UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE CITIGROUP INC. CAPITAL ACCUMULATION PLAN LITIGATION	**MDL No. 1354**
JOHNIE F. WEEMS, individually and on behalf of others similarly situated, Plaintiff, v. CITIGROUP, INC., et al., Defendants.	**Civil Action No. 00CV11912-NG (LEAD DOCKET NO.)**
JAMES S. MEWHINNEY, individually and on behalf of others similarly situated, Plaintiff, v. CITIGROUP, INC., et al., Defendants.	Civil Action No. 03CV10516-NG (ORIGINAL DOCKET NO.) S.D. Tex. No. 5:03-CV-00015

GERTNER, D.J.:

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT
August 8, 2008

This case is one of several challenges to Citigroup, Inc.'s[1] Capital Accumulation Plan ("CAP" or "the Plan"), which gives certain employees the option of receiving part of their compensation in Citigroup stock. The stock is awarded at a discounted rate, but carries restrictions, of which the most

[1] The defendants -- Citigroup Inc.; Citigroup Global Market Holdings, Inc.; Salomon Smith Barney, Inc.; Primerica Financial Services, Inc.; Citicorp; Travelers Property Casualty Corp.; The Travelers Insurance Company; The Travelers Life and Annuity Company; and Citifinancial, Inc. -- will be collectively referred to as "Citigroup" or "the defendants."

important is that it does not fully vest for two years after it is awarded. The dispute in this case arises from the provisions of CAP that require a participating employee to forfeit unvested shares -- and by implication the equivalent monetary wages foregone to purchase those shares -- if she voluntarily leaves the company before the two-year period has elapsed. Along with fifteen other member cases, this case was consolidated in this Court for pretrial proceedings pursuant to Multidistrict Litigation Order No. 1354. See 28 U.S.C. § 1407.

Plaintiff James S. Mewhinney ("Mewhinney" or "the plaintiff") initiated this case in state court in Texas. Citigroup removed to the U.S. District Court for the Southern District of Texas, citing federal jurisdiction based on both the Securities Litigation Uniform Standards Act of 1998 and diversity of citizenship.[2] It then filed a Notice of Tag-Along Action, and the case was duly transferred to this District for pretrial proceedings. Mewhinney sues on his own behalf and as a class representative of former Citigroup employees in Texas.[3]

Two other challenges to CAP -- one by a class of Florida plaintiffs, Slutzky v. Smith Barney, Inc., and one by a former Citigroup employee in Georgia, Gilmore v. Smith Barney, Inc. --

[2] The Court denied Mewhinney's Motion to Remand to state court. See Practice & Procedure Order No. 14 at 5-12 (document # 339).

[3] The Court certified the class on June 30, 2004. See Electronic Order Granting Motion for Certification (entered July 30, 2004).

were rejected by this Court. See Final Judgment, Gilmore v. Smith Barney, Inc. (entered July 25, 2006); Final Judgment, Slutzky v. Smith Barney, Inc. (entered Nov. 28, 2006) (document # 650). The First Circuit affirmed. See In re Citigroup Capital Accumulation Plan Litig., No. 06-2565, --- F.3d ---, 2008 WL 2840601 (1st Cir. July 24, 2008) (document # 714).[4] Two other member cases, Peckler v. Citigroup, Inc. (Massachusetts class) and Lomas v. Citigroup, Inc. (Connecticut class), have been stayed pending the decision of the respective states' highest courts on certain statutory issues. Many of the remaining actions have been deferred until the resolution of the Mewhinney case. See, e.g., Joint Submission Concerning Arizona Case (Woods) and Montana Case (Udall) at 1 (document # 691).

The cases have proceeded piecemeal, each member case differing slightly because it applies a different state's law. Nevertheless, the First Circuit's decision in In re Citigroup goes a long way toward resolving the challenges in this case as well. The contract documents are the same and the rules governing the Court's interpretation of those documents are largely the same; the differences, if they exist, lie in the states' different approaches to public policy issues.

Based on the Court's reading of the CAP documents and the First Circuit's decision in In re Citigroup, the Court finds the

[4] The decision is hereafter referred to as the slip opinion in In re Citigroup.

plaintiff's claims to be without merit. For the reasons discussed below, the defendants' Motion for Summary Judgment (document # 590) is **GRANTED**, and the plaintiffs' Motion for Summary Judgment (document # 574) is **DENIED**.

I. BACKGROUND

A. Facts

Citigroup's CAP is a deferred-compensation scheme that allows its participants, high-level employees at Citigroup, to forego some of their cash compensation in exchange for the receipt of restricted Citigroup stock. Beyond that general description, however, the parties agree on little. Citigroup characterizes the Plan as a lucrative award program for loyal employees. Mewhinney calls it an improper "golden handcuff," forced on reluctant participants by Citigroup's corporate culture. More importantly, as discussed below, the parties dispute the precise mechanics of the Plan.

1. The Inception and Administration of the Plan

The first iteration of the Citigroup CAP was the Primerica Corporation's "Incentive and Retention Plan," adopted in 1989. According to the plaintiffs, "[s]etting aside . . . non-material differences, the same Plan is in effect today across Citigroup" as in 1989. Mem. Supp. Mot. Class Certification at 4 (document # 460); see also First Am. Class Action Compl. ("Compl.") ¶ 21 (document # 354).

The Plan is generally administered by a committee ("the Committee") appointed by Citigroup. Presently, it is the Incentive Compensation Subcommittee of the Citigroup Board of Directors. Citibuilder Capital Accumulation Program Prospectus ("2000 Prospectus") at 4, Ex. P to Defs.' App. CAP Documents (document # 706). As described more fully below, the Committee has broad administration powers over the Plan.

2. Enrollment in the Plan

Employees may participate in the CAP through either or both of two sub-programs, the Payroll Program and the Bonus Program. The Payroll Program, also called the "Financial Consultant Program" after the employees for whom it is offered, is a voluntary program[5] in which participants receive restricted stock in place of cash compensation. Travelers Group Capital Accumulation Plan Prospectus ("1997 Prospectus") at 6 (Oct. 15, 1997), Ex. M to Defs.' App. CAP Documents (document # 706).[6] The Bonus Program applies to employees who receive a year-end

[5] Certain employees are required to participate in the Plan and receive at least 10% of their annual compensation in restricted stock. Mewhinney is not among them. Travelers Group Capital Accumulation Plan Prospectus ("2001 Prospectus") at 2 (Nov. 1, 2000), Ex. Q to Defs.' App. CAP Plan Documents (document # 706).

[6] The Prospectus describes itself as a "summary [which] is qualified in its entirety by reference to the Plan, a copy of which is attached as Annex A." 1997 Prospectus at 6, Ex. M to Defs.' App. CAP Documents (document # 706). Because the Plan is not separately tabbed or paginated, the Court refers to the copy of the Plan itself as "Annex A" to a particular prospectus in order to aid citation. It is plain -- and all parties agree -- that the terms set forth in the Annexes are binding. It is not necessary to decide whether the prospectuses themselves are binding on the parties (although the First Circuit held that they were, In re Citigroup, slip op. at 19.)

incentive award. Under the Bonus Program, a portion of the award is made in restricted stock rather than cash. See id. at 6-7; Def. Stmt. Material Facts at 6 (document # 592). This case primarily concerns the Payroll Program.

Mewhinney claims that participation in the CAP Plan's Payroll Program was expected as a matter of Citigroup's corporate culture, and that it was not truly "voluntary."[7] Pl. Stmt. Material Facts at 5-6 (document # 578). Citigroup denies placing any pressure on employees. Def. Resp. Pl. Stmt. Material Facts at 14-15 (document # 593). In any event, the parties agree that any such pressure is irrelevant to the resolution of this case.[8] As the First Circuit noted, participation in CAP carries the risk of forfeiture, but it also has several substantial benefits. First, the restricted stock is awarded at a discounted rate compared to the price of common stock on the market. See 1997

[7] The stated purpose of the CAP is "to attract, retain, and motivate officers and certain other employees, to compensate them for their contributions to the growth and profits of the company, and to encourage ownership of stock in the Company on the part of such personnel." 1997 Prospectus, Annex A at A-1, Ex. M to Defs.' App. CAP Documents (document # 706). Mewhinney argues that the Plan reflected ulterior purposes as well: an internal Citigroup memorandum notes that "the key objectives of the Plan are to "encourage the [participants] to defer as much compensation as possible," enabling Citigroup to save money, and to "'punish' those who leave and go to a competitor." Mem. from J.H. Dietzel to B.L. Mannes at 3 (May 23, 1991), Ex. R to Pl. Stmt. Material Facts (document # 578).

[8] Mewhinney has expressly waived claims based on the alleged pressure. In requesting class certification, he characterized his earlier pleadings regarding coercion as merely "descriptive" and explicitly stated that "[t]he fact that [participants] were 'pressured and compelled' to participate in the CAP Plan . . . does not factor into their legal causes of action." Tex. & N.C. Pls.' Reply & Response Mem. at 9 (document # 493). The Court relied on that representation in granting the plaintiff's motion for class certification. See Tr. Case Mgmt. Conf. (June 30, 2004) (document # 499).

Prospectus, Annex A, at A-4, Ex. M to Defs.' App. CAP Documents (document # 706). Second, because of the risk of forfeiture of the restricted stock, the stock need not be counted as "income" until it vests. See 1997 Prospectus at 16, Ex. M to Defs.' App. CAP Plan Documents (document # 706).

Employees who enroll in the Payroll program fill out and sign an Election Form. Pl. Stmt. Material Facts at 7 (document # 578); Def. Stmt. Material Facts at 3 (document # 592). An Election Form allows an employee to "elect to receive the following percentage of [her] annual cash compensation in the form of restricted stock" for each half of the calendar year. The election may be made from 0% to 25% in 5 percent increments. See CAP Election to Receive Restricted Stock ("Mewhinney Election Form") (Dec. 4, 1996), Ex. A to Defs.' App. CAP Documents (document # 706). The decision to participate, once made, is irrevocable for the calendar year. 1997 Prospectus at 7, Ex. M to Defs.' App. CAP Documents (document # 706). Unless participants indicate on an Election Form that they wish to change it for the subsequent year, the same level of participation is carried forward from year to year. Id.

By contrast, management employees in the Bonus Program are issued part of their year-end bonuses in restricted stock. They do not have the opportunity to elect to be paid that portion in

cash instead. See Def. Stmt. Material Facts at 6-7 (document # 592).

3. The Mechanics of the Plan

The parties diverge sharply over how the Payroll Program works. It is addressed much more extensively below in sections IV.B and IV.C, but for context's sake, the parties' positions are briefly described here. According to Citigroup, the Payroll Program distributes restricted stock instead of cash compensation. That is, a participant chooses to receive a smaller cash salary and instead receive some compensation for her services in the form of restricted Citigroup stock. The amount of restricted stock awarded is calculated based on the amount of cash salary the participant chooses to forego but, strictly speaking, no "purchase" of the stock ever occurs. Participation in the Payroll Program is simply a reconfiguration of the participant's salary package. See Def. Mem. Supp. Mot. Summ. J. ("Def. Mem.") at 4 (document # 591). The restricted stock is subject to forfeiture until it vests, two years after the award date.

In the plaintiff's view, the Payroll Program operates by deducting the portion of the salary the participant elected from her paycheck. The funds are held in the participant's "CAP Plan account." E.g., Pl. Mem. Supp. Mot. Summ. J. ("Pl. Mem.") at 11 & n.11 (document # 575); Pl. Stmt. Material Facts at 8, 9

(document # 578). Twice a year, the funds in the accounts -- called "suspense accounts" below -- are used to purchase Citigroup restricted stock. For two years after the purchase date, until it vests, the stock is subject to forfeiture. But if the stock is forfeited, that means the funds used to purchase the stock must be returned to the suspense account -- and then to the CAP participant.

The parties do agree on one important aspect of the Payroll Program. If a CAP participant leaves Citigroup before the stock is awarded, Citigroup returns the portion of her salary that has been deferred or deducted, but not yet transformed into restricted stock. The dispute in this case is solely over the forfeiture clauses' effect after the restricted stock is awarded. See Tr. Summ. J. Hrg. at 59 (July 25, 2006) (document # 618) (plaintiff's counsel, discussing the funds in the "suspense account," and stating "[w]e concede. That part he gets back."). See also In re Citigroup, slip op. at 5 & n.4.

The Bonus Program, the parties agree, pays part of an employee's discretionary year-end bonus in restricted stock. Pl. Stmt. Material Facts at 16 (document # 578); Def. Stmt. Material Facts at 6-7 (document # 592). The remainder of the bonus is cash.

The privileges and perils of the restricted stock are discussed below in detail in Section IV.B. For now, it is enough

to say that if an employee leaves Citigroup voluntarily or involuntarily for cause -- who resigns or is fired -- before the stock vests, she forfeits her restricted stock. Plaintiff Mewhinney (who resigned) and all the members of the class fall into this category. An employee who leaves involuntarily, but not for cause -- for example, one who is laid off -- forfeits her restricted stock, but receives a cash payment equal to the salary she gave up in order to receive the restricted stock instead. Other rules, not relevant here, govern employees who retire or die during the vesting period.

4. Representative Plaintiff Mewhinney's Participation in the Plan

Mewhinney was a financial consultant at Smith Barney in Dallas from 1987 to 2002. See Compl. ¶¶ 38, 45 (document # 354); Def. Stmt. Material Facts at 1 (document # 591). He participated in the Payroll Program at levels varying from 5% to 20%. See Dep. of James Mewhinney at 70-71 (May 6, 2004), Ex. E to Defs.' App. Suppl. Materials (document # 707). Mewhinney alleges that he forfeited approximately $93,000 of "earned compensation" when he voluntarily left Citigroup for UBS PaineWebber in 2002. Compl. ¶ 5, 45-46 (document # 354). (By "earned compensation," Mewhinney means the cash salary that he gave up in order to participate in the Payroll Program.) He "requested a refund of the non-vested portion of his CAP Plan account" -- that is, a return of that cash he exchanged for restricted stock -- but his

request was ignored. Id. ¶ 45. Citigroup did return to Mewhinney funds that had been deducted from his paycheck but not yet used to purchase restricted stock. See Tr. Summ. J. Hrg. at 59 (July 25, 2006) (document # 618).

Mewhinney never participated in the Bonus Program. See Compl. ¶¶ 38-46 (not alleging such participation); Pl. Stmt. Material Facts at 14 (document # 578) (only noting deductions of earned compensation); Mewhinney Restricted Stock Summary (Nov. 27, 2002), Ex. S to Pl. Stmt. Material Facts (document # 578) (same).

B. Procedural History

This case was originally filed in the district court for the Southern District of Texas. On March 20, 2003, it was transferred to this District for pretrial proceedings, pursuant to Multidistrict Litigation Order No. 1354. On June 30, 2004, Judge Keeton certified Mewhinney as the representative plaintiff for a class, consisting of "all persons formerly employed by the Defendants in Texas who invested their earned compensation in CAP Plan Stock, and who forfeited all or part of such earned compensation (i.e. wages, commissions, and/or bonuses), CAP Plan stock, dividends, appreciation thereon, and splits thereof when their employment terminated." Compl. ¶ 2 (document # 354); see also Mot. Certify Class (document # 459).

Mewhinney asserts six claims against the defendants: (1) money had and received; (2) breach of fiduciary duty; (3) conversion; (4) breach of contract; (5) quantum meruit; and (6) unjust enrichment. See Compl. ¶¶ 60-85 (document # 354).[9] He now seeks summary judgment on five claims, excluding only the one for quantum meruit. See generally Pl. Mem. (document # 575).

The defendants answered and asserted a counterclaim, arguing that if the Court found that the Plan was invalidated, all parties must be restored to the status quo ante. Answer at 10 (document # 358). That, they argue, would require complete rescission of the CAP, so that the plaintiffs would be required to restore to Citigroup all of the compensation they had ever received through the Plan in exchange. Citigroup seeks summary judgment on all six of the plaintiffs' claims. See Def. Mem. Supp. Mot. Summ. J. ("Def. Mem.") (document # 591).

Mewhinney moved for summary judgment in February 2006. In April, the defendants opposed Mewhinney's motion and cross-moved for summary judgment. On July 25, 2006, Judge Keeton held a hearing on the motions; he made some oral rulings, but they were not clear to the parties. Compare Pl.'s Mot. Order on Cross-Motions (document # 619), with Defs.' Mot. Seeking Entry of Proposed Order on Cross-Motions (document # 622).

[9] The plaintiff originally brought a common-law debt action for unpaid wages. Compl. ¶¶ 56-59. However, he has since expressly abandoned that claim, Pl. Suppl. Br. at 20 n.6 (document # 694), and the Court does not address it.

The case was reassigned to this Court on September 11, 2006. On June 26, 2007, the Court requested supplemental briefing on several questions. It also indicated that because of ambiguity in the record, it would not seek to discern Judge Keeton's rulings on the motions for summary judgment, but would undertake its own analysis. See Order re Supplemental Briefing (June 26, 2007) (document # 688). The parties submitted their supplemental briefs as ordered.

II. SUMMARY JUDGMENT STANDARD AND CHOICE OF LAW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Interpretation of an unambiguous contract is a matter of law. See, e.g., John Hancock Life Ins. Co. v. Abbott Labs., 478 F.3d 1, 6-7 (1st Cir. 2006). If a contract is ambiguous, however, it may require findings of fact in order to ascertain the intent of the parties. Den Norske Bank A.S. v. First Nat. Bank of Boston, 75 F.3d 49, 52-53 (1st Cir. 1996). Such findings of fact might involve contested issues of material fact sufficient to preclude summary judgment.

When a moving party has pointed to the absence of adequate evidence supporting the nonmoving party's case -- as each party

has done here by arguing that the contract terms unambiguously support its position -- the nonmoving party must specifically identify contested issues of fact. See Serrano-Cruz v. DFI Puerto Rico, Inc., 109 F.3d 23, 25 (1st Cir. 1997); LeBlanc v. Great American Ins. Co., 6 F.3d 836, 841-42 (1st Cir.1993). "[N]either conclusory allegations [nor] improbable inferences" are sufficient to withstand summary judgment. J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1251 (1st Cir. 1996) (internal quotation marks omitted).

In this case, the plaintiffs have asserted that both Delaware and Texas law apply to their claims. See Pl. Mem. at 4-5 (document # 575). The Court need not decide the choice of law issue now, as it does not appear to alter the analysis. See Lexington Fire Ins. Con. v. General Accident Ins. Co. of America, 338 F.3d 42, 46 (1st Cir. 2003) (stating that where a case is unaffected by the choice of law, the court may prudently bypass the question). The parties agree that this approach is sound. See Pl. Mem. at 5 (document # 575); Def. Mem. at 10 (document # 591).

III. STANDING AND SCOPE OF THIS OPINION

The class-action complaint asserts some claims regarding the Bonus Program. See Compl. ¶¶ 25, 48 (document # 354). However, representative plaintiff Mewhinney apparently never participated in the Bonus Program. See id. ¶¶ 38-46 (discussing Mewhinney's

participation in the Plan, but never mentioning receipt of bonuses in restricted stock); Mewhinney Aff. ¶¶ 6, 8, 15, Ex. A to Pl. Stmt. Material Facts (document # 578) (same); Restricted Stock Summary (Nov. 27, 2002), Ex. S to Pl. Stmt. Material Facts (document # 578) (appearing to contain no stock awards for bonuses); Mewhinney Dep. at 70-82, Ex. E to Pl. Stmt. Material Facts (document # 578) (discussing participation in the Payroll Program, but not mentioning the Bonus Program). Mewhinney purports to have left the question of the Bonus Program for trial. Pl. Suppl. Mem. at 3-4 (document # 694). The defendants say the Court should adjudicate it now. Def. Suppl. Mem. at 2-3 (document # 695).

The Court, however, can do neither. While Mewhinney participated in the CAP Plan through the Payroll Program, he never participated in the Bonus Program. He therefore cannot have been harmed by the defendants' alleged improprieties with respect to that aspect of the CAP Plan. And without an injury-in-fact, Mewhinney lacks standing to seek relief with respect to the Bonus Program. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (describing injury-in-fact requirement); see also DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 351-52 (2006) (noting that the standing analysis must be undertaken for each claim a plaintiff seeks to press).

It is true that Mewhinney represents some class members who received Bonus Program restricted stock awards in addition to awards through the Payroll Program. But that does not change the standing analysis. For a class action, standing must be evaluated with respect to the representative plaintiff. See Warth v. Seldin, 422 U.S. 490, 502-03 (1975) (examining claims of representative plaintiffs to determine whether standing existed); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976) ("That a suit may be a class action . . . adds nothing to the question of standing . . . .").

Consequently, this opinion only addresses the Payroll Program. The Court notes, however, that it appears that the relevant provisions of the Bonus Program -- providing for the forfeiture of restricted stock -- are largely identical.

IV. BREACH OF CONTRACT

Mewhinney's breach of contract claim will be addressed first because it conveniently presents several of the contested issues in this case. In the plaintiff's view, the agreement between the parties says only that participants agree to forfeit "restricted stock" if they leave Citigroup voluntarily or are terminated for cause. He contends that the term "restricted stock" means only restricted stock, and not cash salaries deducted from the participants' paychecks, held in the CAP Plan accounts, and then used to acquire the stock. Like Slutzky, the plaintiff whose

claims the First Circuit rejected, Mewhinney argues that the forfeiture provisions of the CAP apply only to the restricted shares and not to the earned compensation a participant forgoes purchase those shares.[10]

Citigroup, by contrast, argues that Mewhinney mistakes the nature of the Plan. It argues that there exist no cash "earned compensation" or "CAP Plan account." Rather, the restricted stock is all that participants ever receive -- so when it is forfeited, participants are entitled to nothing else. Alternatively, they contend that the documents creating the agreement between the parties clearly place the participants on notice that they stand to lose the cash compensation that they forwent in order to participate in the Plan.

A. What Documents Comprise the Agreement Between the Parties

The parties fundamentally disagree over what documents comprise the Plan, with the Election Forms at the crux of the argument. The Election Forms are especially important because they state:

> If I leave the Company voluntarily or am terminated for Cause before the restrictions lapse on shares of restricted stock awarded under CAP, I understand that I will forfeit the restricted stock as well as the compensation I have authorized to be paid in the form of such restricted stock.

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[10] Mewhinney suggested for the first time in his reply brief that the contract was void for vagueness. See Pl. Reply Mem. at 18 (document # 612). Because this argument was presented for the first time in a reply brief and because it is undeveloped, the Court need not address it.

Mewhinney Election Form, Ex. A to Defs.' App. CAP Documents (document # 706). Mewhinney argues that they should not be considered part of the agreement between the parties. Notably, Slutzky and Gilmore made very similar arguments with respect to the same documents; the First Circuit rejected them. See In re Citigroup, slip op. at 15-19, 31-32. As the Court explains below, there is no basis in fact or under Texas law to reach a different conclusion here.

Mewhinney begins his analysis of what documents comprise the Plan with the Plan's prospectus. The prospectus states, "All determinations regarding participation in and awards under the Plan shall be governed by the terms of the Plan and, where applicable, the terms of the actual award agreement (the 'Restricted Stock Award Agreement') between [Citigroup] and each Participant." 1997 Prospectus at 6, Ex. M to Defs.' App. CAP Plan Documents (document # 706); 1998 Prospectus at 6 (May 15, 1998), Ex. N to Defs.' App. CAP Plan Documents (document # 706) (same).

Mewhinney argues that this means only two sets of documents are relevant to this Court's inquiry: the Restricted Stock Award Agreements and the "terms of the Plan." In turn, the phrase "terms of the Plan" refers only "to the formal CAP Plan documents." Pl. Mem. at 6 (document # 575). These "formal" documents are the ones titled with the name of the Plan and

annexed to the various prospectuses. See id. By negative implication, Mewhinney reasons, all other documents, including the prospectuses themselves and the critical Election Forms, are excluded as governing documents. Id. at 6, 9-10.

The plaintiff's argument is without merit for several reasons. First, it faces a logical problem. Under his approach, the prospectus -- the document upon which Mewhinney relies to enumerate the binding documents -- is not itself binding. See Pl. Mem. at 5-6 (document # 575). Presumably, unless the prospectus is binding, it cannot conclusively exclude other documents from being integrated into the contract.

Second, and relatedly, the "formal Plan documents" themselves are not so restrictive. The "terms of the plan," as Mewhinney describes them, ascribe broad powers to the administering Committee to define and set the rules of participation in the Plan.

> The Committee shall have the authority . . . to determine the terms and conditions, not inconsistent with the terms of the Plan, of any award granted hereunder . . . .
>
> The Committee shall have the authority to adopt, alter and repeal such administrative rules, guidelines, and practices governing the Plan as it shall, from time to time, deem advisable; to interpret the terms and provisions of the Plan and any award issued under the Plan; and to otherwise supervise the administration of the Plan.

1996 Prospectus, Annex A, at A-8, Ex. L to Pl. Stmt. Material Facts (document # 578). The Restricted Stock Award Authorization

similarly anticipates that the Committee may promulgate other binding documents. See 1997 RSAA ¶ 3, Ex. Q to Pl. Stmt. Facts (document # 578) ("By signing and returning this Agreement, the Participant agrees to be bound by the terms, conditions and limitations of the Plan, this Agreement and the Company's policies, as in effect from time to time, relating to the administration of the Plan."). See also In re Citigroup, slip op. at 15-16 (noting that RSAA at issue in that case incorporated extrinsic documents, including "rules adopted by the Committee").

As a result, the Plan is vague in some places, allowing the Committee to fill in details later. Significantly, the Plan itself does not appear to differentiate between the Payroll Program and the Bonus Program; presumably, the Plan's different versions were created by the Committee later. Furthermore, the Committee has the discretion to determine what employees are eligible to participate in the CAP Plan. It may provide for alternative methods of awarding stock under the Plan. And it sets the formula by which shares are awarded. See, e.g., 1997 Prospectus, Annex A at A-3 to A-4, Ex. M to Defs.' App. CAP Plan Documents (document # 706).

Moreover, all of these decisions by the Committee appear to be implemented solely through documents that are neither the Plan itself nor the Restricted Stock Award Agreement. For example, the 1997 Prospectus allows participants to choose what percentage

of their compensation to receive in restricted stock, and mandates that "[p]ercentage elections, once made for a given calendar year, are irrevocable and may not be changed." 1997 Prospectus at 7, Ex. M to Defs.' App. CAP Plan Documents (document # 706). The Committee may also treat a Participant's failure to return an Election Form as a choice to maintain the same level of CAP participation as the previous calendar year. Id. Those rules do not appear in the 1997 Plan, see generally 1997 Prospectus, Annex A, Ex. M Defs.' App. CAP Plan Documents (document # 706), but rather are implemented and enforced through the Election Form, see Mewhinney Election Form, Ex. A to Defs.' App. CAP Plan Documents (document # 706).

Finally, and perhaps most tellingly: on their faces, the Election Forms are plainly intended to be binding documents. They appear to be the only document a participant executes to enroll in the Plan, thereby choosing to forego part of her cash salary and to receive stock instead. Both parties plainly meant for the Election Form to be binding -- if there was a dispute about whether the correct amount of restricted stock was issued for the amount of compensation the participant had forgone, the Election Form would surely control. See, e.g., Baylor Univ. v. Sonnichsen, 221 S.W.3d 632, 635 (Tex. 2007) ("Evidence of mutual assent in written contracts generally consists of signatures of the parties and delivery with the intent to bind.").

Because the Election Forms were within the Committee's power to promulgate, and because they were treated by the parties as binding -- showing a mutual assent to enroll the participant in the Plan -- the Court concludes that they were binding documents. Accord In re Citigroup, slip op. at 16-19 (concluding, under Florida law, that CAP contract consisted of restricted stock award agreement, election form, and prospectus and annex); id. at 32 (same under Georgia law); Prac. & P. Order No. 20 at 8-9, 10 (document # 506) (Order of Keeton, J.) (holding that a participant's signature on the Election Form, along with the one on the Restricted Stock Award Agreement, is "sufficient to manifest his assent to the contract and all its terms," and treating the Election Form as part of the contract).

That does not end the contract inquiry, however. Treating the Election Forms as binding triggers Mewhinney's alternative argument. Since the Election Forms provide for the forfeiture of "compensation . . . authorized to be paid," they conflict with the Plan documents, which only provide for the forfeiture of restricted stock. That conflict, Mewhinney concludes, creates an ambiguity within the contract as to whether the "compensation . . . authorized to be paid" exists. See Pl. Mem. at 7-12 (document # 575).

To address that argument, the Court turns to precisely how the plan works.

B. The Mechanics of the Plan

1. Calculation of the Restricted Stock

Employees who participate in CAP receive restricted stock biannually, in early January and early July. Each award reflects the participant's earnings and percentage election for the previous six-month period. See, e.g., 2001 Payroll Program Prospectus at 3, Ex. Q to Defs.' App. CAP Plan Documents (document # 706).[11] To determine the amount of restricted stock each participant receives, Citigroup first calculates how much pre-tax compensation was deferred. It then computes the price of one share of restricted stock: the average month-end closing share price of Citigroup common stock on the New York Stock Exchange over the preceding six months, discounted by 25%. See, e.g., 1997 Prospectus, Annex A at A-4, Ex. M to Defs.' App. CAP Plan Documents (document # 706). The discount "reflect[s] . . . the impact of the restricted nature and potential forfeiture of the Restricted Stock." Id. Finally, the total amount of deferred compensation is divided by the price of one share of restricted stock to arrive at the total number of restricted

[11] Earlier prospectuses, such as the 1997 Travelers Group Prospectus, do not include the dates on which the restricted stock award is made. See, e.g., 1997 Prospectus, Annex A at A-3, Ex. M to Defs.' App. CAP Plan Documents (document # 706) (discussing "[a]mount and [f]orm of [a]wards" without specifying dates). The Court assumes them to be roughly the same as specified in later prospectuses; the precise dates are immaterial.

shares to be awarded.[12] The value of any fractional shares is paid in cash. Id.

The parties disagree over the details by which this process is carried out.[13] In Mewhinney's view, the Plan uses a deduction-and-sale method to calculate and award the shares of restricted stock to each participant. On each payday, a participant's "deferred" cash compensation, as chosen on the Election Form, is deposited in an electronic "Citigroup CAP Plan account[]," held by Citigroup. Pl. Stmt. Material Facts at 8 (document # 578); see Pl. Mem. at 1 n.3, 6-7, 11 (document # 575); Aff. of James S. Mewhinney ¶¶ 6-8, Ex. A to Pl. Stmt. Material Facts (document # 578). The account is dedicated to holding funds for purchasing restricted stock; Citigroup pays no interest on the funds while they are in the account. Pl. Stmt. Material Facts at 8 (document # 578). At six-month intervals, the funds in the account "are used to purchase as many shares of Restricted Stock as possible." Id.

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[12] The 2001 Prospectus subdivides the award of restricted stock into a "Basic Award" and a "Premium Award." 2001 Payroll Program Prospectus at 2 (Nov. 1, 2000), Ex. Q to Defs.' App. CAP Plan Documents (document # 706). This distinction is not material for present purposes.

[13] This question was not squarely presented to the First Circuit. Consequently, it characterized the Plan in two slightly different ways in its opinion. Compare In re Citigroup, slip op. at 3 (stating that "CAP offers an eligible employee the opportunity to receive restricted shares of Citigroup stock . . . in lieu of cash compensation" (emphasis added)), with id. at 18 (stating that the award "requires that a participant's compensation be accumulated for six months prior to being invested in Citigroup stock" (emphasis added)).

This view of the Plan has some support. As noted above, the Election Forms refer to both "restricted stock" and "compensation . . . authorized to be paid in the form of restricted stock." Mewhinney Election Form, Ex. A to Defs.' App. CAP Documents (document # 706). Prospectuses from 1998 and before describe the diminution in cash compensation as a "percentage . . . to be deducted from each paycheck." E.g., 1998 Prospectus at 7, Ex. N to Defs.' App. CAP Plan Documents (document # 706). Similarly, a paycheck from Salomon Smith Barney listed "2000FCCAP 1" under the heading "taxes/deduct" with an amount reflecting an election to participate in CAP at the 5% level. See Pay Stub, Ex. W to Pl. Stmt. Material Facts (document # 613). Deduction, in its ordinary meaning, suggests that some cash earned by the participant was taken away and diverted to another purpose. Furthermore, at least one deponent agreed that the money "deducted" was held in a particular general ledger account. See Calabro Dep. at 56-57, Ex. W to Pl. Stmt. Material Facts (document # 613).

There is also support for Citigroup's contrary view. Citigroup contends that there is no such thing under the plan as a "contribution." See, e.g., Def. Mem. at 7 n.5, 30 n.25 (document # 591); Def. Stmt. Material Facts at 3-4 (document # 592); Def. Mot. & Mem. Supp. Proposed Order at 5-6 (document # 622). Under their theory, participants' cash compensation is

diminished, and at six-month intervals, participants are awarded a certain amount of additional compensation in the form of restricted stock. Def. Stmt. Material Facts at 4 (document # 592). Thus, according to Citigroup, there simply is no "earned compensation" or "contribution" that can be returned. The only compensation is the restricted stock.

Citigroup's interpretation accords somewhat more closely with the language of the Plan. On the Election Form, a participant "direct[s] [her] employer . . . to pay [her] the percentage [she has] elected in the form of restricted stock out of all cash compensation paid to [her] during the periods specified on the election form." Mewhinney Election Form, Ex. A to Defs.' App. CAP Plan Documents (document # 706) (emphasis added). There is no mention of a purchase or sequestering funds in a particular account. Indeed, there is no mention whatsoever in any prospectus, Plan, or other document, of a separate account where the "deductions" were to be placed.[14] Similarly, the Plan calls for the "award" of restricted stock as compensation -- not its purchase. See generally 1997 Prospectus, Annex A, Ex. M to Defs.' App. CAP Plan Documents (document # 706); 1997 RSAA, Ex. Q

[14] Mewhinney mentions the existence of the "account" in his own affidavit, see Mewhinney Aff. ¶¶ 7-8, Ex. A to Pl. Stmt. Material Facts (document # 578), but considering that this is a legal matter of contract interpretation, his view is insufficient to create an issue of fact as to the operation of the Plan. See, e.g., Nadherny v. Roseland Prop. Co., 390 F.3d 44, 51 (1st Cir. 2004) (applying Massachusetts law).

to Pl. Stmt. Material Facts (document # 578).[15] In this interpretation, the financial consultant whose paycheck the plaintiffs submitted earned some $25,700 worth of compensation, but the compensation package was actually $24,420 in cash and $1,280 in Citigroup restricted stock. See Pay Stub, Ex. W to Pl. Stmt. Material Facts (document # 613).

Ultimately, whether Mewhinney or Citigroup is correct is immaterial. Either the restricted stock was "awarded" at six-month intervals, with no underlying cash compensation, or the restricted stock was "purchased" at six-month intervals out of sequestered cash compensation. Either way, following the purchase or award date, a participant possessed only restricted stock.[16] No reasonable participant could have thought otherwise -- even under the plaintiff's "purchase" theory. Indeed, participants in CAP effectively acknowledge that they only possess restricted stock by executing the Restricted Stock Award Agreement. See 1997 RSAA ¶ 1, Ex. Q to Pl. Stmt. Facts (document # 578) ("This Agreement shall evidence an award . . . made by [Citigroup] to the Participant of 74.00 shares of common stock . . . subject to the terms, conditions and restrictions set forth

[15] Although not strongly persuasive because the context is quite different, the parties were also capable of making very clear that two separate transactions occurred. See 2002 Prospectus at 10, Ex. R to Defs.' App. CAP Plan Documents (document # 706) (discussing the "same-day-sale" method of exercising stock options).

[16] Furthermore, as noted above, any cash remaining in the "account" was returned to Mewhinney when he left Citigroup. See Tr. Summ. J. Hrg. at 59 (July 25, 2006).

herein and in the [Citigroup] Capital Accumulation Plan . . . .").

2. Receipt of the Restricted Stock

When the restricted stock is awarded, either a stock certificate is issued or, if no certificate is issued, a "book entry" is made "in the records of the Company to evidence an award of shares of Restricted Stock to a Participant." 1997 Prospectus, Annex A at A-4, Ex. M to Defs.' App. CAP Plan Documents (document # 706).[17] Either one constitutes an issue of shares out of Citigroup's treasury. Apparently book entries were the predominant practice.

Mewhinney views the book entry as an accounting sleight-of-hand in which money is moved from the participant's "account" to the company in exchange for restricted stock, but no substantial rights are altered. See Pl. Mem. at 11 (document # 575); Pl. Reply Mem. at 5-7 (document # 612); Tr. Summ. J. Hrg. at 61-64 (July 25, 2006); Pl. Suppl. Mem. at 7 (document # 694). The Plan makes clear, however, that the "book entry" means recording of the participant's ownership interest in the company -- the creation of a share as an ownership interest without the attendant creation of a stock certificate. See 1997 Prospectus, Annex A at A-4, Ex. M to Defs.' App. CAP Plan Documents (document # 706) (stating that upon an award of restricted stock, a "'book

[17] Even if a certificate is issued, it must be "held in the custody of the Company until the restrictions [on the stock] have lapsed." Id.

entry' (i.e. a computerized or manual entry) shall be made in the records of the Company to evidence an award of shares of Restricted Stock").[18]

Citigroup's choice to record the restricted stock by book entry was permissible; it simply made the restricted stock an uncertificated security. A share of restricted stock is an obligation, albeit a conditional one, owed to CAP participants. The share is registered on Citigroup's books; it is one of a class or series of ownership interests; and as a specific type of share of Citigroup common stock, it is "of a type" of obligation that can be traded on securities markets. Plainly, it is a "security." See Tex. Bus. & Com. Code § 8.102(a)(15) (defining "security"); 6 Del. Code § 8-102(a)(15) (same); see also Landreth Timber Co. v. Landreth, 471 U.S. 681, 686-87 (1985) (discussing meaning of "security" under federal law); Dynamics Corp. of Am., SEC No-Action Letter, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. ¶ 76,098 (Feb. 11, 1992) (suggesting that book entries of

[18] To argue that the book entry is meaningless, the plaintiff relies on the peculiar deposition testimony of Paula Frimmer, a senior manager at Citigroup. She stated that after shares of restricted stock are awarded but before they fully vest, the shares do not exist. Frimmer Dep. at 106-08, Ex. U to Pl. Stmt. Material Facts (document # 578). Frimmer may have been confused as to whether the questions were about common stock or restricted stock, or she may have mistaken the non-existence of a stock certificate for the non-existence of a share. The plaintiff, however, does not appear to contest that the book entry was actually and correctly made. See Pl. Stmt. Material Facts at 8 (document # 578) ("Every January 1 and July 1, the accumulated 'electronic payments' are used to purchase as many shares of Restricted Stock as possible. However, no stock certificates are issued; the 'purchase' of Restricted Stock is merely a bookkeeping entry." (citation omitted)). Thus, although the defendant did not submit copies of the book entries, the Court takes their existence as undisputed.

restricted stock are "equity securities . . . [which] should be treated as restricted stock," and noting that "[t]he lapse of restrictions and receipt of common stock . . . is a change in the form, rather than the substance, of beneficial ownership"). If no stock certificate was issued with the book entry, the restricted stock was an uncertificated security. See Tex. Bus. & Com. Code § 8.102(a)(18) (defining "uncertificated security" as "a security that is not represented by a certificate"); 6 Del. Code § 8-102(a)(18) (same). As such, the restricted stock was effectively delivered to participants when the book entry was made. See Tex. Bus. & Com. Code § 8.301(b); 6 Del. Code § 8-301(b).

The book entry itself is sufficient to represent the security. See Tex. Bus. & Com. Code § 8.102 cmt. 18 ("For uncertificated securities, there is no need to draw any distinction between the underlying asset and the means by which a direct holder's interest in that asset is evidenced."); 6 Del. Code § 8-102 cmt. 18 (same). The book entries made in Mewhinney's name were as complete and final a recording of his interest as if he had received certificates representing the restricted stock. Mewhinney is therefore incorrect in stating that forfeiture of restricted stock "result[s] in reversal of the book entry by which the Restricted Stock was created, thereby reinstating a participant's earned compensation in his or her CAP

Plan account." Pl. Mem. at 11 (document # 575); see also Pl. Reply Mem. at 6-7 (document # 612). There is nothing in the Plan to indicate that the award was not final.[19] After he signed the Restricted Stock Award Agreement and after the book entry was made in his name, Mewhinney held only restricted stock.

3. The Vesting and Forfeiture of Restricted Stock

When the restricted stock is awarded, it remains unvested for a two-year period, the "vesting period" or "Restricted Period." See, e.g., 1997 Prospectus, Annex A at A-5, Ex. M to Defs.' App. CAP Plan Documents (document # 706).[20] During that time, the participant takes certain rights from the stock, but not others. For example, "[u]nless the Committee in its sole discretion shall determine otherwise at or prior to the time of the grant of any award, the Participant shall have the right to direct the vote of his shares of Restricted Stock." Id. Similarly, the participant has the right to "receive any regular dividends on . . . shares of Restricted Stock." However, the "Committee shall in its sole discretion determine the Participant's rights with respect to extraordinary dividends or

[19] Furthermore, while the Court agrees that it is possible to make too much of an argument that a stockbroker is necessarily a sophisticated investor who understands the legal instrument she signs, Pl. Mem. at 11 (document # 575), stockbrokers can surely be expected to recognize that book entries represent real stock regardless of whether a certificate is issued, cf. Pl. Suppl. Mem. at 7-8 (document # 694).

[20] Participants may elect to extend the vesting period. See id.

distributions on the shares of Restricted Stock." Id. The stock cannot be transferred or assigned during the vesting period. Id.

The most important restriction on the stock, however, is its contingency on its holder's continued employment at Citigroup. During the vesting period, the Restricted Stock can be forfeited if the participant is fired by or voluntarily resigns from Citigroup. See, e.g., id. at A-4, A-5; id., Annex A, Schedule A at A-14, Ex. M to Defs.' App. CAP Plan Documents (document # 706);[21] see also 1997 RSAA, Ex. Q to Pl. Stmt. Material Facts (document # 578) (referring to and incorporating the terms of the Plan, explicitly including those relating to forfeiture). By contrast, if an employee is involuntarily terminated without cause, her restricted stock is also forfeited -- but she receives a cash severance payment to compensate for the loss. The payment is "equal to seventy-five percent (75%) of the fair market value of the number of shares of Restricted Stock forfeited, calculated as of the date of the award." Id. at A-14 ¶ 2(c)(i).[22]

If the restricted stock is forfeited, the shares are absorbed into the pool of common stock that has been reacquired

[21] "Schedule A," a document evidently generated by the governing Committee, defines a number of important terms for the implementation of the Plan. It is incorporated by reference into the Plan. See 1997 Prospectus, Annex A at A-5, Ex. M to Defs.' App. CAP Plan Documents (document # 706).

[22] While Mewhinney equates this phrase with "earned compensation," Pl. Suppl. Br. at 6 (document # 694), it is not clear that is the case. The slightly convoluted language of the phrase, rather, sets out a calculation that yields a cash payment equal to Mewhinney's concept of "earned compensation." It is equally amenable to interpretation as an award, rather than rescission of a sale.

by Citigroup. See 1997 Prospectus, Annex A at A-3, Ex. M to Defs.' App. CAP Plan Documents (document # 706). There is no indication that the restricted stock is resold to Citigroup; there is no hint that the participant is entitled to a refund of the salary she chose to forego in order to receive the restricted stock. The restricted stock is simply "forfeited." Id., Annex A, Schedule A at A-14.

C. The Merits of Plaintiff's Contract Claims

1. Legal Standard

While the Court applies the substantive law of Texas and Delaware, the principles of interpretation appear identical in all material aspects to the Florida and Georgia law applied by the First Circuit in In re Citigroup. The documents in question are also materially identical. See Mem. Supp. Mot. Class Certification at 4 (document # 460) (suggesting CAP documents have not materially changed since the Plan's inception); Compl. ¶ 21 (document # 354) (same).

To make out a claim for a breach of contract, a plaintiff must demonstrate the existence of a valid contract; breach of the contract by the defendant; and damages caused by the breach. E.g., Roof Sys., Inc. v. Johns Manville Corp., 130 S.W.3d 430, 442 (Tex. App. 2004); VLIW Tech., LLC v. Hewlett-Packard Co., 840 A.2d 606, 612 (Del. 2003). The parties dispute what the terms of the contract were and whether the defendant breached them. More

specifically, Mewhinney contends that the contract was ambiguous, and that it should be construed against Citigroup. Whether an ambiguity exists is a question of law. E.g., Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd., 940 S.W.2d 587, 589 (Tex. 1996).

The language of the contract itself is the starting point in determining whether the contract is ambiguous. Contracts are not ambiguous merely because the parties disagree about the meaning of the terms. See City Investing Co. Liquidating Trust v. Continental Cas. Co., 624 A.2d 1191, 1198 (Del. 1993). "The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant." Rhone-Poulenc Basic Chem. Co. v. American Motorists Ins. Co., 616 A.2d 1192, 1196 (Del. 1992); see also Heritage Resources, Inc. v. NationsBank, 939 S.W.2d 118, 121 (Tex. 1996) ("A contract is ambiguous when its meaning is uncertain and doubtful or is reasonably susceptible to more than one interpretation.").

Since the annex to the Prospectus, the Election Form, and the Restricted Stock Award Agreement together comprise the contract, the Court must consider all of them. Even if they were executed at different times, they pertain to the same transaction. See City of Houston v. Clear Channel Outdoor, Inc., 233 S.W.3d 441, 445-46 (Tex. App. 2007); see also Realy Growth

Investors v. Council of Unit Owners, 453 A.2d 450, 454 (Del. 1982) ("A contract can be created by reference to the terms of another instrument if a reading of all documents together gives evidence of the parties' intention and the other terms are clearly identified."). Accord In re Citigroup, slip op. at 19.

Thus, the contract here is only ambiguous if, considering all of the documents, a reasonable Plan participant could have believed that she would be entitled to a return of "earned compensation" if she voluntarily quit or was involuntarily terminated for cause. Should the contract be ambiguous, the plaintiff urges, the Court should apply two canons of construction against Citigroup. The first is that "the law abhors a forfeiture." Pl. Mem. at 7 (document # 575). Therefore, any ambiguity regarding the forfeiture invalidates it. See State ex rel. State Bd. of Pension Trs. v. Dineen, 409 A.2d 1256, 1261 (Del. Ch. 1979) ("If such a forfeiture is to be made . . . the conditions and conduct that would work such a forfeiture should be clearly designated."); G.C. Murphy Co. v. Lack, 404 S.W.2d 853, 858 (Tex. Civ. App. 1966) ("The courts do not favor forfeitures and unless compelled to do so by language that will admit no other construction, forfeiture will not be enforced."). Second, and similarly, because Citigroup drafted the contract, any ambiguities in its language must be construed strictly against Citigroup. Twin City Fire Ins. Co. v. Delaware Racing

Ass'n, 840 A.2d 624, 630 (Del. 2003); Gonzalez v. Mission Am. Ins. Co., 795 S.W.2d 734, 737 (Tex. 1990). Neither of those canons, however, permits the Court to find ambiguity where none exists. See G.C. Murphy, 404 S.W.2d at 858; Twin City Fire, 840 A.2d at 628.

2. Application

As explained above, after execution of the Restricted Stock Award Agreement and the book entries reflecting delivery of the restricted stock, Mewhinney had precisely what he contracted for: restricted stock. (It is irrelevant for present purposes whether he received the stock directly as compensation for his services or received it in exchange for cash compensation.) But in his view, the contract was ambiguous as to whether it also applied to his "earned compensation," the cash payments he elected to forego in exchange for restricted stock. The Court disagrees. As the First Circuit held, see In re Citigroup, slip op. at 19-22, the CAP contracts are not ambiguous.

Mewhinney's first purported ambiguity stems from the Election Forms's use of "compensation" as a distinct category from "restricted stock." By signing the Election Form, a CAP participant acknowledges, "I understand that I will forfeit the restricted stock as well as the compensation I have authorized to be paid in the form of such restricted stock." Mewhinney Election Form, Ex. A to Defs.' App. CAP Documents (document #

706). The phrase implies that compensation and restricted stock are not the same. And as the plaintiff argues, courts construe contracts to avoid surplusage. See, e.g., Sonitrol Holding Co. v. Marceau Investissements, 607 A.2d 1177, 1183 (Del. 1992). But the context of the Election Forms makes clear the reason for that additional warning: the form is the document a participant signs to opt to forego future cash compensation. Since she is not yet a participant, but merely a potential participant, the Election Form makes it extremely clear that she cannot reverse her decision to participate in CAP if she decides to leave the company.[23]

As the First Circuit discussed, see In re Citigroup, slip op. at 19-20, this conclusion is bolstered by comparing the forfeiture clauses with other language in the Plan. The Plan specifically allows for cash payments where the participant retires or is involuntarily terminated without cause. See 1997 Prospectus, Annex A, Schedule A at A-14, A-16, Ex. M to Defs.' App. CAP Plan Documents (document # 706). The omission of such a clause for voluntary departure or termination for cause, see id. at A-14, strongly suggests that the parties did not contract to

[23] Moreover, while one can strain to read the Election Form as creating an ambiguity as to whether "earned compensation" exists separate from "restricted stock," the language is hardly ambiguous about whether the earned compensation is forfeited.

provide for cash reimbursement of any kind in those cases.[24] See In re Citigroup, slip op. at 20.

The First Circuit also found persuasive, as does this Court, the tax-deferral purposes of the Plan. According to the Prospectus, CAP is structured to permit a participant to defer income taxes on part of her compensation. See 1997 Prospectus at 16, Ex. M to Defs.' App. CAP Plan Documents (document # 706). Under 26 U.S.C. § 83(a), compensation for services is not subject to income taxation until it is "not subject to a substantial risk of forfeiture." Consequently, participants need not pay income tax on the restricted stock until it vests. See In re Citigroup, slip op. at 20-22; Prac. & P. Order No. 19 at 10-12 (June 30, 2004) (document # 494). If Mewhinney's argument were accepted, it would nullify the tax-deferral purposes of CAP, since the "earned compensation" would not be subject to a substantial risk of forfeiture. See In re Citigroup, slip op. at 21-22. Thus, the tax consequences support an inference that the parties intended to subject the cash compensation to a risk of forfeiture.

Finally, Mewhinney contends that his wages were used to "purchase" Citigroup restricted stock. Pl. Stmt. Material Facts

[24] Mewhinney's deposition testimony focused in part on the experience of one of his associates, Joe Schrader. Mewhinney related that Schrader "left voluntarily, so why he did [sic] get his money and I didn't get mine?" Mewhinney Dep. at 62, Ex. E to Defs.' App. Suppl. Materials (document # 707). No other evidence regarding Schrader is before the Court. As such, Schrader's experience, even if accurately characterized by Mewhinney, cannot create an ambiguity in the language of the Plan.

at 4, 8-11 (document # 578). If that is true -- if Mewhinney did actually receive cash compensation, rather than just restricted stock -- the import of his "purchasing" the restricted stock is that he ceded his rights in the money for rights in the stock. Nothing about the Plan or the forfeiture provisions suggest that he retained any right to the cash.

Once the election form is signed and the participant is enrolled, the language governing the forfeiture of restricted stock controls. And it is absolutely clear that Mewhinney's restricted stock was forfeitable. On this point, the documents are uniform. The 1997 Plan states, "[i]n the event of a voluntary termination of Employment, other than pursuant to Retirement, Restricted Shares shall be forfeited." 1997 Prospectus, Annex A, Schedule A, at A-14, Ex. M to Defs.' App. CAP Plan Documents (document # 706). Similarly, "[i]n the event of an involuntary termination of Employment for Cause, Restricted Stock shall be forfeited." Id. The Prospectus for the Plan states, "In the event a Participant voluntarily terminates his or her employment or is involuntarily terminated for Cause . . . such Participant will forfeit his or her Restricted Stock." Id. at 8. The Restricted Stock Award Agreement does not specifically set forth the forfeiture terms, but does state that "[t]he terms, conditions, and restrictions contained in the Plan, including those provisions relating to . . . vesting [and] forfeiture . . .

shall govern the Award and are hereby incorporated by reference into this Agreement." 1997 RSAA ¶ 3, Ex. Q to Pl. Stmt. Facts (document # 578). And the Election Form states,

> If I leave the Company voluntarily or am terminated for cause before the restrictions lapse on shares of restricted stock awarded under CAP, I understand that I will forfeit the restricted stock as well as the compensation I have authorized to be paid in the form of such restricted stock.

Mewhinney Election Form, Ex. A to Defs.' App. CAP Documents (document # 706). The plaintiff cannot maintain that there is any ambiguity with respect to forfeiture of restricted stock.[25]

D. Public Policy

Finally, Mewhinney argues that the Court should find the contract void as against Texas public policy. It is in this area, if at all, that cases brought within this multidistrict litigation may diverge. See In re Citigroup, slip op. at 26-27, 33 (emphasizing law of individual states in considering public policy objections); Certification Request to the Supreme Judicial Court of Massachusetts, Peckler v. Citigroup (document # 689) (requesting interpretation of Mass. Gen. Laws ch. 149, § 148 et seq.); Certification Request to the Supreme Court of Connecticut,

[25] Mewhinney admitted as much at his deposition. Concerning language materially identical to the one on the Mewhinney Election Form, he stated, "I understood [the clause] to mean that if I leave, I forfeit the stock and the money awarded. But then after this, you know, Joe Schrader left the firm and he got his stock and went to a competitor. So I thought that there's nothing in stone here." Mewhinney Dep. at 74, Ex. E to Defs.' App. Suppl. Materials (document # 707).

Lomas v. Citigroup (document # 690) (requesting interpretation of Conn. Gen. Stat. § 31-71 et seq.).

Mewhinney contends that "[t]he public policy of virtually every state -- including Texas -- is clear and well-settled: once an employee has earned wages, such wages cannot be taken away or forfeited." Pl. Suppl. Mem. at 10 (document # 694). The Court first takes as correct Mewhinney's "purchase" interpretation of the contract, in which he exchanged cash for restricted stock. See, e.g., Pl. Mem. at 11 & n.11 (document # 575); Pl. Stmt. Material Facts at 8, 9 (document # 578). The Court notes that, as an initial matter, the restricted stock may not have constituted "wages" at all. Mewhinney voluntarily entered into a purchase agreement to obtain a contingent security interest in Citigroup. Arguably, the wages were the cash with which Mewhinney purchased the interest; the interest does not constitute "wages" itself, even if the contingency it incorporates is his continued employment at Citigroup. Therefore, the Court views the facts in the light more favorable to Mewhinney, Fed. R. Civ. P. 56(c), and assumes for this purpose that the restricted stock was directly awarded to him as compensation for his services.

Mewhinney's public policy arguments boil down to a single point: that when he resigned, he was entitled to the full wages he had earned to that time. See Tex. Labor Code § 61.014; 19

Del. Code Ann. § 1103(a) (same); Thayer v. Tandy Corp., No. 153-1987, 533 A.2d 1254, 1987 WL 3745 (Del. 1987) (table decision, text in Westlaw); Shute & Limont v. McVitie, 72 S.W. 433, 435-36 (Tex. Civ. App. 1903). That begs the question of what his "wages" were. Texas law permits compensation for services to be made "in kind or in another form [than cash, negotiable instruments, or electronic funds transfer]." Tex. Labor Code § 61.016(b).[26] Mewhinney contracted to receive some compensation in the form of restricted stock. He received exactly what he bargained for; there is no allegation that Mewhinney received fewer shares of restricted stock than he deserved for the services he performed.

He is thus unlike the plaintiff in Thayer. The predominant question in that case was "when Thayer's [year-end] bonus became 'earned' within the meaning of [19 Del. Code Ann. §] 1103(a)." 1987 WL 3745, at *1. The court held that under Delaware law, portions of the bonus accrued and became "earned" monthly, rather than entirely at the end of the year -- a requirement incorporated into the employment contract by operation of law. Consequently, even when the employee breached the contract by leaving after only 10 months had elapsed on the year-long

[26] While Delaware requires wages to be paid only in cash, checks, or fund transfers, 19 Del. Code Ann. § 1102(a), the restricted stock may well constitute a "benefit" or "wage supplement" within the meaning of id. § 1109. The plaintiffs do not press the issue, however, and the Court need not decide it.

contract, he was entitled to the "bonus earned and accrued monthly to date of termination." Id. at *2. Similarly, in McVitie an employee was terminated, then sued to recover the remainder of his total annual salary; the employer counterclaimed, arguing that the employee had breached his contract, causing damages. 72 S.W. at 434. The Court of Civil Appeals reversed the jury's finding that the discharge had not been justified and remanded. In doing so, it instructed that the employee was entitled to keep the reasonable value of the services rendered, and that the counterclaim for breach could not rescind the employee's previously earned salary. Id. at 435-36. Here, as noted above, Mewhinney received the total amount of restricted stock to which he was entitled under his employment contract.[27]

The public policy question is thus not whether compensation can be forfeited, but whether compensation can take the form of an instrument whose value is contingent on continued employment.

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[27] The plaintiffs' reliance on Beckwith v. UPS, 889 F.2d 344, 349 (1st Cir. 1989), is misplaced. That case turned entirely on a Maine statute, Me. Rev. Stat. tit. 26, § 629. The facts of that case reflect its narrow focus. After having been terminated for gross negligence leading to loss of merchandise, the employee agreed to a $50 deduction from his weekly wages until the cost of the merchandise was repaid as a condition of reinstatement. Beckwith, 889 F.3d at 345. The Maine statute provides that "[n]o [employer] shall require any person as a condition of securing or retaining employment to work . . . when having an agreement . . . that a part of such [monetary] compensation should be returned to the [employer] for any reason other than for" certain irrelevant exceptions. Not only does the statute not apply in this case, the factual scenario is quite different. Participation in the CAP program was not a condition of employment, and the diminution in Mewhinney's cash wages was not due to an antecedent debt, but to his knowing, negotiated decision to receive restricted stock instead.

Cf. In re Citigroup, slip op. at 27 (noting that CAP is not a covenant against competition because it "does not prevent a departing employee from securing gainful employment" for a competitor). The plaintiff suggests that the deduction from his salary used to fund the award of the restricted stock was a deduction not made for a "lawful purpose," Tex. Labor Code § 61.018(3), because the deduction "allows the forfeiture of earned compensation." Pl. Suppl. Mem. at 14 (document # 694).[28]

But even the reading of the case most favorable to the plaintiffs does not indicate that forfeiture is per se unlawful; in McVitie, the Civil Court of Appeals noted that "[f]orfeitures are not regarded with favor by our laws, and none can be permitted here." 72 S.W. at 436 (emphasis added). Indeed, Texas courts have consistently held that while forfeiture clauses are to be strictly construed against the beneficiary of the forfeiture, they are enforceable. See Dewhurst v. Gulf Marine Inst. of Tech., 55 S.W.2d 91, 99-100 (Tex. App. 2001). In this case, given the absolute clarity of the language of the Election Form, there is no question that the parties intended to, and did, create an enforceable forfeiture clause.

Another possible approach is the one Texas courts take in the absence of guidance from the legislature. In that situation,

[28] Mewhinney also suggests that the payment "in kind or in another form" permitted under Texas law was invalid because the book entries were insufficient to convey an interest to participants. As discussed above, see section IV.B.2, he is incorrect.

a court must balance the public interest in enforcing agreements and the public interest against enforcing agreements such as the one at bar. Fairfield Ins. Co. v. Stephens Martin Paving, L.P., 246 S.W.3d 653, 663-64 (Tex. 2008).

Texas public policy strongly favors freedom of contract. Id. at 664-65. While there are established exceptions, see id. at 665 n.20, none of them appear to apply to an arm's-length transaction between an employee and employer to exchange cash wages for restricted stock. Mewhinney's participation in CAP was voluntary, Mewhinney Dep. at 82, Ex. E to Pl. Stmt. Material Facts (document # 578), and he could have continued in employment at Citigroup without joining. He was presumably motivated at least in part by the financial incentives of receiving stock at a discount and deferring income tax,[29] as well as the rights of stock ownership. See also In re Citigroup, slip op. at 20-22 (discussing advantages of participating in CAP); Marsh, 1 N.Y.3d at 155-56 (discussing advantages and disadvantages of a similar plan). As discussed above, the triggers for forfeiture, and what forfeiture entailed, were clearly and unequivocally disclosed before he signed the Election Form to participate. While participating in CAP undoubtedly carried risks, a rational

[29] Though the documents are not in the record, it appears that Mewhinney elected to include the restricted stock as taxable earned income in the year in which it was awarded, rather than the year in which it vested. See Mewhinney Dep. at 92-93, Ex. E to Pl. Stmt. Material Facts (document # 578); see also I.R.C. § 83(b) (permitting such an election).

employee could decide that the benefits outweighed the costs. See id.; Rosen v. Smith Barney, Inc., 393 N.J. Super. 578, 593 (N.J. Super. Ct. App. Div. 2007) (discussing CAP under New Jersey law). Under these circumstances, CAP did not violate Texas public policy.

V. QUASI-CONTRACTUAL THEORIES

Mewhinney's second claim is for money had and received.[30] He also asserts claims for quantum meruit and unjust enrichment. Each of these claims similarly sounds in quasi-contract.

Under Texas law, money had and received is an equitable cause of action which "belongs conceptually to the doctrine of unjust enrichment." Edwards v. Mid-Continent Office Distribs., L.P., 252 S.W.3d 833, 837 (Tex. App. 2008) (quoting Amoco Prod. Co. v. Smith, 946 S.W.2d 162, 164 (Tex. App. 1997)) (internal quotation marks omitted). The quasi-contractual claim is "not premised on wrongdoing, but seeks to determine to which party, in equity, justice, and law, the money belongs, and it seeks to prevent unconscionable loss to the payor and unjust enrichment to the payee." Id. To prove his claim, a plaintiff "must show that a defendant holds money which in equity and good conscience belongs to him." Id. Thus, one Texas court characterized money

[30] It is not clear that such an action lies under Delaware law. Compare Street Search Partners L.P. v. Ricon Int'l, LLC, No. 04C-09-156PLA, 2005 WL 1953094 (Del. Super. Ct. Aug. 1, 2005) (suggesting that money had and received "is no longer a legally cognizable claim"), with Salisbury v. Credit Serv., 199 A. 674, 680 (Del. Super. Ct. 1937) (appearing to recognize the cause of action). In any event, the parties cite only Texas law regarding this claim.

had and received as "a cause of action for debt not evidenced by a writing." Amoco Prod. Co., 946 S.W.2d at 164. Quantum meruit is similarly an equitably remedy based on a contract implied by law "for beneficial services rendered and knowingly accepted." E.g., In re Kellogg, Brown & Root, 166 S.W.3d 732, 740 (Tex. 2005).

However, it is well established that Texas law generally does not provide recovery in quasi-contract where a valid express contract covers the same subject matter.[31] See, e.g., Fortune Prod. Co. v. Conoco, Inc., 52 S.W.3d 671, 684 (Tex. 2000); Lone Star Steel Co. v. Scott, 759 S.W.2d 144, 154 (Tex. App. 1988) (rejecting unjust enrichment and quantum meruit claims because the same subject was covered by an express contract). This case has precisely such a contract, and the Court is compelled to find that the plaintiff's quasi-contractual theories of recovery fail. See In re Citigroup, slip op. at 28-29 (reaching same conclusion on unjust enrichment claim under Florida law).

VI. BREACH OF FIDUCIARY DUTY

Mewhinney next claims that Citigroup breached a fiduciary duty it owed to him. He argues that Citigroup was a "trustee[] of the earned compensation contributed . . . to the CAP Plan."

[31] The courts have made an exception for overpayments in excess of the agreed-upon contractual rate. See S.W. Elec. Power Co. v. Burlington N. R.R., 966 S.W.2d 467, 469-70 (Tex. 1998). The plaintiffs do not press this theory, and in any event, Mewhinney did not overpay Citigroup for the amount of restricted stock that he received. The exception is inapplicable.

Compl. ¶ 65 (document # 354). In his view, Citigroup breached that duty by failing to pay interest on the compensation that funded the issue of the restricted stock, id. ¶ 68(i); by executing CAP's forfeiture provisions, id. ¶ 68(ii); and by failing to remit the cash or stock to CAP participants, id. ¶ 68(iii).

Under Texas law, a plaintiff asserting a claim for breach of fiduciary duty must prove (1) the existence of a fiduciary duty; (2) a breach of the duty; and (3) that the breach resulted in a benefit to the fiduciary or an injury to the principal. E.g., Academy of Skills & Knowledge, Inc. v. Charter Schs., USA, Inc., No. 12-07-00027-CV, ___ S.W.3d ___, 2008 WL 2514313, at *8 (Tex. App. June 25, 2008). Citigroup argues that no fiduciary relationship existed between the parties.

Mewhinney locates two central sources for the fiduciary relationship. First, he suggests that the CAP documents acknowledge such a relationship. Pl. Mem. at 13 (document # 575). The only language Mewhinney cites in support of this theory, however, concerns how shares of restricted stock are voted. "[T]he Plan Administrator shall vote such shares in accordance with instructions received from Participants (unless to do so would constitute a violation of the Plan Administrator's fiduciary duties)." 1997 Prospectus, Annex A at A-5, Ex. M to Defs.' App. CAP Documents (document # 706). Citigroup argues

that the fiduciary duties referred to are those the Administrator, as Citigroup's employee, owes to Citigroup, not to CAP participants. It is the only logical reading -- otherwise, it would suggest that the Plan Administrator might, in certain instances, breach a duty to CAP participants by voting the shares as those participants instructed.

Mewhinney next argues that Citigroup must have been acting in a fiduciary manner because it was administering an employee benefit plan. He contends that by taking a portion of the participants' salary, Citigroup became a trustee, since the participants continued to hold beneficial and equitable ownership. See Pl. Reply Mem. at 14-15 (document # 612). Under Texas law, an express trust "is a fiduciary relationship with respect to property which arises as a manifestation by the settlor of an intention to create the relationship and which subjects the person holding title to the property to equitable duties to deal with the property for the benefit of another person." Tex. Prop. Code § 111.004(4). Arguably, assuming Mewhinney's deduction-and-purchase interpretation of CAP is correct, cf. section IV.B.1, supra (noting that there is at least equal support for Citigroup's competing interpretation), Citigroup temporarily holds legal title to the participants' wages, though the participants continue to hold equitable ownership. Other relationships might be equally tenable.

Even assuming CAP created a trust, the plaintiff's argument suffers from two fatal flaws. First, if a trust relationship exists, its terms are set by CAP, since that agreement defines the trust purpose, res, and beneficiary. The CAP participant, insofar as she is a trust settlor, committed the property to Citigroup under those terms and no others. See Tex. Prop. Code § 111.004(15) (defining "[t]erms of the trust" as "the manifestation of intention of the settlor with respect to the trust"). Nothing in the CAP documents refers to the placement of funds in an interest-bearing account or otherwise confers on Citigroup a duty to invest property for the trust estate. Nor have the plaintiffs offered any evidence whatsoever to show that the funds actually were placed in an interest-bearing account and that Citigroup kept the interest as an unlawful benefit. At most, Citigroup failed to make the deducted compensation productive -- but that obligation is neither expressed nor implied in the CAP. Citigroup executed the unambiguous CAP documents to the letter. See In re Citigroup, slip op. at 30.

The second flaw in the plaintiff's trust theory is that the "trust," if one existed, dissolved once the restricted stock was delivered to him by book entry. At that point, Mewhinney held the stock himself, even if it was subject to the restrictions placed on it by the parties' agreement. The forfeiture, when it occurred, was not a forfeiture of trust property; it was a

forfeiture of property to which Mewhinney held legal and equitable title. And as explained above, the forfeiture provisions were crystal clear.

In short, and to repeat, there was no breach of fiduciary duty or trust because Mewhinney received precisely what he bargained for. See In re Citigroup, slip op. at 30 (reaching same conclusion under Florida law).

VII. CONVERSION

Mewhinney's final cause of action is conversion. To make out a claim for conversion, he must show that Citigroup unlawfully and without authorization took control over property inconsistent with rights he held in the property and refused to return it on his demand. See Smith v. Maximum Racing, Inc., 136 S.W.3d 337, 341 (Tex. App. 2004). He cannot show that Citigroup's taking of the restricted stock by forfeiture was unlawful or inconsistent with his rights. As the First Circuit held, "[b]ecause the CAP terms were clear, and the contract was entered willingly and voluntarily," Citigroup was entitled to repossess the restricted stock Mewhinney held that had not yet vested at the time he left the defendant's employ. In re Citigroup, slip op. at 28.

VIII. CONCLUSION

For the foregoing reasons, the plaintiffs' Motion for Summary Judgment (document # 574) is **DENIED** in its entirety, and

the defendants' Motion for Summary Judgment (document # 590) is **GRANTED** in its entirety. Judgment shall enter for the defendants.[32]

SO ORDERED.

Date: August 8, 2008

/s/ Nancy Gertner
NANCY GERTNER, U.S.D.C.

[32] Citigroup's counterclaim is **MOOT.** See Answer at 10 (document # 358) (noting that counterclaim is conditional on judgment in plaintiffs' favor). Furthermore, Citigroup's Motions for Leave to submit further supplemental authority (documents ## 685 and 712) are **MOOT.** The Motions seeking a ruling on the Cross-Motions for Summary Judgment (documents ## 619 and 622) are **MOOT.**