert, Dr. Francisco Gonzalez de Cossio ("Dr. Gonzalez"), who attests that litigating a similar case in Mexico, with appeals, "could take approximately 15 years, if not longer." *See* Gonzalez Decl. [ECF No. 85-1] ¶ 67. Dr. Gonzalez arrives at his conclusion by taking the average number of days Mexican courts took in 2015 to decide an *amparo* (a collateral appeal that can be filed against any court decision)—ninety-nine days, excluding appeals of those decisions—and multiplying that number by the number of *amparos* he estimates could be filed in this litigation—fifty. *See id.* ¶ 68. The Court finds Dr. Gonzalez's estimate unpersuasive. Dr. Gonzalez fails to substantiate the premises underlying his conclusion—that *amparos* are filed consecutively, not concurrently, and that they are decided one at a time. *See* Supp. Cruz Decl. [ECF No. 92] ¶¶ 26-27.

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[2] *In re Chiquita Brands* involved claims by the families of victims who were murdered by paramilitary and guerilla groups in Colombia in an alleged conspiracy to suppress labor unrest in the banana industry. The court found that Colombia was an inadequate forum due to the significant possibility that plaintiffs would be severely harmed by members of the paramilitary groups if the case was brought in Colombia. *Id.* at 6-11.

"[W]hile defendants do have the 'ultimate burden of persuasion' to establish adequacy, they bear this burden *only* where the plaintiff *substantiates* its allegations of . . . delay." *Jiangsu*, 159 F. Supp. 3d at 1330. In *Leon*, the Eleventh Circuit explained that if a plaintiff proffers "*significant* evidence documenting the . . . delay (in years) typically associated with the adjudication of similar claims, and these conditions are so severe to call the adequacy of the forum into doubt, then the defendant has the burden to persuade the [court] that the facts are otherwise," but where a plaintiff's allegations are insubstantially supported, the court is "free to reject them without considering any evidence from defendants." *Leon*, 251 F.3d at 1312 (emphasis added). Plaintiffs fail to proffer such significant evidence to support a claim that serious delays would render Mexico an inadequate forum.[3]

In addition, the Court notes that all of the Plaintiffs are currently pursuing various bankruptcy and breach of contract related claims in Mexico that involve substantially the same parties and events that are the subject of this

[3] The Court also notes that numerous federal courts, including this one, have found that Mexico is an adequate forum for all manner of litigation, including the claims at issue in this action. *See Ballard v. Maco Caribe, Inc.*, No. 14-21670, 2014 WL 4723144, at *2 (S.D. Fla. Sept. 23, 2014) ("Mexico has frequently been found to provide an adequate alternative forum."); *Ochoa v. Empresas ICA, S.A.B. de C.V.*, 11-23898-CIV, 2013 WL 5674697, at *5 (S.D. Fla. Oct. 17, 2013), *aff'd sub nom. Ochoa v. Empresas ICA, S.A.B. DE CV*, 600 F. App'x 725 (11th Cir. 2015) (finding Mexico to be an adequate forum in a civil RICO action); *see also*, *e.g.*, *Republic of Panama v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 952 (11th Cir. 1997) (holding that "a plaintiff's inability to assert a RICO claim in [a] foreign forum does not preclude *forum non conveniens* dismissal").

action. *See* Am. Compl. [ECF No. 72] ¶¶ 113-114, 250-252; *see also Banco Latino v. Gomez Lopez*, 17 F. Supp. 2d 1327, 1332 (S.D. Fla. 1998) (noting that parallel proceedings lend support to a finding that the alternative forum is adequate).

The Court, therefore, finds that Mexico is an adequate forum for Plaintiffs' claims.

b. Availability

An alternative forum is "available" to a plaintiff "when the foreign court can assert jurisdiction over the litigation sought to be transferred." *Leon*, 251 F.3d at 1311. This requirement will ordinarily be satisfied "when the defendant is 'amenable to process' in the other jurisdiction." *Piper Aircraft*, 454 U.S. at 254 n.22. Whether Mexico is an available alternative forum is a simple inquiry in this instance. Citigroup has stipulated that it will (1) be amenable to suit in Mexico; (2) submit to the jurisdiction of a Mexican court; (3) waive statute of limitations defenses; and (4) be bound by a final judgment entered by a Mexican court. *See* [ECF No. 80, at p.10]. These stipulations suffice to allow the Court to deem Mexico an available forum. *See Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1330 (11th Cir. 2011).

2. Private Interest Factors

The Court must next consider the private interest factors. "Pertinent private interests of the litigants include relative ease of access to evidence in the competing fora, availability of witnesses and compulsory process over them, the cost of obtaining evidence, and the enforceability of a judgment." *Pierre-Louis v. Newvac Corp.*, 584 F.3d

1052, 1056 (11th Cir. 2009) (citation omitted). In weighing the private interest factors, the Court must bear in mind that "[a] defendant invoking *forum non conveniens* ordinarily bears a heavy burden in opposing the plaintiff's chosen forum," but "[w]hen the plaintiff's choice is not its home forum . . . the presumption in the plaintiff's favor 'applies with less force.'" *Sinochem*, 549 U.S. at 430 (quoting *Piper Aircraft*, 454 U.S. at 255-56).[4]

Given that the presumption in favor of a plaintiff's initial forum choice "is at its strongest when the plaintiffs are citizens, residents or corporations of this country," the Eleventh Circuit in such cases requires "positive evidence of unusually extreme circumstances and thoroughly convince [the court] that material injustice is manifest before ousting a domestic plaintiff from this country's courts." *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1101-02 (11th Cir. 2004). That said, "dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. . . . [I]f the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." *Wilson v. Is. Seas Invs., Ltd.*, 590 F.3d 1264, 1270 (11th Cir. 2009) (quoting *Piper Aircraft*, 454 U.S. at 255 n.23). Of the over three dozen Plaintiffs in this action, only two—Otto Candies, LLC, and Waypoint Asset Management LLC—

[4] "[F]ederal courts, in the *forum non conveniens* context, do not focus on the connection between the case and a particular state, but rather on the connection of the case to the United States as a whole." *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1303 (11th Cir. 2002).

are U.S.-based companies.[5] Therefore, in the Court's analysis, the U.S.-based Plaintiffs' choice of forum will receive the presumption outlined above; but the foreign Plaintiffs' will not. *See King*, *supra*, 562 F.3d at 1383 (holding that the district court did not abuse its discretion by simultaneously according less deference to European plaintiffs' choice of forum and more deference to American plaintiffs' choice of forum).

In addition, while courts usually afford deference to a domestic plaintiff's choice of forum, when "an American plaintiff chooses to invest in a foreign country and then complains of fraudulent acts occurring primarily in that country, the plaintiff's ability to rely upon citizenship as a talisman against *forum non conveniens* dismissal is diminished." *Warter v. Bos. Sec., S.A.*, 380 F. Supp. 2d 1299, 1314 (S.D. Fla. 2004) (quoting *Sussman v. Bank of Israel*, 801 F. Supp. 1068, 1073 (S.D.N.Y. 1992), *aff'd*, 990 F.2d 71 (2d Cir. 1993)); *EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro S.A.*, 246 F. Supp. 3d 52, 78 (D.D.C. Mar. 30, 2017) (noting that several circuits have held that

[5] On May 3, 2017, the Court issued an order requiring these two Plaintiffs to file a statement that details the identities and citizenships of the members of each company, in keeping with the Eleventh Circuit's instruction that "a limited liability company is a citizen of any state [or country] of which a member of the company is a citizen." *Rolling Greens, MHP, L.P. v. Comcast SCH Holdings, L.L.C.*, 374 F.3d 1020, 1022 (11th Cir. 2004); *see also* [ECF No. 105]. The Plaintiffs filed a sealed document responsive to the Court's Order; the Court has reviewed this document and concludes that both companies are to be considered citizens of the United States for purposes of this analysis.

"the presumption in favor of [a plaintiff's] choice of forum . . . is diminished because [a plaintiff's] decision to invest abroad [puts] them on notice that they might be required to litigate disputes in a foreign forum.") (collecting cases). As this action arises out of *each* Plaintiff's decision to invest in a Mexican company doing business in Mexico, none of the Plaintiffs, whether U.S.-based or foreign, can feign surprise at potentially having to litigate a resulting dispute in Mexico. Therefore, the Court will also apply reduced deference to the U.S.-based Plaintiffs' choice of forum.

a. Ease of Access to Evidence and Cost

The first factor, ease of access to evidence, supports dismissal. As an initial matter, Plaintiffs contend that litigating this case in Mexico would significantly impair the parties' access to evidence because Mexico does not afford the same type of discovery available in the United States. However, their concerns about the limited scope of pretrial discovery are unavailing because it is not necessary that the alternative forum have comparable procedural safeguards. *Banco Latino*, 17 F. Supp. 2d at 1332 (citing *Proyectos Orchimex de Costa Rica, S.A. v. E.I. duPont de Nemours & Co.*, 896 F. Supp. 1197, 1200 (M.D. Fla. 1995)) (dismissal despite lack of extensive pretrial discovery). Nonetheless, Plaintiffs' concerns are belied by their own expert who concedes that there are multiple ways for parties to obtain documentary evidence during Mexican civil proceedings. *See* Gonzalez Decl. [ECF No. 85-1] ¶¶ 39, 45, 54, 60, 63.

With Defendant voluntarily agreeing to submit itself to Mexican jurisdiction, all of the key players in this

dispute–OSA, Pemex, Citibanamex, and Citigroup–will be available in Mexico and subject to the jurisdiction of its courts. The presence of all of the key players under the jurisdiction of the Mexican courts means that the parties will not need to resort to the costly and time-consuming process of obtaining documents and testimony through letters rogatory and the Hague Convention as would be required if the case was litigated in the United States. *See Warrick v. Carnival Corp.*, 12-61389-CIV, 2013 WL 3333358, at *7 (S.D. Fla. Feb. 4, 2013) (noting that private interest factors weighed in favor of dismissal where the defendants would have to use the Hague Convention to gather evidence; finding the process "unduly time consuming and expensive.") (citations omitted). Litigation in this forum will also make it more challenging to secure documentary evidence from Mexican sources over which Defendant, and perhaps this Court, does not have control. With all of the relevant players located under the jurisdiction of the Mexican courts, a Mexican court will be better able to resolve discovery disputes, particularly those relating to Mexican bank secrecy laws affecting Citibanamex and government transparency laws affecting Pemex.

Finally, the Court notes that the parties are equally entitled to access to the evidence needed to prosecute and defend their respective cases. Here, Plaintiffs contend that there is little need for any evidence located in Mexico because they intend to prove their case solely on the acts of Citigroup from the United States. On the other hand, Defendant argues that documents and testimony related to the alleged underlying fraud are located in Mexico and critical to establishing its defense. Notwithstanding

Plaintiffs' expressed disinterest in obtaining evidence from the key Mexican players in the alleged fraud, Defendant certainly has a right to obtain such evidence for its defense, and those documents and witnesses are all located in Mexico.

In order to assuage Plaintiffs' discovery concerns, the Court will implement the approach taken in *Banco Latino, Satz*, and *Piper Aircraft* and condition dismissal upon Defendant's agreement to make available all relevant documents and witnesses within their control. *Satz*, 244 F.3d at 1283 (noting that the district court conditioned its order of dismissal on the defendant agreeing to conduct all discovery in accordance with the Federal Rules of Civil Procedure and voluntarily producing documents and witnesses within the United States); *Piper Aircraft*, 454 U.S. at 257 (district courts may dismiss subject to the condition that parties agree to comply with reasonable discovery requests); *Banco Latino*, 17 F. Supp. 2d at 1333 (conditioning dismissal upon defendant filing an affidavit with the court agreeing to "make available all relevant documents and witnesses within their control"). Accordingly, the Court finds that these elements weigh in favor of dismissal.

b. Availability of Witnesses and Compulsory Process

Plaintiffs contend that this case solely concerns Citigroup's actions in the United States. Defendant argues that the underlying facts of this case arise out of an alleged fraudulent scheme carried out in Mexico between three Mexican companies. Defendant argues

that the main witnesses it needs to challenge Plaintiffs' underlying fraud allegations are the employees of OSA, Pemex, and Banamex, who are all located in Mexico. As Plaintiffs will necessarily be required to establish that the underlying fraud between OSA, Pemex, and Banamex actually occurred, it would be a fiction to accept Plaintiffs' contrary contention that the only witnesses needed to try this case are the U.S.-based employees of Citigroup. The Court believes that Defendant would be severely prejudiced in its ability to defend its case in the United States as it would be unable to compel the attendance of any witnesses located in Mexico and would be forced to defend this case on deposition testimony. The Court finds the opposite to be true as to Plaintiffs since Plaintiffs will not need to compel the attendance of their own witnesses in Mexico. As the Supreme Court explained in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) the doctrine of *forum non conveniens* should be applied to avoid these situations: "Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants." *Gulf Oil Corp.*, 330 U.S. at 511; *see also Montgomery v. Oberti*, 945 F. Supp. 2d 1367, 1376 (S.D. Fla. 2013) ("given the importance of these witnesses in assessing the disputed factual issues, the Court finds that no adequate substitute exists for the witnesses' live testimony and that the lack of access to this testimony weighs very strongly in favor of dismissal."); *McLane v. Marriott Int'l, Inc.*, 960 F. Supp. 2d 1351, 1360 (S.D. Fla. 2013) (finding that the "private interest factors also strongly weigh in favor of dismissal because the most critical witnesses concerning liability cannot be

compelled to testify in this Court"), *aff'd*, 547 F. App'x 950 (11th Cir. 2013). Accordingly, the availability of pertinent witnesses weighs in favor of a Mexican forum.

c. Enforceability of Judgment

This final private interest factor weighs in favor of dismissal as Defendant has expressly stipulated that it will be bound by any judgment entered against it in Mexico. *See* Def. Mot. to Dismiss [ECF No. 80, p.10]; Hr. Tr. [ECF No. 125, p.12]. In addition, the Florida Uniform Outof-Country Foreign Money-Judgment Recognition Act, §§ 55.601-55.607, Fla. Stat., allows for a judgment entered against Defendant by a Mexican court to be enforced domestically.

3. Public Interest Factors

"Relevant public interests include the familiarity of the court(s) with the governing law, the interest of any foreign nation in having the dispute litigated in its own courts, and the value of having local controversies litigated locally." *Pierre-Louis*, 584 F.3d at 1056. The Court finds that the relevant public interest factors weigh in favor of this action being litigated in Mexico. As stated above, while Citigroup is the only named Defendant in this action, this case involves four primary players, three of which are unquestionably Mexican entities: (1) Citigroup, who is alleged to have acted in part through its wholly-owned Mexican subsidiary Citibanamex; (2) Citibanamex; (3) OSA, a Mexican oil and gas company; and (4) Pemex, a Mexican state-owned oil company. Mexico clearly has a substantial interest in this case being litigated in Mexico as evidenced by the numerous parallel proceedings already underway and the fact that one of the key players in this dispute is owned by the Mexican government. Finally, the

Court does not find such meaningful connections between any of the parties and this District that would outweigh the clear interest Mexico has over this litigation.

4. Undue Inconvenience or Prejudice

Defendant argues that based on its stipulation to submit to jurisdiction and waive statute of limitations defenses, Plaintiffs can easily reinstate this action in Mexico without undue inconvenience or prejudice. As Plaintiffs do not contest Defendant's representation, the Court finds Defendant's stipulations sufficient to establish that Plaintiffs can reinstate their case in Mexico without undue burden.

III. CONCLUSION

The Court finds that all of the relevant factors weigh in favor of dismissing this action on *forum non conveniens* grounds.[6] Based on the foregoing, it is **ORDERED AND ADJUDGED** that:

(1) Defendant's Motion to Dismiss [ECF No. 80] is **GRANTED**;

(2) this cause is **DISMISSED** without prejudice to Plaintiffs refiling it in the appropriate forum, conditioned on the following:

a. Defendant shall consent to the jurisdiction of the Mexican courts;

b. Defendant shall waive all applicable statute of limitations defenses attributable to the delay

[6] Defendant argues in the alternative that the Amended Complaint be dismissed for failure to state a claim under Federal Rules of Civil Procedure 9(b) and 12(b)(6). Because the Court finds that the *forum non conveniens* issue is dispositive, it will not consider the parties' alternative arguments.

between the filing of this action and any action initiated by Plaintiffs in Mexico within one (1) year of this Order;

c. Defendant shall consent to the enforcement of any final Mexican judgement against it as to its assets in Mexico or the United States; and

d. Defendant shall reasonably make available all relevant documents and witnesses within its control.

This action shall be **CLOSED** for administrative purposes, and all pending motions, are **DENIED as moot**.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of January, 2018.

/s/ Darrin P. Gayles
DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE