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AHW Investment Partnership v. Citigroup Inc., No. 13-4488 (2d Cir.)

- This is a case of great importance to investors that is pending before the U.S. Court of Appeals for the Second Circuit in New York.

- The case involves the viability of "holder" claims. A holder claim is a claim by a plaintiff who lost money because he was fraudulently induced to retain his stock, rather than being fraudulently induced to purchase or sell stock.

- In this case, Arthur L. Williams and his family lost more than $800 million because they relied on false statements that Citigroup made to them about its exposure to subprime mortgages. As a result of those misrepresentations, Mr. Williams abandoned plans to sell his Citigroup stock and instead held onto the stock as it lost substantially all its value.

- Although holder claims are not permitted under the federal securities laws, most States allow them under causes of action for common-law fraud or negligent misrepresentation.

- The U.S. District Court in Manhattan, however, dismissed the Williamses' case, issuing two rulings that significantly restrict the viability of holder claims.

  - First, the court ruled that, even if a plaintiff resides in a State like Florida that provides liberal remedies for holders, the more stringent New York standards apply whenever the fraudulent statements are made from New York. That is a significant obstacle to holder claims because, while defrauded shareholders reside in many jurisdictions, publicly traded companies are often based in New York and perpetrate frauds from that State.

  - Second, the court construed New York holder law narrowly by restricting the damages recoverable. Under the court's holding, it is not enough to show that the plaintiff would have sold his shares at a specific price but was fraudulently induced to refrain from doing so and suffered losses when the share price declined. The plaintiff must prove an "out-of-pocket loss" — a vague standard that lacks any clear definition in this context.

- The Williamses have appealed to the Second Circuit and filed the attached brief. The case likely will not be argued until the end of 2014.

- This case is important for any institutional investor. Investors often suffer losses because they are fraudulently induced to retain stock rather than selling it. If the district court's decision is affirmed, the availability of relief will be sharply restricted, and institutional investors will find it much more difficult to pursue claims when they are fraudulently induced to retain stock.

13-4488-cv(L),
13-4504-cv(XAP)

United States Court of Appeals
for the
Second Circuit

AHW INVESTMENT PARTNERSHIP, MFS, INC., ANGELA H. WILLIAMS, as Trustee of the Angela H. Williams Grantor Retained Annuity Trust UAD March 24, 2006, the Angela Williams Grantor Retained Annuity Trust UAD April 17, 2006, the Angela Williams Grantor Retained Annuity Trust UAD May 9, 2006, the Angela Williams Grantor Retained Annuity Trust UAD November 1, 2007, the Angela Williams Grantor Retained Annuity Trust UAD May 1, 2008, the Angela Williams Grantor Retained Annuity Trust UAD July 1, 2008, and the Angela Williams Grantor Retained Annuity Trust UAD November 21, 2008,

Plaintiffs-Appellants-Cross-Appellees,

– v. –

CITIGROUP INC., CHARLES PRINCE, VIKRAM PANDIT, GARY CRITTENDEN, ROBERT RUBIN, ROBERT DRUSKIN, THOMAS G. MAHERAS, MICHAEL STUART KLEIN, DAVID C. BUSHNELL,

Defendants-Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS-CROSS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, appellants AHW Investment Partnership and MFS, Inc. state that they have no parent corporation and that no publicly held corporation owns 10% or more of either entity's stock or ownership interests.

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PRELIMINARY STATEMENT

Arthur L. Williams and his family lost more than $800 million because they relied on lies Citigroup told them about its exposure to subprime mortgages during the financial crisis Citigroup helped bring about. As a result, Mr. Williams lost the financial benefit of his life's work. The district court ruled that he is not entitled to his day in court to seek redress for that fraud. We ask this Court to reverse.

Mr. Williams and his wife, both citizens of Florida, became significant stockholders in Citigroup after Citigroup acquired an insurance business he founded. Given their large stake, the Williamses closely monitored their investment, and they ultimately decided to sell it in May 2007. But Citigroup fraudulently induced them to retain the shares by concealing its exposure to subprime mortgages. This suit, brought by their Florida-based family trusts and businesses, seeks compensation for the hundreds of millions of dollars they lost as a result.

The Williamses are asserting what are known as "holder" claims – claims by a shareholder fraudulently induced to ***retain*** his stock rather than one fraudulently induced to purchase or sell it. Both Florida and New York permit such claims. Moreover, the allegations of Citigroup's fraud have already led to a $75 million settlement with the SEC and withstood motions to dismiss in two private securities actions. Nonetheless, the district court dismissed this suit after determining that

the Williamses had not pled a cognizable loss under New York's "out-of-pocket loss" measure of damages.

That holding was wrong. Plaintiffs are domiciled in or controlled from Florida; they received Citigroup's fraudulent representations in Florida; they relied upon the representations in Florida; and they suffered losses in Florida when those representations proved to be false. Florida clearly has the dominant interest in determining what ***measure of damages*** should apply.

Even under New York law, this case should proceed. The Williamses more than adequately alleged an out-of-pocket loss by pleading that the actual value of their Citigroup stock declined from $51.59 to $3.09 per share as a result of Citigroup's fraud. And unlike some holder cases where plaintiffs must speculate about "alternative" transactions, the Williamses alleged the specific time and price at which they would have sold – and the specific steps they took in preparation.

The judgment should be reversed and the case remanded for trial.

JURISDICTIONAL STATEMENT

Plaintiffs appeal from a final judgment of the U.S. District Court for the Southern District of New York. SPA.23. The district court had diversity jurisdiction under 28 U.S.C. § 1332(a)(1). Plaintiff AHW Investment Partnership is a Nevada partnership whose partners are both Florida citizens, A.19 ¶14; plaintiff MFS, Inc. is a Nevada corporation controlled from Florida, A.19 ¶15; and the

plaintiff trusts are all based in Florida, A.19 ¶16. Defendant Citigroup is a Delaware corporation with its principal place of business in New York, A.20 ¶17; and the individual defendants are citizens of New York, New Jersey, Connecticut, or Utah, A.20 ¶¶18-25. The amount in controversy exceeds $75,000. A.96 ¶296.

This Court has jurisdiction under 28 U.S.C. § 1291. The district court entered judgment on October 30, 2013, SPA.23, and plaintiffs timely appealed on November 25, 2013, A.315.

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that plaintiffs' claims were governed by New York rather than Florida law.

2. Whether the district court erred in holding that plaintiffs failed to allege a cognizable loss under New York law.

STATEMENT OF THE CASE

Plaintiffs filed suit in the U.S. District Court for the Southern District of New York on December 29, 2010. A.5. On July 1, 2011, they filed an amended complaint alleging fraud and negligent misrepresentation under Florida law. A.15. On October 30, 2013, Judge Stein granted defendants' motion to dismiss. SPA.1; *AHW Inv. P'ship v. Citigroup Inc.*, — F. Supp. 2d —, 2013 WL 5827643 (S.D.N.Y. Oct. 30, 2013). The court entered judgment the same day. SPA.23.

I. THE PARTIES

Arthur L. Williams is a successful entrepreneur and former insurance executive who resides in the State of Florida. A.16 ¶¶1, 2. In 1977, Mr. Williams founded a financial services company specializing in insurance, which merged with Travelers Group in 1989. A.16 ¶2. In 1998, Citigroup merged with Travelers and exchanged Mr. Williams's shares in Travelers for shares in Citigroup. A.16 ¶¶2, 3. As a result, Mr. Williams became a significant shareholder in Citigroup, acquiring 17.6 million shares for approximately $35 apiece—a total investment of more than $600 million. A.16 ¶3.

Over the next decade, Mr. Williams transferred portions of that investment to entities controlled by him and his wife, who also resides in Florida. A.16 ¶¶1, 3. The Williamses formed AHW Investment Partnership, with Mr. and Mrs. Williams as its sole partners, and controlled the partnership from Florida. A.20 ¶27. They also established MFS Inc., which Mr. Williams controlled from Florida as its president and majority shareholder. A.21 ¶28. Finally, Mrs. Williams served as trustee to seven trusts she managed in Florida. A.19-20 ¶16.

To help inform his investment strategy, Mr. Williams established a "family office" of investment professionals who worked exclusively for him. A.16 ¶4. Those advisors "were intimately involved in monitoring and gathering information" on Mr. Williams's investments, "including by far his largest single invest-

ment, his Citigroup stock." A.63 ¶185. Mr. Williams also retained several top-tier financial firms, including Credit Suisse, Wells Fargo, and Capital Guardian, to provide information and advice about his Citigroup investment. A.63 ¶186.

Defendant Citigroup is a diversified global financial services company incorporated in Delaware and headquartered in New York. A.21 ¶30. The eight individual defendants served as Citigroup's executives and authorized or made the representations on which the Williamses relied. A.21-25 ¶¶31-38. Four are citizens of New York, two are citizens of New Jersey, and the other two are citizens of Connecticut and Utah. A.20 ¶¶18-25.

II. CITIGROUP'S FALSE AND MISLEADING STATEMENTS ABOUT ITS SUBPRIME EXPOSURE

As the housing crisis unfolded over 2007 to 2009, Citigroup made a series of misrepresentations to the Williamses and the broader market that concealed its exposure to subprime mortgages. Most of those misrepresentations concerned Citigroup's holdings and contingent liabilities associated with collateralized debt obligations ("CDOs") and structured investment vehicles ("SIVs") backed by subprime mortgages. A.29-31 ¶¶54-63.

Citigroup trumpeted its "highly disciplined . . . credit management." A.35 ¶75. Even as markets began to experience volatility from the subprime crisis, Citigroup's CEO claimed he felt "good about the composition of [Citigroup's] portfolio, . . . especially in the U.S. mortgage area, where we have avoided the

riskier products at some cost to revenues in prior years." A.69 ¶204. Citigroup claimed it had only "$13 billion" in secured-lending subprime exposure and that this amount was decreasing over time. A.37 ¶84.

In reality, Citigroup had massive subprime exposure through its holdings in CDOs and SIVs. Citigroup concealed some "$55 billion of subprime exposure in 2007," including $11.7 billion of mortgage-backed securities warehoused for CDOs or other structures as well as $43 billion of so-called "super senior" tranches of CDOs that Citigroup had underwritten but could not sell. A.34 ¶73. That latter amount included $24.5 billion of exposure from so-called "liquidity puts." A.37 ¶85. Citigroup also concealed $49 billion in off-balance-sheet SIVs. A.46 ¶110.

Citigroup's fraudulent concealment of its subprime exposure led the Securities and Exchange Commission to file an enforcement action accusing the company of making "'a series of material misstatements about its investment bank's exposure to sub-prime mortgages.'" A.25 ¶40; *see SEC v. Citigroup Inc.*, No. 10-cv-01277 (D.D.C. July 29, 2010). The SEC charged that Citigroup's "total subprime exposure exceeded $50 billion" and that "the company's disclosures materially understated that exposure." Compl. in No. 10-cv-01277 ¶1. Internal documents showed that, by April 2007, Citigroup knew it had "an additional $37.8 billion in sub-prime exposure from super senior tranches of CDOs ($14.6 billion) and liquidity puts ($23.2 billion)." *Id.* ¶14. Yet Citigroup "misstated, and omitted

to state, material information about the investment bank's sub-prime exposure." *Id.* ¶49. Citigroup was ultimately forced to pay $75 million to settle the SEC's charges. A.25 ¶40.

Citigroup's fraud also led to multiple private civil suits. A.26 ¶41. In *In re Citigroup Inc. Bond Litigation*, 723 F. Supp. 2d 568 (S.D.N.Y. 2010), the court found that bondholders had adequately pled false or misleading statements in violation of Section 11 of the Securities Act. The complaint alleged that Citigroup had not made "accurate disclosure about [its] direct exposure to nearly $66 billion in CDO securities." *Id.* at 590. Likewise, in *In re Citigroup Inc. Securities Litigation*, 753 F. Supp. 2d 206 (S.D.N.Y. 2010), the court found that stockholders had adequately pled scienter on the part of Citigroup's executives. *Id.* at 240-41. Citigroup's officers were "at least reckless" in making CDO-related misrepresentations. *Id.* at 240. Those same allegations underpin the Williamses' complaint here. *See* A.35-57 ¶¶74-168.

III. THE WILLIAMSES DECIDE NOT TO SELL THEIR STOCK IN RELIANCE ON CITIGROUP'S FALSE STATEMENTS

By 2006, the Williamses' 17.6 million shares of Citigroup represented approximately 60% of their net worth. A.64 ¶190. Their financial advisors recommended that they sell the stock to diversify their holdings. *Id.* Mr. and Mrs. Williams took concrete steps to prepare for the sale. After consulting with tax attorneys, they created two trusts to minimize gift taxes and transferred some of the

stock to those entities. A.64-65 ¶¶190-193. Mr. Williams also reduced his borrowings against his shares so they could be sold freely. A.67 ¶199.

Consistent with their large stake in the company, the Williamses closely monitored Citigroup's performance as they considered when to sell. They "regularly reviewed public filings, listened to conference calls, monitored the media and had direct communications with senior Citigroup officers, in order to understand the Company's true financial condition." A.62 ¶184. "Williams' Financial Advisors had direct private meetings with senior Citigroup officers and relayed their discussions to Williams. Williams also had periodic discussions with former . . . colleagues who were now Citigroup senior executives about the Company's financial health, and even had at least one discussion with [Citigroup CEO Charles] Prince when they happened to meet." A.64 ¶188.

In February 2007, Mr. Williams received a highly negative report on Citigroup's restructuring from one of his financial advisors. A.67 ¶200. Following an April 2007 earnings call, Mr. Williams took a survey of his advisors. A.68 ¶202. They expressed concerns that Citigroup had a "credibility gap," that its stock price was stuck "in the doldrums," and that they did not "want to own Citigroup today." *Id.* The "consensus" was that this was "a good time for Williams to sell." *Id.*

Accordingly, "[i]n the middle of May 2007, Williams decided to liquidate his entire 17.6 million share position in Citigroup." A.58 ¶170. He planned to

"s[ell] all of his shares in May 2007 at $55 per share and diversif[y] into safer investments." A.28 ¶48. He began to execute that strategy by selling the first one million shares at $55 per share on May 17, 2007. A.68, 73 ¶¶203, 212.

When Citigroup's stock price dipped after markets began experiencing turmoil from the subprime mortgage crisis, Mr. Williams temporarily "delayed executing his sales." A.59 ¶174. "Williams and his Financial Advisors combed through Citigroup's filings and statements to see whether it had meaningful exposure to the subprime mortgage assets that were beginning to drag down other major players in the financial services sector." A.58 ¶170. Citigroup's management allayed those concerns, stating that they "fe[lt] good about the composition of [the company's] portfolio, . . . especially in the U.S. mortgage area," and that "the quality of the [mortgage] portfolio [wa]s very good." A.69 ¶204. Those statements "portrayed a company facing no risk at all from the roiling subprime mortgage crisis." A.70 ¶205.

"Trusting that the Company's public pronouncements were forthright and that it had no exposure to those 'toxic' assets," Williams stopped selling his shares. A.58 ¶170. "Based on Citigroup's statements, Williams had every reason to believe that the Company was being unfairly lumped in with . . . other companies, and once the market understood and took into account the different – and far superior – risk posture of Citigroup, its shares would recover and he could com-

plete his planned sale as intended." A.59-60 ¶175. "Had the Company truthfully disclosed the risks it faced or the tens of billions of subprime assets it held, Williams would have fully implemented his sales and selling plan while the stock was trading at $55." A.70 ¶205.

Over the next two years, Mr. Williams repeatedly considered liquidating his holdings. Each time, Citigroup deceived him into retaining the shares. For example, in November 2007, Mr. Williams considered selling while Citigroup was trading in the "high $30s," and emailed his advisors to inquire when he should sell. A.75 ¶219. But Citigroup, although finally acknowledging it faced some subprime exposure, falsely portrayed the issue as "an 'accounting' issue that [would have] no impact on its cash flow or future dividend payments." A.74-75 ¶¶215-218. Mr. Williams thus decided to "wait and see." A.75 ¶219. A month later, he considered selling around $33, but again reversed course after his advisers, relying on Citigroup's false disclosures, believed the stock had bottomed out and "would likely recover." A.76 ¶220.

By August 2008, Citigroup stock had fallen to $17.50, and Mr. Williams again took steps to sell. A.81 ¶234. He was dissuaded after a "town hall meeting" in which Citigroup "downplayed the subprime crisis" and "painted an optimistic view of its restructuring." A.82 ¶239. On December 2, Mr. Williams "placed—and then subsequently retracted—sell orders to liquidate his position" at "$8.50 per

share." A.61 ¶180. Once again, he "reversed course based on Citigroup's false statements about its financial condition, its 'strong capital position,' its 'reduction of risky assets,' and its plans to turn itself around." A.84 ¶245.

Finally, in early 2009, after the U.S. government took over Citigroup and gained access to its books and records, the true extent of Citigroup's subprime exposure emerged. A.62, 84 ¶¶183, 246. Realizing that Citigroup likely was never going to recover, Mr. Williams sold his remaining shares at $3.09 per share on March 18, 2009. A.85 ¶¶249-250.

IV. THE WILLIAMSES FILE SUIT

On December 29, 2010, plaintiffs filed suit in the U.S. District Court for the Southern District of New York. A.5. On July 1, 2011, they filed an amended complaint. A.15. Count I asserted "common law negligent misrepresentation . . . under Florida law." A.19, 86-87 ¶¶12, 254-262. Count II asserted "a common law claim for fraud under Florida law." A.19, 88-96 ¶¶12, 263-296.

The Williamses pursued two damages theories. First, "[b]ased on an event study conducted using widely accepted analytical methods," they alleged that "the true value of the stock on May 17, 2007, *i.e.*, the 'fraud-free price' if Citigroup had honestly disclosed its subprime exposure, would have been $51.59" – a few dollars less than the market price of $55. A.58 ¶171. By the time Citigroup's fraud was revealed in March 2009, the Williamses were only able to sell for $3.09. A.58

¶172. Accordingly, they claimed as damages the decline in the actual value of their 16.6 million shares from $51.59 to $3.09, or about $800 million. *Id.*

Alternatively, the Williamses calculated their damages on a "net out-of-pocket basis." A.59 ¶173. That measure was based on the difference between the $35 price at which Mr. Williams acquired the shares in 1989 and the $3.09 price at which plaintiffs ultimately sold the stock, a difference of about $530 million. *Id.*

V. THE DISTRICT COURT'S DECISION

On October 30, 2013, the district court granted defendants' motion to dismiss. SPA.1. It rejected Citigroup's argument that the claims had to be dismissed because they were derivative rather than direct. SPA.5-9. But it held that the Williamses failed to allege a cognizable loss under New York law. SPA.9-22.

A. Choice of Law

The parties disputed whether New York or Florida law applied. They agreed that the two States' laws diverged as to negligent misrepresentation. "New York requires a 'special relationship' between the parties; Florida does not." SPA.10.

The district court also found a conflict over the measure of damages. Although Florida imposes "heightened pleading standards for reliance," it does not "impose[] any other limits on the viability of holder claims." SPA.11. In New York, by contrast, while the Court of Appeals has not addressed the question, the First Department "significantly narrowed the scope of cognizable damages" in

Starr Foundation v. American International Group, Inc., 901 N.Y.S.2d 246 (1st Dep't 2010). SPA.12. Under *Starr*, "New York's out-of-pocket damages rule limit[s] a fraud plaintiff to recovering its actual losses, not 'profits which would have been realized in the absence of fraud.'" *Id.* (quoting 901 N.Y.S.2d at 249).

The court next examined whether those rules were conduct-regulating or loss-allocating. "[T]he place of the tort," it explained, "is most important for conduct-regulating rules, and the parties' domiciles take priority for loss-allocating rules." SPA.14. There was no dispute that the "special relationship" requirement was conduct-regulating. SPA.15. And the court ruled that *Starr*'s out-of-pocket loss limitation was likewise conduct-regulating because its "primary purpose . . . is to encourage the optimal functioning of the securities markets." *Id.*

The court acknowledged that "[t]he default rule for conduct-regulating tort rules is *lex loci delicti* – to apply the law of the place of the tort." SPA.15. And when "'conduct occurs in one jurisdiction and the plaintiff's injuries are suffered in another, the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred.'" *Id.* (quoting *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 195 (1985)). The court thus agreed that "the law of the jurisdiction in which a plaintiff suffers loss from fraud would usually apply." *Id.*

Nonetheless, the court refused to follow that rule here, for three reasons. It cited New York's interest in "regulating its vast securities industry." SPA.17. It

feared that the *lex loci delicti* rule would expose defendants to the laws of many jurisdictions, "paralyz[ing] actors in the securities markets." *Id.* And it raised the specter of forum-shopping. SPA.17-18.

B. Sufficiency of the Allegations Under New York Law

Applying New York law, the district court dismissed the suit. It first held that the negligent misrepresentation claim failed to meet New York's "special relationship" requirement. "[D]efendants," it ruled, "are not in a special privity-like relationship with the investing public, or with actual purchasers." SPA.18.

The court then dismissed the fraud claim for failure to allege a cognizable loss under *Starr*. The Williamses urged that *Starr* was distinguishable because, unlike the plaintiff there – who never sold its shares and acquired them for ***less*** than their ultimate price – the Williamses suffered a concrete, out-of-pocket loss. SPA.19. The court rejected that claim. The Williamses' losses, it held, were "mere 'paper "loss[es]"' that are not actually losses for purposes of New York common law fraud." SPA.19-20 (quoting *Starr*, 901 N.Y.S.2d at 250).

<u>SUMMARY OF ARGUMENT</u>

I. New York and Florida law diverge on two key issues: the "special relationship" required for negligent misrepresentation and the "out-of-pocket loss" limitation on damages. While correctly recognizing those conflicts, the district court erred in resolving them in favor of New York law.

The court first erred by deeming New York's out-of-pocket loss rule conduct-regulating rather than loss-allocating. Conduct-regulating rules are those that set forth "appropriate standards of conduct" such as "rules of the road." *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 198 (1985). Loss-allocating rules, by contrast, "allocat[e] losses that result from admittedly tortious conduct." *Id.*

New York's out-of-pocket loss rule plainly falls into the latter category. The rule does not prescribe any standard of conduct; it does not tell anyone what they may or may not do. Both New York and Florida prohibit issuers from defrauding shareholders. The two States differ only in the ***measure of damages*** they apply. Those measures are classic loss-allocating rules because they "allocat[e] losses that result from admittedly tortious conduct." *Schultz*, 65 N.Y.2d at 198.

Even for conduct-regulating rules, the applicable law is normally the *lex loci delicti* – the place of the tort. Where "conduct occurs in one jurisdiction and the plaintiff's injuries are suffered in another, the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred" – *i.e.*, "where the plaintiffs' injuries occurred." *Schultz*, 65 N.Y.2d at 195. The district court thus conceded that, even for conduct-regulating rules, "***the law of the jurisdiction in which a plaintiff suffers loss from fraud would usually apply***." SPA.15 (citing *Sack v. Low*, 478 F.2d 360, 365 (2d Cir. 1973)) (emphasis added).

The court gave no persuasive reason to depart from that normal rule here. It invoked generalized concerns about New York's interest in "regulating its vast securities industry." SPA.17. But that vague rationale could be invoked in virtually any case and would cause the exception to swallow the rule. The court's concerns about "market paralysis" are overblown given the limited scope of the conflicts here, and its fears about forum-shopping should be addressed in a case that actually presents those concerns. At a minimum, the court should have deferred ruling on choice of law until the record was more fully developed.

II. In any event, the complaint states a claim even under New York law. New York has allowed holder claims for nearly a century. *See Cont'l Ins. Co. v. Mercadante*, 225 N.Y.S. 488 (1st Dep't 1927). And while the Appellate Division's First Department may have limited the damages recoverable in *Starr Foundation v. American International Group, Inc.*, 901 N.Y.S.2d 246 (1st Dep't 2010), the complaint here is fully consistent with the standards that court applied.

Starr held that a defrauded holder may recover only his out-of-pocket loss, not the benefit of an " 'alternative contractual bargain' " forgone. 901 N.Y.S.2d at 249 (quoting *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 422 (1996)). But the Williamses are not seeking the benefit of any "alternative contractual bargain." They are not demanding the difference between the $55 price at which they ***would have sold*** the Citigroup stock and the $3.09 price at which they actu-

ally sold it. Rather, they are seeking compensation for the decline in the ***actual value*** of their investment during the time they were fraudulently induced to hold it. That is a paradigmatic out-of-pocket loss.

Nor are the Williamses' claims impermissibly speculative. The Williamses alleged the precise amount, timing, and price of their planned sale, as well as the concrete steps they took in anticipation. Those pleadings are a far cry from the vague allegations in *Starr*.

Finally, while the complaint is sufficient even under *Starr*'s interpretation of New York law, to the extent there is any doubt, the Court should certify this case to the New York Court of Appeals. That court has never opined on holder claims, and *Starr* should not be used to effectively foreclose such claims without giving the Court of Appeals a chance to weigh in.

ARGUMENT

I. THE DISTRICT COURT ERRED IN RULING THAT NEW YORK LAW APPLIES

Standard of Review. "A district court's choice of law determination is reviewed *de novo*." *Int'l Bus. Mach. Corp. v. Liberty Mut. Ins. Co.*, 363 F.3d 137, 143 (2d Cir. 2004).

Although the district court properly found conflicts between New York and Florida law, it erred in resolving them in favor of New York. Florida has the greater interest in determining what measure of damages should apply to compen-

sate Florida victims who received misrepresentations in Florida, relied upon the misrepresentations in Florida, and suffered losses in Florida when those misrepresentations were exposed. Florida also has the greater interest in providing a remedy when Florida citizens suffer losses from negligent misrepresentations, even absent the "special relationship" New York requires. The district court erred in ruling otherwise.

In diversity cases, "federal courts must follow conflict of laws rules prevailing in the states in which they sit." *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 494 (1941). New York decides choice of law by looking to "the law of the jurisdiction having the greatest interest in resolving the particular issue." *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 72 (1993). A court must address two questions: "(1) what are the significant contacts and in which jurisdiction are they located; and, (2) whether the purpose of the law is to regulate conduct or allocate loss." *Padula v. Lilarn Props. Corp.*, 84 N.Y.2d 519, 521 (1994).

Where a conduct-regulating rule is at issue, the "law of the place of the tort" normally governs. *Babcock v. Jackson*, 12 N.Y.2d 473, 484 (1963). That is because, "[w]hen the conflicting rules involve the appropriate standards of conduct, . . . the law of the place of the tort 'will usually have a predominant, if not exclusive, concern.'" *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 198 (1985) (quoting *Babcock*, 12 N.Y.2d at 483).

If loss-allocating rules are at stake, by contrast, "other factors are taken into consideration, chiefly the parties' domiciles." *Cooney*, 81 N.Y.2d at 72. Domicile is key because the "domiciliary jurisdiction . . . has the greater 'interest in enforcing the decisions of [its residents] to accept both the benefits and the burdens of identifying with that jurisdiction and to submit themselves to its authority.'" *Id.* at 73 (quoting *Schultz*, 65 N.Y.2d at 198); *see also Wall v. CSX Transp., Inc.*, 471 F.3d 410, 415 n.3 (2d Cir. 2006) (noting that the "plaintiff's domicile" is an "obvious possibility for governing law" because "'[t]o the extent plaintiff became a poorer man, he became a poorer Connecticut resident'" (quoting *Klock v. Lehman Bros. Kuhn Loeb Inc.*, 584 F. Supp. 210, 215 (S.D.N.Y.1984))).

Where the parties share a common domicile, that state's law controls. *Cooney*, 81 N.Y.2d at 73. In split-domicile cases, New York "generally uses the ***place of injury*** . . . as the determining factor." *Id.* at 74 (emphasis added); *see also id.* ("[T]he place of injury was the traditional choice of law crucible."); *Neumeier v. Kuehner*, 31 N.Y.2d 121, 128 (1972) (same); *Kranzler v. Austin*, 732 N.Y.S.2d 328, 329 (2d Dep't 2001) (same). That makes sense because, when loss-allocating rules are at stake, the State ***where the loss occurred*** has the dominant interest.

A. The District Court Correctly Found Two Relevant Conflicts Between Florida and New York Law

The district court did correctly find two conflicts. First, New York and Florida law conflict over whether a plaintiff claiming negligent misrepresentation must

prove a "special relationship" with the defendant. SPA.10. New York requires a "'special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff.'" *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 180 (2011). Florida, by contrast, follows the *Restatement (Second) of Torts* § 552 (1977), which imposes no such requirement. *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334, 337 (Fla. 1997).

The district court also properly found a conflict over the measure of damages. As it noted, *Starr Foundation v. American International Group, Inc.*, 901 N.Y.S.2d 246 (1st Dep't 2010), "significantly narrowed the scope of cognizable damages for holder claims." SPA.12. The plaintiff in *Starr* suspended sales of the defendant's stock in reliance on the defendant's false statements and sought to recover "the value it hypothetically would have realized for its [stock] . . . had defendants at that time accurately disclosed the risk." 901 N.Y.S.2d at 248. According to *Starr*, "such a recovery would violate New York's longstanding out-of-pocket rule," which limits damages to "'what [plaintiffs] lost because of the fraud, not . . . what they might have gained.'" *Id.* at 248-49 (quoting *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421 (1996)). "'The purpose of an action for deceit is to indemnify the party injured,' and '[a]ll elements of profit are excluded.'" *Id.* at 249 (quoting *Reno v. Bull*, 226 N.Y. 546, 553 (1919)).

Florida, by contrast, takes a more "flexib[le]" approach. *DuPuis v. 79th St. Hotel, Inc.*, 231 So. 2d 532, 536 (Fla. Dist. Ct. App. 1970). Instead of seeking out-of-pocket losses, a plaintiff can invoke the " 'benefit of the bargain' rule" and seek lost profits instead. *Martin v. Brown*, 566 So. 2d 890, 891 (Fla. Dist. Ct. App. 1990). "Either [standard] may be used to do justice as the circumstances demand." *Id.* That flexible approach is endorsed by the *Restatement* and followed by the vast majority of jurisdictions. *See Restatement (Second) of Torts* § 549 & cmt. g (1977) (noting that "the great majority of the American courts [have] adopt[ed] a broad general rule giving the plaintiff, in an action of deceit, the benefit of his bargain"). Only seven States follow New York's approach. *See id.* § 549 reporter's note.

B. The District Court Erred in Finding New York's Out-of-Pocket Loss Rule Conduct-Regulating Rather Than Loss-Allocating

The district court labeled *Starr*'s out-of-pocket loss rule conduct-regulating rather than loss-allocating. SPA.15. That was wrong. Conduct-regulating rules are those that prescribe "appropriate standards of conduct" such as "rules of the road." *Schultz*, 65 N.Y.2d at 198. They are rules "people use as a guide to governing their primary conduct." *K.T. v. Dash*, 827 N.Y.S.2d 112, 117 (1st Dep't 2006). "Loss allocating rules, on the other hand, are those which prohibit, assign, or limit liability after the tort occurs." *Padula*, 84 N.Y.2d at 522. They "allocat[e] losses that result from admittedly tortious conduct." *Schultz*, 65 N.Y.2d at 198.

New York's out-of-pocket loss rule is plainly loss-allocating under that framework. It is not a "rule of the road": It does not tell anyone what ***conduct*** they may or may not engage in. New York and Florida both prohibit the same fraudulent ***conduct*** in connection with securities; they simply allow different ***damages*** to compensate defrauded victims. The out-of-pocket loss rule thus "allocat[es] losses that result from admittedly tortious conduct." *Schultz*, 65 N.Y.2d at 198. Securities fraud is not any less tortious – or criminal – merely because Florida permits a more flexible measure of damages.

New York courts have repeatedly found rules that govern the measure of damages to be loss-allocating. In *Miller v. Miller*, 22 N.Y.2d 12 (1968), for example, a New York resident died when the car he was in crashed in Maine. *Id.* at 14. His family brought a wrongful death action against the driver, who was a Maine resident at the time but later moved to New York. *Id.* Maine imposed a $20,000 limit on wrongful death actions, whereas New York had no such limit. *Id.* at 15, 18. The court deemed those rules loss-allocating, not conduct-regulating. The "'evident purpose'" of New York's law was "'to authorize a recovery measured by the actual loss sustained.'" *Id.* at 18 (quoting *Medinger v. Brooklyn Heights R.R. Co.*, 39 N.Y.S. 613, 616 (2d Dep't 1896)). And Maine's damages cap was "obviously not the kind of statute which regulates conduct" because it "deal[t] . . . with the nature of the remedy for concededly tortious conduct." *Id.* at 19. The

court thus refused to apply the law of the place of the tort, and instead applied the law of the parties' common domicile, New York. *Id.* at 21-22.

The Court of Appeals reached a similar result in *Schultz v. Boy Scouts of America, Inc.*, 65 N.Y.2d 189 (1985). In that case, a Boy Scout leader sexually abused two children; the organization and the children were New Jersey residents but the tort occurred mainly in New York. *Id.* at 193-94. New Jersey had a charitable immunity statute; New York did not. *Id.* at 192. The court applied New Jersey law because it deemed the statute loss-allocating, not conduct-regulating. *Id.* at 198-200 & n.2. "[W]hen the conflicting rules involve the appropriate standards of conduct, rules of the road, for example, the law of the place of the tort 'will usually have a predominant, if not exclusive, concern.'" *Id.* at 198 (quoting *Babcock*, 12 N.Y.2d at 483). But "when the jurisdictions' conflicting rules relate to allocating losses that result from admittedly tortious conduct, as they do here, . . . considerations of the State's admonitory interest and party reliance are less important." *Id.*[1]

By contrast, courts have found rules conduct-regulating where they actually ***regulate conduct***. In *Padula*, for example, the court held certain labor laws con-

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[1] *See also Edwards v. Erie Coach Lines Co.*, 17 N.Y.3d 306, 330 (2011) (holding damages cap to be loss-allocating); *Cooney*, 81 N.Y.2d at 74-75 (bar on contribution claims); *Elson v. Defren*, 726 N.Y.S.2d 407, 412 (1st Dep't 2001) (vicarious liability rules); *Cunningham v. Williams*, 814 N.Y.S.2d 467, 469 (4th Dep't 2006) (damages caps); *Bodea v. Trans Nat Express, Inc.*, 731 N.Y.S.2d 113, 116 (4th Dep't 2001) (same); *In re N.Y. City Asbestos Litig.*, 921 N.Y.S.2d 466, 472 (Sup. Ct. N.Y. Cnty. 2011) (same).

duct-regulating because they "requir[ed] that adequate safety measures be instituted at the worksite." 84 N.Y.2d at 522-23. In *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 672 F.3d 155 (2d Cir. 2012), this Court held that "the scope of a bank's duty to protect third parties against intentional torts committed by the bank's customers" was conduct-regulating. *Id.* at 158. And in *Devore v. Pfizer Inc.*, 867 N.Y.S.2d 425 (1st Dep't 2008), the court held that "the standard of care required for a product liability claim against a pharmaceutical company" was conduct-regulating. *Id.* at 427-28.[2]

New York's out-of-pocket loss limitation bears no resemblance to those "rules of the road." Rather, it reflects the State's position that fraud victims should recover their actual out-of-pocket losses and nothing more. *See Lama*, 88 N.Y.2d at 421. In New York's view, " 'the loss of an alternative contractual bargain [should not] serve as a basis for fraud or misrepresentation damages because the loss of the bargain [i]s "undeterminable and speculative." ' " *Starr*, 901 N.Y.S.2d at 249 (quoting *Lama*, 88 N.Y.2d at 422). Those are not judgments about what

[2] The cases the district court invoked (SPA.16) likewise involved paradigmatic conduct-regulating rules. *See, e.g.*, *In re Refco Inc. Sec. Litig.*, 892 F. Supp. 2d 534, 537 (S.D.N.Y. 2012) ("[T]he question of whether a broker has a duty to disclose that it is hopelessly insolvent before accepting a customer's funds is clearly a conduct regulating rule designed to prevent brokers from fraudulently inducing deposits that customers will never get back.").

conduct is permissible. They are judgments about what losses should be recoverable when issuers engage in concededly improper conduct.

Conversely, Florida's flexible approach to damages reflects that State's own loss-allocating determinations. Like the many other States that allow recovery for lost profits, Florida has concluded that out-of-pocket losses often "do not afford compensation that is just and satisfactory." *Restatement (Second) of Torts* § 549 & cmt. g. Florida thus permits broader recovery – allocating those additional losses to the perpetrator rather than the victim.

The district court offered two grounds for deeming the out-of-pocket loss rule conduct-regulating, but neither is persuasive. First, it held that "[t]he primary purpose of the rule articulated in *Starr* is to encourage the optimal functioning of the securities markets." SPA.15. But even if true, that does not make the rule conduct-regulating. States often adopt loss-allocating rules to promote particular industries or social goals. For example, charitable immunity statutes are loss-allocating even though one obvious purpose is to encourage charitable activities. *See Schultz*, 65 N.Y.2d at 200. The relevant point is that *Starr* attempts to "encourage the optimal functioning of the securities markets" by ***allocating losses*** to other parties, not by ***regulating conduct***.

The district court also deemed the out-of-pocket loss rule conduct-regulating because loss is an element of fraud. "Rather than accepting that a tort had been

properly alleged and constraining or shifting liability as a policy matter, the *Starr* court found that plaintiffs could not prove fraud in the first place." SPA.15. But whether a rule is conduct-regulating or loss-allocating does not depend on the technical detail of whether it is an element of the cause of action. It depends on whether the rule ***regulates conduct*** or ***allocates losses***. Under the district court's theory, ***any*** rule defining the types of compensable damages could be conduct-regulating because a plaintiff who fails to suffer a cognizable loss would not have a claim. That clearly is not the law.

The district court's error fundamentally skewed its analysis. Having classified the out-of-pocket rule as conduct-regulating, the court "focus[ed] primarily on ***the location of the conduct to be regulated***." SPA.15 (emphasis added). That was the only way the court could justify applying New York law in a case where Florida citizens suffered losses in Florida from fraudulent representations they received in Florida and relied upon in Florida. Had the court deemed the rule loss-allocating instead, it would have focused on the ***place of loss*** – Florida – and could not possibly have reached the result it did.

C. Even If the Conflicting Rules Are Conduct-Regulating, Florida Law Still Applies

Even assuming that both the "special relationship" requirement and the out-of-pocket loss rule are conduct-regulating, the district court still erred by applying New York law. For conduct-regulating rules, the "law of the place of the tort"

generally governs. *Babcock*, 12 N.Y.2d at 484. But "when the defendant's negligent conduct occurs in one jurisdiction and the plaintiff's injuries are suffered in another, the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred." *Schultz*, 65 N.Y.2d at 195; *see also Elmaliach v. Bank of China Ltd.*, 971 N.Y.S.2d 504, 516 (1st Dep't 2013) (noting this "well-settled principle"). Thus, for claims like fraud where damages are an element of the cause of action, the last event necessary to make the actor liable is the injury, so the "place of the wrong" for choice of law purposes is "where the plaintiffs' injuries occurred." *Schultz*, 65 N.Y.2d at 195; *see also Devore*, 867 N.Y.S.2d at 428 (same).

State and federal courts in New York routinely follow that rule in fraud cases. For example, in *Sack v. Low*, 478 F.2d 360 (2d Cir. 1973), Massachusetts residents sued New York residents for securities fraud. *Id.* at 361. The defendants contended that New York's borrowing statute barred the claims, a defense that turned on where the claims accrued. *Id.* at 365. This Court cited the *Restatement* for the proposition that "[t]he traditional view has been that a cause of action for tort arises when and where 'the last event necessary to make an actor liable . . . takes place.'" *Id.* (quoting *Restatement (First) of Conflicts of Laws* § 377 n.4 (1934)). "Since a tort action traditionally has not been viewed as complete until the plaintiff suffers injury or loss, the cause of action has been considered to arise

at the place where this damage was sustained." *Id.* Thus, "'when a person sustains loss by fraud, ***the place of wrong is where the loss is sustained, not where fraudulent representations are made***.'" *Id.* (quoting *Restatement (First) of Conflicts of Laws* § 377 n.4) (emphasis added).

This Court then provided the following example ***specifically addressing holder claims***:

> A, in state X, owns shares in the M company. B, in state Y, fraudulently persuades A not to sell the shares. The value of the shares falls. The place of wrong is X.

478 F.2d at 365 (quoting *Restatement (First) of Conflicts of Laws* § 377 n.4 illus.). "New York," the Court believed, "would follow this traditional approach." *Id.*

As indeed it has. Courts applying New York law have overwhelmingly applied the law of the place of injury in fraud cases, even where conduct-regulating rules are at issue. *See, e.g.*, *Emjayco v. Morgan Stanley & Co.*, No. 95-cv-8546, 1996 WL 452266, at *4 (S.D.N.Y. Aug. 8, 1996) ("Because all of the claims against Morgan Stanley are based on conduct regulating rules, I look to the law of the 'locus' jurisdiction. Fraud and other tort actions ordinarily have their 'locus' for these purposes in the place where the alleged damage was sustained – here, Illinois."), *aff'd*, 125 F.3d 843 (2d Cir. 1997); *La Luna Enters., Inc. v. CBS Corp.*, 74 F. Supp. 2d 384, 389 (S.D.N.Y. 1999) ("In the context of such conduct-regulating torts, . . . the law of the place of the wrong governs," and is "determined

by where the plaintiffs' injuries occurred.").[3] The handful of district court cases invoked by the court below (SPA.16) pale in comparison to that authority – and are inapposite in any event.[4]

The *Restatement (Second) of Conflict of Laws* likewise points to Florida law. Under Section 148, "[w]hen the plaintiff's action in reliance took place in whole or

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[3] *See also Krock v. Lipsay*, 97 F.3d 640, 646 (2d Cir. 1996) ("It may well be . . . that New York courts would apply the substantive law of Massachusetts because, while the alleged fraud occurred in New York, the plaintiffs suffered their injuries in Massachusetts."); *J.A.O. Acquisition Corp. v. Stavitsky*, 745 N.Y.S.2d 634, 639 (Sup. Ct. N.Y. Cnty. 2001) ("[U]nder New York conflict of law principles, fraud claims are governed by the law of the place of injury – in this case New York, where plaintiffs are located."), *aff'd*, 739 N.Y.S.2d 821 (1st Dep't 2002); *H.S.W. Enters., Inc. v. Woo Lae Oak, Inc.*, 171 F. Supp. 2d 135, 142 (S.D.N.Y. 2001) ("[T]he locus of a fraud [is] the place where the injury was inflicted and not the place where the fraudulent act originated."); *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 292 (S.D.N.Y. 2000) (same), *aff'd*, 2 F. App'x 109 (2d Cir. 2001); *Telecom Int'l Am., Ltd. v. AT & T Corp.*, 67 F. Supp. 2d 189, 207 (S.D.N.Y. 1999) (same); *Robinson v. Avis Rent-A-Car, Inc.*, No. 98-cv-4321, 1999 WL 342037, at *3 (E.D.N.Y. May 24, 1999) (same); *Trionic Assocs., Inc. v. Harris Corp.*, 27 F. Supp. 2d 175, 182 n.7 (E.D.N.Y. 1998) (same), *aff'd*, 198 F.3d 235 (2d Cir. 1999); *Pinnacle Oil Co. v. Triumph Okla., L.P.*, No. 93-cv-3434, 1997 WL 362224, at *1 (S.D.N.Y. June 27, 1997) (same); *Plymack v. Copley Pharm., Inc.*, No. 93-cv-2655, 1995 WL 606272, at *4 (S.D.N.Y. Oct. 12, 1995) (same); *Carr v. Equistar Offshore, Ltd.*, No. 94-cv-5567, 1995 WL 562178, at *5 (S.D.N.Y. Sept. 21, 1995) (same); *Schupak v. Florescue*, No. 92-cv-1189, 1993 WL 256572, at *4 (S.D.N.Y. July 8, 1993) (same); *Rosenberg v. Pillsbury Co.*, 718 F. Supp. 1146, 1150 (S.D.N.Y. 1989) (same).

[4] In *Amusement Industry, Inc. v. Stern*, 693 F. Supp. 2d 327 (S.D.N.Y. 2010), for example, the court declined to apply the *lex loci delicti* only because "the overwhelming center of the events giving rise to the case" was elsewhere. *Id.* at 341. That is not the case here: Even if Citigroup made the misrepresentations primarily from New York, the representations were received, were relied upon, and caused injury in Florida. Other cases such as *In re Refco Inc. Securities Litigation*, 892 F. Supp. 2d 534 (S.D.N.Y. 2012), simply ignore the place-of-injury rule altogether.

in part in a state other than that where the false representations were made, the forum will consider . . . the following contacts”:

> (a) the place, or places, where the plaintiff ***acted in reliance*** upon the defendant’s representations,
>
> (b) the place where the plaintiff ***received the representations***,
>
> (c) the place where the defendant ***made the representations***,
>
> (d) the ***domicil***, residence, nationality, place of incorporation and place of business ***of the parties***,
>
> (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
>
> (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

Restatement (Second) of Conflict of Laws § 148(2) (1971) (emphasis added).

The *Restatement* explains that “the place where the plaintiff acted in reliance” is more important than “where the representations were made.” *Restatement (Second) of Conflict of Laws* § 148 cmt. g. Moreover, “[i]f any two of the above-mentioned contacts, apart from the defendant’s domicile, state of incorporation or place of business, are located wholly in a single state, this will usually be the state of the applicable law.” *Id.* § 148 cmt. j. Here, those contacts point strongly toward Florida: Each plaintiff is domiciled in or controlled from Florida; each plaintiff

acted in reliance in Florida; and each plaintiff received the representations directly or through advisor intermediaries in Florida. A.19-21 ¶¶14-16, 27-29.[5]

The district court did not dispute those principles. It agreed that "when the 'conduct occurs in one jurisdiction and the plaintiff's injuries are suffered in another, the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred.'" SPA.15 (quoting *Schultz*, 65 N.Y.2d at 195). It conceded, therefore, that "the law of ***the jurisdiction in which a plaintiff suffers loss from fraud*** would usually apply." *Id.* (citing *Sack*, 478 F.2d at 365) (emphasis added). But the court cited three reasons for refusing to follow that normal rule here.

The district court's first rationale was that "common law fraud rules seek to deter the intentional deception of stockholders," and that "New York has the greater interest in regulating its vast securities industry to ensure that application of the law leads to the appropriate admonitory effects on industry participants." SPA.17. But that rationale proves far too much. New York's interest in "regulating its vast securities industry" would apply in ***every*** case involving fraudulent

[5] The complaint does not expressly identify where the plaintiffs received the representations or acted in reliance on them. But because it alleges that the Williamses are domiciled in Florida, and does not allege that they were domiciled anywhere else at any relevant time, it is a reasonable inference that plaintiffs received and relied upon the statements in Florida. On a motion to dismiss, a court must "draw[] all reasonable inferences in plaintiffs' favor." *Freidus v. Barclays Bank PLC*, 734 F.3d 132, 137 (2d Cir. 2013).

statements made from New York that cause harm elsewhere. That approach would eviscerate New York's rule that the place of injury, not the place of misconduct, normally governs for fraud claims.

Besides, the issue here is not New York's interest in enforcing its underlying prohibitions on fraud and negligent misrepresentation. The issue is New York's interest in enforcing its ***out-of-pocket loss and special relationship*** requirements. Conflicts analysis turns on "the state of most significant relationship ***with respect to the particular issue***" on which there is a conflict. *Restatement (Second) of Conflict of Laws* § 148 cmt. e (emphasis added); *see also Miller*, 22 N.Y.2d at 16 (courts look to "particular law in conflict"). Both New York and Florida prohibit fraud and negligent misrepresentation. The only issues on which they disagree are the measure of damages and the parties' relationship. On those issues, New York's interest in ensuring "appropriate admonitory effects" is much diminished.

The district court's second rationale was that applying the *lex loci delicti* would expose companies to "the laws of all fifty states and an unknown number of foreign nations" and "paralyze actors in the securities markets." SPA.17. But this is not a case where different state laws mandate different ***conduct***. At most, some plaintiffs may recover different amounts for the ***same unlawful conduct***. Securities professionals will not be "paralyzed" merely because the same illegal conduct – prohibited throughout the Nation – is compensated in different ways.

In any event, a mere desire for uniform treatment of nationwide frauds is not a sufficient basis for ignoring otherwise applicable state laws. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-23 (1985) (rejecting the rule that "in a nationwide class action . . . 'the law of the forum should be applied,'" despite acknowledging "practical reasons" in favor of such an approach). Even if a uniform rule were necessary, the district court never explained why New York rather than Florida law should govern, when most States follow Florida's approach. *See Restatement (Second) of Torts* § 549 & cmt. g; p. 21, *supra*.

The district court's final rationale was that the *lex loci delicti* rule would encourage forum-shopping because a defrauded plaintiff might change his residence to a more permissive jurisdiction immediately before selling his stock. But those forum-shopping concerns are wholly hypothetical here. Nothing in the complaint suggests that the Williamses moved to Florida to take advantage of its more liberal damages measure. To the contrary, so far as the complaint shows, plaintiffs resided in Florida at all relevant times. A.19-21 ¶¶14-16, 27-29. Courts are perfectly capable of disregarding a party's change of residence where there is an ***actual*** risk of forum-shopping. *See Miller*, 22 N.Y.2d at 22 (noting that courts may "ignore changes in domicile after the accident" to "prevent forum shopping"). This is not such a case.

D. At a Minimum, the Court Should Have Deferred Ruling on Choice of Law

The district court at least should have deferred ruling on choice of law until a later stage of the proceedings. Particularly where a court must conduct an "interest analysis," it should "defer its choice-of-law decision until the parties present a factual record full enough" to permit analysis. *Harper v. LG Elecs. USA, Inc.*, 595 F. Supp. 2d 486, 491 (D.N.J. 2009). "Because the governmental interest analysis is fact intensive, it can be inappropriate or impossible for a court to conduct that analysis at the motion to dismiss stage when little or no discovery has taken place." *In re Samsung DLP Television Class Action Litig.*, No. 07-cv-2141, 2009 WL 3584352, at *3 (D.N.J. Oct. 27, 2009); *see also In re Google Inc.*, No. 13-MD-02430, 2013 WL 5423918, at *19 (N.D. Cal. Sept. 26, 2013) ("The Court finds that it cannot conduct a meaningful choice of law analysis . . . at this early stage of the litigation where the issues of contention are still in flux.").

Here, for example, the applicable law may turn on where the Williamses received and relied upon the fraudulent representations. *See Restatement (Second) of Conflict of Laws* § 148(2)(a)-(b). Although the complaint permits the reasonable inference that all those contacts point to Florida, *see* p. 31 n.5, *supra*, discovery may confirm or refute that inference and reveal where plaintiffs were located when they received Citigroup's fraudulent statements and acted in reliance on them by abandoning their plan to sell.

Discovery may also shed light on where the fraudulent statements were made. Although many may have been made from Citigroup's headquarters in New York, several may have been made elsewhere. For example, many of the statements appear in Citigroup's SEC filings. *See, e.g.*, A.35-78 ¶¶77, 94, 109, 153, 155, 187, 225. Those statements may well have been "made" at the SEC's headquarters in Washington, D.C., rather than Citigroup's headquarters in New York.

Given those uncertainties, the district court's adoption of New York law was at best premature. The court should have reserved ruling pending development of a full factual record. At a minimum, it should have granted the Williamses' request to amend their complaint to add any necessary allegations. *See* A.240 (requesting "leave to replead"); *Porat v. Lincoln Towers Cmty. Ass'n*, 464 F.3d 274, 276 (2d Cir. 2006) (lack of a formal motion is "not a sufficient ground . . . to dismiss without leave to amend"). For those reasons too, the judgment should be reversed.

II. THE DISTRICT COURT ERRED IN RULING THAT THE WILLIAMSES FAILED TO STATE A CLAIM UNDER NEW YORK LAW

Standard of Review. This Court "review[s] *de novo* a district court's dismissal of a complaint for failure to state a claim, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in plaintiffs' favor." *Freidus v. Barclays Bank PLC*, 734 F.3d 132, 137 (2d Cir. 2013).

Even if New York law governs, the decision below should still be reversed because the complaint sufficiently states a claim under New York law. The district court did not dispute that New York has long allowed holder claims. *Starr* merely "narrowed the scope of ***cognizable damages*** for holder claims." SPA.12 (emphasis added). But the court erred in determining that the Williamses failed to satisfy that standard here. The Williamses adequately alleged that they suffered a concrete out-of-pocket loss when the ***actual value*** of their shares declined as a result of Citigroup's fraud. Moreover, there is nothing indeterminate or speculative about the Williamses' claims: The complaint alleges precisely how much stock the Williamses would have sold, at what price, and when. Those allegations are a far cry from the vague claims rejected in *Starr*.

A. New York Law Permits Holder Claims

The district court was correct to assume that New York permits holder claims as a general matter. That much has been clear for almost a century. In *Continental Insurance Co. v. Mercadante*, 225 N.Y.S. 488 (1st Dep't 1927), insurers claimed they had been fraudulently induced to refrain from selling bonds they owned. "The gravamen of the action [wa]s for fraud in inducing, not the purchase of the bonds, but their retention after purchase." *Id.* at 490. The plaintiffs claimed they intended to "sell the bonds, if it appeared that the obligor's business and financial condition would not justify" retention. *Id.* at 489. But the defendants

made "false representations as to the earnings and solvency of the obligor." *Id.* at 490. In reliance, "the plaintiffs held their bonds," and their investments later became "substantially worthless." *Id.*

The First Department allowed the claims. "[T]he plaintiffs," it held, "cannot be denied redress because their conduct was inaction, rather than action." *Mercadante*, 225 N.Y.S. at 491. New York would "not countenance a standard of business morality which would permit vendors of securities to promote a market by publication of false representations, and escape the consequence thereof" merely because "the damage is caused by inducing plaintiff's inaction" rather than an affirmative purchase or sale. *Id.* at 494.

Mercadante is no outlier. *See, e.g.*, *Kaufmann v. Delafield*, 229 N.Y.S. 545, 546 (1st Dep't 1928) ("[T]he defrauded one may sue for damages occasioned by his own inaction, even though he had no predetermined notion of selling."); *Thayer v. Schley*, 121 N.Y.S. 1064, 1067 (1st Dep't 1910) (similar). This Court itself has cited *Mercadante* for the proposition that New York allows recovery where "misrepresentations and nondisclosures caused [plaintiffs] to hold securities they would otherwise have sold." *Weinberger v. Kendrick*, 698 F.2d 61, 78 (2d Cir. 1982); *see also AUSA Life Ins. Co. v. Ernst & Young*, 206 F.3d 202, 212-13 (2d Cir. 2000) (applying *Mercadante*); *Marbury Mgmt., Inc. v. Kohn*, 629 F.2d 705, 709 (2d Cir. 1980) (citing *Mercadante* for the proposition that "fraudulent representations may

induce the retention of securities as an investment and entail liability for the damages flowing from retention").[6]

Nothing in *Starr* undermines *Mercadante*. Explicitly "[a]ssuming the continuing vitality of *Mercadante*," *Starr* distinguished the claims before it based on the damages sought. 901 N.Y.S.2d at 252. In *Mercadante*, the "plaintiffs did suffer an out-of-pocket loss, specifically, the loss of their investment in the bonds," which became "'substantially worthless.'" *Id.* The *Starr* plaintiff, by contrast, sought "recovery for the loss of the value that might have been realized in a hypo-

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[6] *See also Warshaw v. Mendelow*, 2011 N.Y. Slip Op. 33972(U), 2011 WL 11100990, at *16 (Sup. Ct. N.Y. Cnty. Dec. 16, 2011) ("New York courts have long recognized investors' right to sue for false statements inducing them to retain their investments."); *Robeco-Sage Capital, L.P. v. Citigroup Alt. Invs. LLC*, 2009 N.Y. Slip Op. 31751(U), 2009 WL 2626244 (Sup. Ct. N.Y. Cnty. July 28, 2009) (citing *Mercadante* for the point that "misrepresentations and misleading information supplied to Plaintiffs that caused them to retain their investment and not to redeem their shares constitutes a fraud"); *Babcock v. Citigroup Inc.*, No. 602965/04, 2005 WL 6465161 (Sup. Ct. N.Y. Cnty. Dec. 22, 2005) (noting that "the First Department upheld the viability of 'holder' claims in [*Mercadante*]," which is "still binding precedent"); *Prime Mover Capital Partners, L.P. v. Elixir Gaming Techs., Inc.*, 793 F. Supp. 2d 651, 672 n.108 (S.D.N.Y. 2011) (New York "allows a plaintiff to recover on a fraud claim where the plaintiff was injured because he or she ***held***, rather than bought or sold, securities in reliance on defendants' misrepresentations"); *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 446 F. Supp. 2d 163, 204 (S.D.N.Y. 2006) ("New York recognizes a claim of fraud where investors were induced to retain securities in reliance on a defendant's misrepresentations."); *In re WorldCom, Inc. Sec. Litig.*, 382 F. Supp. 2d 549, 559 (S.D.N.Y. 2005) ("New York recognizes a claim of fraud where investors were induced to retain securities . . . ."); *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt. LLC*, 376 F. Supp. 2d 385, 407 (S.D.N.Y. 2005) (citing *Mercadante* for the point that "a claim for common law fraud is available to investors who retain their securities in reliance on a defendant's misrepresentations").

thetical market exchange that never took place" – *i.e.*, the benefit of the bargain it lost by not selling its stock when it had the chance. *Id.*

Mercadante thus remains good law. *See, e.g.*, *Matana v. Merkin*, No. 13-cv-1534, 2013 WL 6147700, at *6-9 (S.D.N.Y. Nov. 22, 2013) ("Defendants read *Starr* as barring all holder claims, not just those for lost profits. But *Starr* cannot be read so broadly. . . . The Court instead is compelled to predict, consistent with *Starr*, that the New York Court of Appeals today would still recognize . . . holder claims . . . in which plaintiffs seek to recover out-of-pocket losses . . . ."); *ASR Levensverzekering NV v. Swiss Re Fin. Prods. Corp.*, No. 650557/09, 2011 WL 10338595, at *5 (Sup. Ct. N.Y. Cnty. Oct. 11, 2011) ("[*Starr*] did not overrule [*Mercadante*], and this Court remains bound by it."). While *Starr* may limit the types of damages recoverable, it does not foreclose holder claims.

B. The Williamses Sufficiently Allege Out-of-Pocket Losses Proximately Caused by Citigroup's Misrepresentations

While the district court properly assumed that holder claims remain viable, it erred in holding that the Williamses did not allege cognizable damages. The Williamses' allegations are fully consistent with New York's out-of-pocket rule and bear no resemblance to the claims found lacking in *Starr*.

The plaintiff in *Starr* sought to recover "the value it would have realized by selling its AIG shares before the stock's price sharply declined." 901 N.Y.S.2d at 248. Such damages were prohibited under New York law, the court opined, be-

cause they "would violate New York's longstanding out-of-pocket rule." *Id.* at 248-49. Under that rule, "damages 'are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained,' and 'there can be no recovery of profits which would have been realized in the absence of fraud.'" *Id.* at 249 (quoting *Lama*, 88 N.Y.2d at 421). "[U]nder the out-of-pocket rule 'the loss of an ***alternative contractual bargain*** . . . cannot serve as a basis for fraud or misrepresentation damages . . . .'" *Id.* (emphasis added). But it was precisely such a "lost bargain" the plaintiff in *Starr* sought – "the value it might have realized from selling its shares." *Id.*

The damages the Williamses seek here are fundamentally different. Although the Williamses allege they would have sold their stock for $55 per share in May 2007 had they known the truth, A.58-59 ¶¶170, 174, that "alternative contractual bargain" plays ***no role*** in their damages calculation. Instead, the Williamses claim damages for the out-of-pocket loss they suffered when the ***actual value*** of their shares fell from $51.59 in May 2007 to $3.09 in March 2009. A.58 ¶¶171-172. They calculated that actual value based on an "event study conducted using widely accepted analytical methods," A.58 ¶171, an approach this Court has endorsed, *see, e.g.*, *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 207 (2d Cir. 2008) (event studies are "*prima facie* evidence" of proximate cause). Had the Williamses claimed damages based on their hypotheti-

cal sale price of $55, they might fairly be accused of seeking prohibited benefit-of-the-bargain damages. But they did not.

The damages claim in this case thus resembles *Mercadante*, not *Starr*. As *Starr* explained, *Mercadante* allowed the bondholders' claims because "plaintiffs did suffer an out-of-pocket loss, specifically, the loss of their investment in the bonds," which became " 'substantially worthless.' " 901 N.Y.S.2d at 252. Here too, the Williamses suffered an out-of-pocket loss when the ***actual value*** of their Citigroup investment declined. The out-of-pocket rule permits recovery for partial losses as well as complete ones and thus does not require that an investment be rendered "substantially worthless," like the one in *Mercadante*, to permit recovery. *See Lama*, 88 N.Y.2d at 421 (actual value of property received reduces recovery and therefore need not be zero); *Reno*, 226 N.Y. at 553 (same). But even if *Starr* could be read to impose such a requirement, this case qualifies. The magnitude of the Williamses' loss – a ***94% drop*** from $51.59 to $3.09 – is so staggering that a jury could reasonably classify the remaining value as "substantially worthless."

Quoting *Starr*, the district court held that the Williamses suffered "mere 'paper "loss[es]" ' that are not actually losses for purposes of New York common law fraud." SPA.19-20 (quoting 901 N.Y.S.2d at 250). That rationale ignores the different measures of damages. The plaintiff in *Starr* did not prove the actual value of the stock. Instead, it sought the ***entire decline*** in market price as the

defendant's fraud was exposed. 901 N.Y.S.2d at 248. That decline did not reflect a reduction in ***actual*** value; it reflected the dissipation of fraudulent inflation as the fraud was exposed. As a result, "[i]n holding its stock, the [plaintiff] did not lose or give up any value; rather, it remained in possession of the true value of the stock, whatever that value may have been at any given time." *Id.* at 249. That is why *Starr* referred to the injury as a mere "paper loss." *Id.* at 250.

Here, by contrast, the Williamses used an event study to exclude artificial inflation. A.58 ¶171. The only loss for which they seek damages is the true out-of-pocket loss they suffered when the ***actual value*** of their stock fell over time. In no sense is that a mere "paper loss."

Defendants argued below that New York limits recovery to the difference between purchase price and actual value ***on the date of the transaction*** and excludes subsequent losses. A.132-33. But New York does not apply that rule in cases like this. In *Hotaling v. A.B. Leach & Co.*, 247 N.Y. 84 (1928), for example, the plaintiff was defrauded into purchasing and then continuing to hold bonds issued by an oil company that went bankrupt. *Id.* at 87. The misrepresentations, the court explained, "did not cease with plaintiff's purchase," as he "continued to hold the bond for investment in accordance with the defendant's recommendation." *Id.* at 92. He ultimately lost his investment because "the weakness of the company [that] had been concealed from him" materialized. *Id.*

The court refused to limit damages to the purchase-date disparity: "Proximate damages may not be fixed by arbitrary rule. Sometimes other damages flow from fraud in inducing a purchase, besides the difference between the price paid and the value of the article received." 247 N.Y. at 92. In that case, the plaintiff's loss had to be "determined in the light of subsequent events." *Id.* at 93. "As long as the fraud continued to operate and to induce the continued holding of the bond, all loss flowing naturally from that fraud may be regarded as its proximate result." *Id.*; *see also Kaufmann*, 229 N.Y.S. at 546-47 (loss was "the difference between the amount invested through the inducement of the fraud and the value of the stock after the buyer was apprised of defendant's repudiation of his statements").[7]

This Court takes a similar approach in federal securities cases. Citigroup acknowledges that federal securities law generally follows the same out-of-pocket standard as New York law. A.134. But consistent with that standard, this Court has allowed plaintiffs to recover subsequent losses so long as they were "caused by the materialization of the risk concealed by the fraudulent statement." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 107 (2d Cir. 2007); *see also*

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[7] In *Continental Casualty Co. v. PricewaterhouseCoopers, LLP*, 15 N.Y.3d 264, 271 (2010), the New York Court of Appeals reaffirmed *Hotaling* but found it inapplicable where "plaintiffs could have . . . come forward with portfolio valuations showing the amount of the claimed overvaluation of the portfolio on the day of their respective investments." *Id.* at 271. That is precisely what the Williamses alleged here, when they used an event study to determine a fraud-free price of $51.59 per share. A.58 ¶171.

Lentell v. Merrill Lynch & Co., 396 F.3d 161, 177 (2d Cir. 2005) (same); *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 105 (2d Cir. 2001) (same). The risk that subsequently materialized need only be "within the zone of risk ***concealed*** by the misrepresentations and omissions." *Lentell*, 396 F.3d at 173.

Those principles apply here. When the Williamses were fraudulently induced to retain their stock in May 2007, Citigroup concealed its exposure to subprime risks. At the time, that exposure was only a ***risk***, and thus the fraud-free value of the stock was only modestly less than the $55 market price. A.58 ¶171. By March 2009, however, the chickens had come home to roost: The subprime markets collapsed, and what was once a mere ***possibility*** of losses became a certainty, driving down Citigroup's stock price all the way to $3.09. A.58 ¶172. Even though those losses occurred after the date of the fraud, they were still within the zone of risk that Citigroup concealed, and thus recoverable.

Moreover, this is not a case where unrelated market forces caused the stock-price declines. The complaint alleges that Citigroup's stock price fell because of the materialization of the subprime risks Citigroup concealed. *See, e.g.*, A.17-18 ¶7 ("[Citigroup's] multi-billion dollar [subprime CDO] exposure, along with other undisclosed credit market risk, ultimately caused the firm's stock to drop from nearly $60 to just $2 per share."); A.78 ¶225 ("Citigroup's stock price dropped below $20 per share as the market digested the report" of "additional write-downs

of subprime assets”). In any event, the presence or absence of other market forces is a “matter of proof at trial and not to be decided on a Rule 12(b)(6) motion to dismiss.” *Emergent Capital Inv. Mgmt., LLC v. Stonepath Grp., Inc.*, 343 F.3d 189, 197 (2d Cir. 2003); *see also In re Am. Int’l Grp., Inc. 2008 Sec. Litig.*, 741 F. Supp. 2d 511, 534 (S.D.N.Y. 2010); *In re Winstar Commc’ns*, No. 01-cv-3014, 2006 WL 473885, at *16 (S.D.N.Y. Feb. 27, 2006); *In re Pronetlink Sec. Litig.*, 403 F. Supp. 2d 330, 336 (S.D.N.Y. 2005). Plaintiffs have therefore adequately pled out-of-pocket losses proximately caused by Citigroup’s fraud – losses that fall squarely within *Starr*’s measure of damages.

C. The Williamses’ Damages Claims Are Not Speculative

The district court also rejected the Williamses’ damages claims on the ground that they were too speculative under *Starr*. SPA.20-21. But the court misunderstood *Starr*’s concerns.

Starr did not establish a separate requirement that holder claims not be speculative. It merely cited speculation as one ***reason*** New York courts limit fraud damages to out-of-pocket loss rather than benefit-of-the-bargain. The court explained that “the ***rationale*** of the out-of-pocket rule is that the value to the claimant of a ***hypothetical lost bargain*** is too ‘undeterminable and speculative.’ ” 901 N.Y.S.2d at 250 (emphasis added); *see also id.* at 249 (similar). “[T]he degree of speculation in determining damages” was impermissible only “[i]n the case of a

holder claim ***seeking damages based on the value that would have been realized in a hypothetical sale***." *Id.* at 250 (emphasis added).

As already explained, the Williamses are not seeking lost profits or the benefit of the bargain they would have obtained in a hypothetical sale. Although the complaint pleads that the Williamses would have sold all their stock in May 2007 for $55 per share, A.28 ¶48, that stock price does not figure into their damages calculations, because they are not measuring damages based on that hypothetical transaction. Because the Williamses are not seeking benefit-of-the-bargain damages, *Starr*'s concerns about the "undeterminable and speculative" nature ***of such damages*** are beside the point.[8]

In any event, the complaint's allegations are not in any sense "undeterminable and speculative." The Williamses clearly alleged they would have sold "16.6 million shares" in "May 2007" for "$55 per share." A.28 ¶¶48-49. The Williamses have thus pled with specificity the timing of their contemplated transactions, the amount of stock they would have sold, and the price at which they would have sold it. Moreover, the complaint corroborates the Williamses' intent with specific factual allegations about steps they took in contemplation of the sales:

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[8] Even if *Starr* could be read to establish a special pleading standard for holder claims, that standard would not apply here. Pleading standards are a procedural matter governed by federal, not state, law. *See* Fed. R. Civ. P. 8, 9(b); *Stephenson v. Citco Grp. Ltd.*, 700 F. Supp. 2d 599, 620 n.19 (S.D.N.Y. 2010). Thus, any special pleading standard under New York law would not apply in federal court.

The Williamses consulted with tax attorneys about the sale, created trusts to minimize gift taxes, and reduced their borrowings to free up the shares for sale. A.64-67 ¶¶190-193, 199. If those detailed allegations are not specific enough, it is hard to imagine what would be.

Those allegations bear no resemblance to the vague claims in *Starr*. The plaintiff there could not "allege with particularity that, assuming accurate disclosure of the relevant risk, it 'would have sold the . . . stock, how many shares [it] would have sold, and when the sale would have taken place.'" *Starr*, 901 N.Y.S.2d at 252. It merely "assert[ed], without meaningful explanation, that some unspecified expert testimony would enable it to establish the effect on the market . . . of earlier disclosure of the true risk." *Id.* Indeed, when the plaintiff's president was asked point-blank at a hearing whether she would have sold all the stock had the truth been disclosed earlier, she testified that she "c[ould]n't speculate about that." *Id.* at 250-51. The pleadings here filled all those gaps.

The district court deemed those differences irrelevant on the ground that "*Starr* relied on obstacles to proving the specifics of a claim in court, not obstacles to alleging the specifics in a complaint." SPA.20. "That plaintiffs allege those details hardly reduces the speculation required for the factfinder to credit the allegations." SPA.21. But the two standards are inextricably linked. If the complaint ***alleges*** specific facts that provide a sufficient non-speculative basis for

awarding damages, the Court must presume that plaintiffs will support those allegations with equally specific and non-speculative evidence at trial. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (court must "assume the[] veracity" of well-pleaded factual allegations).

The district court also deemed the complaint unduly speculative because it did not pin down the exact timing of the sales. SPA.21. The court pointed to paragraph 170's allegation that "'Williams decided to liquidate his entire 17.6 million share position' in mid-May 2007," that he "began with 'the sale on May 17, 2007 of one million shares' for $55 per share," and that "'***[t]hereafter***, he canceled the remainder of the planned sale in reliance on' the alleged misstatements," without specifying how long "thereafter" he planned to sell the remaining shares. SPA.21 (quoting A.58 ¶170). The court, however, overlooked paragraph 48's allegation that Mr. Williams "would have sold all of his shares ***in May 2007*** at $55 per share." A.28 ¶48 (emphasis added). The complaint thus identified a specific two-week period, from May 17 to May 31, 2007. In a case involving planned sales of more than $900 million worth of stock, that is sufficient.

D. The Case Should Be Certified to the New York Court of Appeals

For the reasons above, New York law clearly permits holder claims, and the complaint sufficiently alleges a recoverable out-of-pocket loss. To the extent the Court reads *Starr* as foreclosing the claims, however, it should certify the case to

the New York Court of Appeals. If *Starr* bars holder claims even with allegations as concrete and specific as those here, it is hard to imagine what claims could survive. This Court should not lightly presume that New York's highest court would condone upheaval of a century of settled law.

In deciding whether to certify a question, this Court considers three factors: "(1) the absence of authoritative state court decisions; (2) the importance of the issue to the state; and (3) the capacity of certification to resolve the litigation." *O'Mara v. Town of Wappinger*, 485 F.3d 693, 698 (2d Cir. 2007), *certified question accepted*, 8 N.Y.3d 957 (2007), *certified question answered*, 9 N.Y.3d 303 (2007). Each factor favors certification here.

First, there is a clear absence of authoritative state court decisions. As the court below noted, New York's "law regarding holder claims has [not] been conclusively determined by the state's highest court." SPA.10. That absence of guidance is causing serious confusion. While some courts properly construe *Starr* as merely limiting damages, *see, e.g.*, *Matana*, 2013 WL 6147700, at *7, others read it more broadly to eliminate holder claims altogether for publicly traded securities, *see In re Bear Stearns Cos. Sec., Derivative, & ERISA Litig.*, No. 13-cv-2692, 2014 WL 463582, at *19 (S.D.N.Y. Feb. 5, 2014) (*Starr* "suggests that New York does not recognize [holder] claims"); *Irvin v. Jones*, 966 N.Y.S.2d 346, 2012 WL 6634476, at *11 (Sup. Ct. Suffolk Cnty. Dec. 13, 2012) (same).

The importance of the issue likewise favors certification. When the Supreme Court declined to allow holder claims under federal law in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), it specifically cited the availability of state remedies as a factor in mitigation of its holding. *Id.* at 738 & n.9. Given New York's status as the Nation's financial capital, moreover, the permissibility of holder claims is uniquely important to that State. *See ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 166 (2d Cir. 2007) (citing New York's "pivotal role in international commerce" as a factor favoring certification), *certified question accepted*, 8 N.Y.3d 994 (2007), *certified question answered*, 9 N.Y.3d 467 (2007).

Numerous courts have followed New York's lead in recognizing holder claims.[9] Florida courts in particular have repeatedly allowed such claims. *See Ward v. Atl. Sec. Bank*, 777 So. 2d 1144, 1146 (Fla. Dist. Ct. App. 2001); *Rogers v. Cisco Sys., Inc.*, 268 F. Supp. 2d 1305, 1314 (N.D. Fla. 2003); *Pafumi v. Davidson*, No. 05-cv-61679, 2007 WL 1729969, at *3 (S.D. Fla. June 14, 2007). The claims are also well-grounded in fundamental tort principles. Under the *Restatement*:

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[9] *See, e.g.*, *Holmes v. Grubman*, 286 Ga. 636, 641 (2010) (holding that "negligent misrepresentation claims, like fraud claims, can be based on forbearance in the sale of publicly traded securities"); *Small v. Fritz Cos.*, 30 Cal. 4th 167, 171 (Cal. 2003) (allowing holder claims); *Gordon v. Buntrock*, No. 99-CH-18378, 2004 WL 5565141 (Ill. Cir. Ct. Jan. 1, 2004) (same); *David v. Belmont*, 291 Mass. 450, 453 (1935) (same); *Seideman v. Sheboygan Loan & Trust Co.*, 223 N.W. 430, 433 (Wis. 1929) (same); *Gutman v. Howard Sav. Bank*, 748 F. Supp. 254, 263-67 (D.N.J. 1990) (same).

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act ***or to refrain from action*** in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

Restatement (Second) of Torts § 525 (1977) (emphasis added); *see also* 60A N.Y. Jur. 2d *Fraud and Deceit* § 155 (rev. 2014) ("[F]raud that induces nonaction where action would otherwise have been taken is as culpable as fraud that induces action that would otherwise have been withheld.").

Finally, the issue has "the capacity . . . to resolve the litigation." *O'Mara*, 485 F.3d at 698. If New York law applies, and the Court of Appeals refuses to recognize holder claims, this Court could affirm the decision below. By contrast, if the court allows such claims, that decision will clarify this unsettled area of the law, providing crucial guidance not only to the district court and the parties here, but also to state and federal courts, investors, and issuers generally.

CONCLUSION

The district court's judgment should be reversed.

March 5, 2014

Respectfully submitted,

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SPECIAL APPENDIX

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Dated October 30, 2013, Appealed From SPA-1

Judgment, Dated October 30, 2013, Appealed From SPA-23

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AHW INVESTMENT PARTNERSHIP, MFS, INC., and ANGELA H. WILLIAMS as TRUSTEE of the ANGELA H. WILLIAMS GRANTOR RETAINED ANNUITY TRUST UAD MARCH 24, 2006, the ANGELA WILLIAMS GRANTOR RETAINED ANNUITY TRUST UAD April 17, 2006, the ANGELA WILLIAMS GRANTOR RETAINED ANNUITY TRUST UAD MAY 9, 2006, the ANGELA WILLIAMS GRANTOR RETAINED ANNUITY TRUST UAD NOVEMBER 1, 2007, the ANGELA WILLIAMS GRANTOR RETAINED ANNUITY TRUST UAD MAY 1, 2008, the ANGELA WILLIAMS GRANTOR RETAINED ANNUITY TRUST UAD JULY 1, 2008, and the ANGELA WILLIAMS GRANTOR RETAINED ANNUITY TRUST UAD NOVEMBER 21, 2008, Plaintiffs,	09 MD 2070 (SHS) This document relates to: 10 Civ. 9646 (SHS)
-against-	
CITIGROUP INC., CHARLES PRINCE, VIKRAM PANDIT, ROBERT RUBIN, ROBERT DRUSKIN, THOMAS G. MAHERAS, MICHAEL STUART KLEIN, DAVID C. BUSHNELL and GARY CRITTENDEN, Defendants.	OPINION & ORDER

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SIDNEY H. STEIN, U.S. District Judge.

Plaintiffs raise common law claims of negligent misrepresentation and fraud that take the form of what are referred to as "holder" claims: i.e., they allege that they would have sold their Citigroup stock but instead held it to their detriment in reliance on defendants' misleading statements. Specifically, plaintiffs allege that they planned to sell 16.6 million shares of Citigroup stock in May 2007. However, believing defendants' misrepresentations that minimized Citigroup's exposure to its risk from holding residential mortgage-backed securities, they instead held the stock

until March 2009 as its price fell by 95%. Defendants have moved to dismiss the action pursuant to Federal Rule of Civil Procedure 12(b)(6).[1]

Defendants principally assert that plaintiffs cannot state a valid claim based on an injury that derives from a contemplated sale in hypothetical market conditions. The motion presents a choice between New York law—which largely prohibits fraud claims by holders of publicly traded securities alleging such an injury—and Florida law—which likely permits those claims. Defendants contend, first, that New York law applies to plaintiffs' claims and, second, that New York law bars recovery here because the alleged damages are speculative and not proximately caused by the misrepresentations. *See Starr Found. v. Am. Int'l Grp., Inc.*, 76 A.D.3d 25 (1st Dep't 2010). Plaintiffs respond that Florida law applies and permits their claims, and, alternatively, that their claims are actionable pursuant to New York law because they have pled the contemplated sale with sufficient specificity.

Because New York state has the greater interest in applying its law to govern suits regarding misrepresentations made in New York about stock in a New York-based corporation that is traded on a New York exchange, New York law applies to these claims. Applying New York law, the Court finds that plaintiffs have failed to allege cognizable damages proximately caused by the alleged misrepresentations, and thus dismisses the action.

I. BACKGROUND

According to the Amended Complaint (the "Complaint")),[2] the Citigroup shares at issue trace to non-party Arthur Williams and the 1998

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1 The alleged misstatements largely match those that the Court previously found were a valid basis for federal statutory securities fraud claims in two related class actions. *See In re Citigroup Inc. Bond Litig.*, No. 08 Civ. 9522 (SHS), 2013 WL 4427195 (S.D.N.Y. Aug. 20, 2013); *In re Citigroup Inc. Sec. Litig.*, Nos. 09 MD 2070 (SHS), 07 Civ. 9901 (SHS), 2013 WL 3942951 (S.D.N.Y. Aug. 1, 2013); *In re Citigroup Inc. Sec. Litig.*, 753 F. Supp. 2d 206 (S.D.N.Y. 2010); *In re Citigroup Inc. Bond Litig.*, 723 F. Supp. 2d 568 (S.D.N.Y. 2010).

2 In evaluating a motion to dismiss pursuant to Rule 12(b)(6), the Court accepts the truth of the facts alleged in the complaint and draws all reasonable inferences in the

(*footnote continued on next page*)

merger between Citicorp and Travelers Group that formed Citigroup. (Compl. ¶¶ 1-3.) Williams "acquired 17.6 million shares of Citigroup common stock valued at approximately $35 per share" as a result of that merger. (*Id.* ¶ 3.) By 2007, Williams and his wife Angela had transferred these shares to the plaintiff entities—a partnership, a corporation and a series of trusts (*id.*)—all of which the couple controlled (*id.* ¶¶ 1, 14-16, 169).

In May 2007, Williams developed a plan "to sell out his entire Citigroup position." (*Id.* ¶ 5.) In forming this plan, Williams and his financial advisors thoroughly "combed through Citigroup's filings and statements" (*id.* ¶ 170), examining information that included "conference calls, investor slideshows, earnings releases, public filings and statements from senior officers" (*id.* ¶ 169). Williams investigated "whether [Citigroup] had meaningful exposure to the subprime mortgage assets that were beginning to drag down other major players in the financial services sector." (*Id.* ¶ 170.) Although Citigroup had substantial exposure to risky subprime assets throughout 2007, it failed to disclose that exposure until November 2007. (*See, e.g., id.* ¶¶ 64-74, 103-09.) Although Williams thus believed that Citigroup's balance sheet was healthy, he nonetheless sold 1 million shares on May 17, 2007 at $55 per share. (*Id.* ¶ 170.) However, "[t]rusting that [Citigroup]'s public pronouncements were forthright and that it had no exposure to those 'toxic' assets, Williams reversed course [on his plan to fully liquidate] and decided to hold the remainder of his shares." (*Id.* ¶ 170.)

Williams "continually" reconsidered selling the remaining 16.6 million shares "[o]ver the next seventeen months," only to be deceived into holding them each time. (*Id.* ¶ 177.) He reconsidered the sale in July 2007, for example, but decided against it after listening to an earnings call and reviewing "earnings releases and materials downloaded from [Citigroup]'s website." (*Id.* ¶ 209.) Similarly, in January 2008, Williams decided not to sell in reliance on an earnings call in which executives explained further write-downs, but assured investors that "they had a

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plaintiffs' favor. *Wilson v. Merrill Lynch & Co., Inc.*, 671 F.3d 120, 128 (2d Cir. 2011); *Int'l Fund Mgmt. S.A. v. Citigroup Inc.*, 822 F. Supp. 2d 368, 376 (S.D.N.Y. 2011).

complete understanding of their exposure, and that it was contained and under control." (*Id.* ¶ 223.) The price of Citigroup stock steadily fell as market conditions worsened and news of its exposure to toxic assets, with associated accounting and liquidity issues, trickled out. (*See, e.g., id.* ¶ 235 (discussing the effect of "enormous turmoil and uncertainty in the markets".) "It was not until the end of 2008 that Citigroup's full exposure during the subprime crisis, and the consequences [of] its exposure, were revealed." (*Id.* ¶ 115.) Williams finally sold the 16.6 million shares at issue for $3.09 per share on March 18, 2009. (*Id.* ¶ 250.)

Although plaintiffs cite multiple instances of detrimental reliance on defendants' misstatements after May 2007, they allege that their losses stem in full from their having *not* sold 16.6 million shares at some time after the executed sale of 1 million shares on May 17, 2007. But plaintiffs claim as damages the price they would have received for all 16.6 million shares on May 17, 2007—the estimated "fraud-free price" of $51.59—less the $3.09 per share they actually received in 2009. (*Id.* ¶ 171-72.) Alternatively, they claim out-of-pocket damages based on the $35 value of Citigroup shares at the time of the Travelers merger, not on the estimated May 2007 price. (*Id.* ¶ 173.)

II. DISCUSSION

The Court first analyzes whether plaintiffs' claims are actually shareholder derivative claims that they lack shareholder standing to assert on behalf of the corporation. The Court finds the claims are direct and determines that New York law applies to both claims. Finally, the Court finds that New York law requires dismissal of the claims as a matter of law.

A. The Claims are Direct, not Derivative.

The Court rejects defendants' contention that these claims are in reality derivative claims brought on behalf of Citigroup.[3] The parties agree

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[3] If plaintiffs lack shareholder standing to assert the claims because they are derivative, then the Court is arguably without jurisdiction to hear the case. The U.S. Supreme Court views the shareholder standing rule—which "generally prohibits

(*footnote continued on next page*)

that Delaware law determines whether claims against Citigroup are direct or derivative because Citigroup is incorporated in Delaware. *See Seidl v. Am. Century Cos.*, 713 F. Supp. 2d 249, 255 (S.D.N.Y. 2010), *aff'd*, 427 F. App'x 35 (2d Cir. 2011). Two questions comprise the applicable test in Delaware courts: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004).

Conveniently ignoring the second question entirely, defendants contend that because all shareholders suffered when the price of Citigroup stock fell subsequent to the contemplated May 2007 sale, any claim seeking redress for that loss in value is necessarily derivative. This reasoning invokes the bright-line test that *Tooley* "expressly disapprove[d]," *id.* at 1039: that "a suit must be maintained derivatively if the injury falls equally upon all stockholders," *id.* at 1037 (abrogating *Bokat v. Getty Oil Co.*, 262 A.2d 246 (Del. 1970)). That bright line and defendants' argument mistake a necessary condition for a sufficient one. "[A] direct, individual claim of stockholders that does not depend on harm to the corporation can also fall on all stockholders equally, without the claim thereby becoming a derivative claim." *Id.* These are two such direct claims.

Defendants' contentions to the contrary ignore *Tooley*'s instruction that "a court should look to the nature of the wrong and to whom the relief should go." *Id.* at 1039. In sum, the relevant considerations for the *Tooley* test are the following: According to plaintiffs' allegations, "the duty breached was owed to" them and other investors directly, not to Citigroup

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shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action"—as relevant to "the prudential requirements of the standing doctrine." *Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990). The rule is "[r]elated" to the principle that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.* (citation omitted). Accordingly, the Court first addresses whether the prudential standing doctrine removes these claims from its jurisdiction.

and indirectly to shareholders. *See id.*[4] Plaintiffs have also alleged injuries resulting from their unique reliance that is "independent of any alleged injury to" Citigroup. *See id.* Even if Citigroup was also injured, plaintiffs' injuries are not dependant on Citigroup's injury merely because the same misconduct might have harmed Citigroup. *See, e.g., Grimes v. Donald*, 673 A.2d 1207, 1212 (Del. 1996) ("Courts have long recognized that the same set of facts can give rise both to a direct claim and a derivative claim."), *cited with approval by Tooley*, 845 A.2d at 1038. Indeed, plaintiffs "can prevail without showing an injury to" Citigroup because the nature of the allegation is that the misstatements and omissions concealed damage to Citigroup's assets that had already been done. *See Tooley*, 845 A.2d at 1039; *cf. Draper Fisher Jurvetson Mgmt. Co. v. I–Enter. Co.*, No. C 03-1561 MMC, 2004 WL 2944055, at *7 (N.D. Cal. Dec. 15, 2004) (finding breach of duty to report "would injure only the partners, and not the partnership itself, as the financial condition of the partnership exists regardless of whether it is reported to the limited partners"). Finally, defendants do not even contest that any remedy will go directly to plaintiffs, not to Citigroup. To put it simply, plaintiffs, not Citigroup, are the victims of Citigroup and the officer defendants' alleged deception, and therefore plaintiffs are the ones with standing to sue.

The Court recognizes a tension in Delaware law between two lines of cases applying the *Tooley* test to holder claims—one line finds that misrepresentations and omissions generally give rise to direct claims and the other line finds that injuries that result from the diminution of stock value are generally derivative. *Compare Albert v. Alex. Brown Mgmt. Servs., Inc.*, No. Civ.A.762-N, 2005 WL 2130607, at *12 (Del. Ch. Aug. 26, 2005) ("Generally, non-disclosure claims are direct claims."), *with Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008) ("Where all of a corporation's stockholders are harmed and would recover *pro rata* in proportion with

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[4] Defendants' reliance on *Stephenson v. PricewaterhouseCoopers, LLP*, a summary order, is misplaced. *See* 482 F. App'x 618, 621 (2d Cir. 2012). There, the defendant had audited a limited partnership in which the plaintiff had invested; the court found a holder claim derivative because the plaintiff had not alleged "that [the defendant] owed him a duty as a potential investor." *Id.* Plaintiffs here are not suing Citigroup's auditors.

their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature."); *see generally Poptech, L.P. v. Stewardship Inv. Advisors, LLC*, 849 F. Supp. 2d 249, 262-24 (D. Conn. 2012) (recognizing similar tension).

Following the latter line, the U.S. Court of Appeals for the Fifth Circuit has held that holder claims such as plaintiffs' claims are necessarily derivative because the alleged misstatements "only injured [the plaintiffs] indirectly as a result of their ownership of" stock. *See Smith v. Waste Mgmt., Inc.*, 407 F.3d 381, 384 (5th Cir. 2005). This Court respectfully disagrees. *Accord In re Harbinger Capital Partners Funds Investor Litig.*, No. 12 Civ. 1244 (AJN), 2013 WL 5441754, at *9-10 (S.D.N.Y. Sept. 30, 2013) (finding that plaintiffs' negligent misrepresentation and fraud claims based on defendant funds' alleged misrepresentations to investors were direct). The direct claims of the plaintiffs in *Tooley* itself concerned an injury suffered "as a result of their ownership of" stock. They had asserted that the corporate board's delay in closing a transaction harmed them insofar as their stock was worth less based on the time-value of the set amount of money they would be paid at closing. *See* 845 A.2d at 1034. Their injury was the impairment in the value of their stock, but they were injured because the board allegedly violated a contractual duty owed to those stockholders, *id.*, not "*solely* because they are stockholders," *cf. Feldman*, 951 A.2d at 733 (emphasis added).[5]

In both Delaware cases on which defendants rely, the derivative claims were premised on an insider's breach of a duty owed to the

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[5] Defendants contend that *Tooley* presents the only circumstance that justifies that court's rejection of the bright-line rule on which defendants rely. They argue that *Tooley* was unique because claims for the lost time-value of an asset do not allege depreciation of that asset. (Reply Mem. at 14 n.32.) In other words, they contend that the *Tooley* plaintiffs' injury, and thus claim, was unique because their alleged loss did not take the form of a drop in stock price. But that distinction elevates form over substance. There, as here, the plaintiffs alleged damage tied to lost value of their shares resulting from defendants' breach of a duty owed to plaintiffs, not to the corporation. That the lost value took the form of the loss of the ability to use the value of the stock during a certain period of time rather than a price with a falling numeric value is a distinction without an economic difference for these purposes.

corporation. In *Feldman*, the allegations concerned board members' breaches of their fiduciary duties that diluted the plaintiff's ownership stake. *See id.* at 732. In *Manzo v. Rite Aid Corp.*, meanwhile, the Court of the Chancery dismissed the *fraud* claims because plaintiff had not pled reliance or cognizable damages, not because they were derivative. *See* No. Civ.A.18451-NC, 2002 WL 31926606, at *4-5 (Del. Ch. Dec. 19, 2002), *aff'd*, 825 A.2d 239 (Del. 2003). By contrast, the *Manzo* court dismissed a breach of fiduciary duty claim as derivative only after noting the possibility "that intentional misrepresentations to 'holders' of stock . . . could give rise to either a direct or a derivative claim." *Id.* at *5 (citing *Malone v. Brincat*, 722 A.2d 5, 16-17 (Del. 1998)). Unlike the fiduciary duties at issue there, the duty here is owed to members of the investing public.

B. New York Substantive Law Governs the Fraud and Negligent Misrepresentation Claims.

"[F]ederal courts must follow conflict of laws rules prevailing in the states in which they sit." *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 494 (1941). Pursuant to New York law, "[t]he first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved." *In re Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d 219, 223 (1993). In the absence of a conflict, courts apply the forum state's law. But if the states' laws governing tort claims conflict,

> New York applies the law of the state with the most significant interest in the litigation. In weighing interests, New York distinguishes between "conduct regulating" and "loss allocating" rules. If conduct regulating rules are in conflict, New York law usually applies the law of the place of the tort ("*lex loci delicti*"). However, if loss allocating rules conflict, the choice of law analysis is governed by the so-called *Neumeier* rules.

Lee v. Bankers Trust Co., 166 F.3d 540, 545 (2d Cir. 1999) (citations omitted). Here, the states' laws conflict on conduct-regulating rules for both claims, and New York's greater interest in regulating the conduct at issue entails the application of its law.

1. *New York and Florida Law Conflict.*

a. *Negligent Misrepresentation*

The parties agree that the elements of negligent misrepresentation pursuant to New York and Florida law differ materially. New York requires a "special relationship" between the parties; Florida does not. *Compare Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 180 (2011) (first element of "claim for negligent misrepresentation requires the plaintiff to demonstrate [] the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff"), *with Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334, 337 (Fla. 1997) (adopting Restatement (Second) of Torts § 552 (1977), with no such requirement). Thus, the Court must undertake an interest analysis to determine which state, New York or Florida, has the greater interest in the litigation. The answer to that inquiry will in turn determine whether plaintiffs must plead the existence of a "special relationship."

b. *Common Law Fraud*

The parties agree that the basic elements of common law fraud in New York and Florida are substantially equivalent.[6] They further agree that the states differ in their treatment of holder claims, but disagree about the nature and significance of that difference. Neither state's law regarding holder claims has been conclusively determined by the state's highest court. Thus, the Court "must carefully predict how the state's highest court would resolve" these issues. *Runner v. N.Y. Stock Exch., Inc.*, 568 F.3d 383, 386 (2d Cir. 2009) (quoting *The Travelers Ins. Co. v. Carpenter*, 411 F.3d 323, 329 (2d Cir. 2005)).

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[6] New York's elements include the following: "(1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of such reliance." *Wall v. CSX Transp., Inc.*, 471 F.3d 410, 415-16 (2d Cir. 2006) (quoting *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 18 (2d Cir. 1996)). Florida has substantially the same elements with slightly different wording and numbering. *See Lance v. Wade*, 457 So. 2d 1008, 1011 (Fla. 1984).

i. Florida Holder-Claim Law

There are few clues in Florida law to its treatment of holder claims, but the weight of authority supports the conclusion that Florida would permit holder claims with heightened pleading standards. There is one case in which a Florida intermediate appellate court reversed the grant of summary judgment to a defendant that had allegedly dissuaded a plaintiff from selling stock. *See Ward v. Atl. Sec. Bank*, 777 So. 2d 1144, 1146 (Fla. Dist. Ct. App. 2001). Indeed, the plaintiff in *Ward* had actually placed an order to sell her stock but was persuaded to abandon it in a telephone call that a representative of the bank initiated to the stockholder. *Id.* at 1145. She had "properly alleged common law fraud" despite that she had not purchased or sold shares in reliance on the misstatements—a fact that apparently garnered no attention. *Id.* at 1146.

Federal courts have predicted that Florida would permit holder claims, subject to heightened pleading requirements for the reliance element. *See, e.g.*, *Hunt v. Enzo Biochem, Inc.*, 471 F. Supp. 2d 390, 411 (S.D.N.Y. 2006). More specifically, those courts have generally followed the lead of *Rogers v. Cisco Systems, Inc.*, 268 F. Supp. 2d 1305 (N.D. Fla. 2003). There, a federal district court in Florida predicted that Florida courts would follow the Second Restatement of Torts and recognize holder claims, *id.* at 1313, and that Florida would adopt California's heightened pleading standards for reliance, *id.* at 1314 (citing *Small v. Fritz Cos., Inc.*, 65 P.3d 1255 (Cal. 2003)). California law requires that plaintiffs allege specific reliance as follows:

> that if the plaintiff had read a truthful account of the corporation's financial status, the plaintiff would have sold the stock, how many shares the plaintiff would have sold, and when the sale would have taken place. The plaintiff must allege actions, as distinguished from unspoken and unrecorded thoughts and decisions, that would indicate that the plaintiff actually relied upon the misrepresentations.

Small, 65 P.3d at 1265. Aside from the heightened pleading requirements, neither *Small* nor *Rogers* imposed any other limits on the viability of holder claims. This Court, like the *Rogers* court, predicts that Florida would adopt California's approach to recognizing holder claims as explained in *Small*.

ii. New York Holder-Claim Law

New York courts have not explicitly defined distinct pleading requirements applicable to holder claims, but the Appellate Division, First Department, has significantly narrowed the scope of cognizable damages for holder claims in *Starr Foundation v. American International Group, Inc.*, 76 A.D.3d 25, 28 (1st Dep't 2010). *Accord Mantana v. Merkin*, No. 13 Civ. 1534 (PAE), 2013 WL 3940825, at *11 (S.D.N.Y. July 30, 2013) ("The Appellate Division, First Department, has recently held that New York law does not recognize a holder claim seeking to recover lost profits."). As with plaintiffs here, the plaintiff in *Starr* sought to recover the price it would have received if it had sold shares of AIG during a specified time frame had AIG not misrepresented and concealed certain facts. *Id.* at 27. The Appellate Division rejected this claim for three distinct but related reasons. First and foremost, the most basic terms of New York's out-of-pocket damages rule limit a fraud plaintiff to recovering its actual losses, not "profits which would have been realized in the absence of fraud." *Id.*

Second, the court characterized "the value [the plaintiff] might have realized from selling its shares during a period when it chose to hold, under hypothetical market conditions" in which the concealed facts were widely known, as the "undeterminable and speculative" proceeds of "an alternative contractual bargain." *Id.* at 28 (quoting *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 422 (1996)).

Third, the court characterized the claimed damages—the decline in the stock price after revelation of the truth in worse market conditions—as a mere "paper 'loss'" that the alleged misrepresentations did not proximately cause. *Id.* at 29. The decline "was caused by the underlying business decision of AIG's management to build up the [toxic assets] on which the losses reported in early 2008 were sustained, not by the earlier alleged misrepresentations forming the basis of the [plaintiff's] complaint." *Id.* at 29. "In holding its stock, the [plaintiff] did not lose or give up any value; rather, it remained in possession of the true value of the stock, whatever that value may have been at any given time." *Id.* at 28. The majority also explicitly rejected the dissent's attempt to parse the price drop into distinct categories, with part of the drop having a closer causal connection to the misstatements. Whether the reduced price reflected the

market's concerns about the revealed truth, about the fact that management concealed information from the public, or about changed market conditions unrelated to the misstatements, the causal chain could not be credited as a matter of law. *Id.* at 30-31.

As noted above, the decision in *Starr* was rendered by an intermediate appellate court. A federal court will only decline to follow such an intermediate appellate court decision if it "find[s] persuasive evidence that the New York Court of Appeals, which has not ruled on this issue, would reach a different conclusion." *10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co.*, 634 F.3d 112, 120 (2d Cir. 2011) (quoting *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 344 F.3d 211, 221 (2d Cir. 2003)). The degree to which this Court is bound to follow *Starr* depends on whether New York's intermediate appellate courts are in conflict as to the viability of holder claims regarding publicly traded corporations, and if not, whether "persuasive evidence" suggests that the Court of Appeals would reject *Starr*.

On the first question, plaintiffs point to another First Department decision: *Continental Insurance Co. v. Mercadante*, 222 A.D. 181 (1st Dep't 1927). But *Starr* succinctly distinguished *Mercadante* and even cast doubt on that 83-year-old decision's "continuing vitality." *See* 76 A.D.3d at 33.

On the second question, plaintiffs point to the decisions of courts in other states that permit certain holder claims as evidence that the New York Court of Appeals would reject *Starr*. But the fact that some courts in other states may not follow *Starr* is no reason to disregard a recent First Department decision quite squarely addressing the viability of claims by holders of publicly traded securities.[7]

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[7] It is true that the New York Court of Appeals has recognized that common law fraud claims extend to plaintiffs who were fraudulently induced to refrain from acting. *See, e.g., Hadden v. Consol. Edison Co.*, 45 N.Y.2d 466, 470 (1978) (in the context of an employment dispute); *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*, 4 N.Y.2d 403, 406 (1958) (sustaining fraud allegation that "plaintiff refrained from securing commitments for future supplies from others" in reliance on defendant's misrepresentation that it had available and uncommitted supplies). *Starr*, however, addressed the specific issue of the viability of claims by holders of publicly traded

(*footnote continued on next page*)

In sum, New York's appellate courts are the best predictors of how the New York Court of Appeals would decide such a contentious issue. Accordingly, the Court adopts *Starr* as the law governing holder claims in New York. New York law thus diverges from Florida law on whether a holder's losses on a publicly traded security are legally cognizable.

2. ***New York has a Greater Interest in the Litigation than Florida.***

Having found that the law of New York conflicts with that of Florida, the Court must now determine "which of two competing jurisdictions has the greater interest in having its law applied in the litigation. The greater interest is determined by an evaluation of the facts or contacts which relate to the purpose of the particular law in conflict." *Padula v. Lilarn Props. Corp.*, 84 N.Y.2d 519, 521 (1994) (citations, quotation marks, and alterations omitted). "[T]he significant contacts are, almost exclusively, the parties' domiciles and the locus of the tort." *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 197 (1985). The type of law in conflict determines which contacts are most important; the place of the tort is most important for conduct-regulating rules, and the parties' domiciles take priority for loss-allocating rules. *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 72 (1993).

Plaintiffs contend that the only relevant difference is a loss-allocating rule governing the calculation of damages. Defendants contend that *Starr* sets forth conduct-regulating rules because it concerns not the calculation of damages but whether a holder's losses are legally cognizable at all. The parties also dispute the significance of New York's and Florida's contacts with this case; plaintiffs emphasize that the place of the loss determines the location of a tort, and defendants emphasize that the conduct to be regulated occurred in New York.

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securities and does not conflict with those decisions. Plaintiffs' reliance on *AUSA Life Insurance Co. v. Ernst & Young*, 206 F.3d 202 (2d Cir. 2000), is misplaced for the same reason. More importantly, *AUSA Life*'s prediction of New York proximate causation law relied heavily on *Mercadante* and lacked the benefit of *Starr* having been decided. *See id.* at 212-13, 220.

i. Conduct-Regulating or Loss-Allocating Rules

As in *Padula*, the Court finds that the rules at issue here are "are primarily conduct-regulating rules." 84 N.Y.2d at 523. Such rules "govern[] conduct to prevent injuries from occurring." *Id.* at 522. They aim to deter certain actions or shield other actions from deterrence. "Loss allocating rules, on the other hand, are those which prohibit, assign, or limit liability after the tort occurs . . . ." *Id.* The primary purpose of the rule articulated in *Starr* is to encourage the optimal functioning of the securities markets. Rather than accepting that a tort had been properly alleged and constraining or shifting liability as a policy matter, the *Starr* court found that plaintiffs could not prove fraud in the first place. Thus, the rules established in *Starr* are different in kind from the "charitable immunity statutes, guest statutes, wrongful death statutes, vicarious liability statutes, and contribution rules" that exemplify loss-allocating rules. *See Padula*, 84 N.Y.2d at 522 (citations omitted). Further, neither side disputes that the elements of negligent misrepresentation constitute conduct-regulating rules. *See Mark Andrew of the Palm Beaches, Ltd. v. GMAC Commercial Mortg. Corp.*, 265 F. Supp. 2d 366, 378 (S.D.N.Y. 2003) (both fraud and negligent misrepresentation rules are conduct regulating), *aff'd*, 96 F. App'x 750 (2d Cir. 2004).Thus, the Court must determine which state has the greater interest in applying its conduct-regulating rules to the allegations here, focusing primarily on the location of the conduct to be regulated.

ii. Interest in Regulating the Conduct at Issue

The default rule for conduct-regulating tort rules is *lex loci delicti*—to apply the law of the place of the tort. The logic of the rule is straightforward: generally, "that jurisdiction has the greatest interest in regulating behavior within its borders." *Padula*, 84 N.Y.2d at 522 (citation omitted). New York courts have determined that when the "conduct occurs in one jurisdiction and the plaintiff's injuries are suffered in another, the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred." *Schultz*, 65 N.Y.2d at 195. Thus, as plaintiffs contend, the law of the jurisdiction in which a plaintiff suffers loss from fraud would usually apply. *See, e.g.*, *Sack v. V.T. Low*, 478 F.2d 360, 365 (2d Cir. 1973).

"However, where the loss was suffered is not conclusive and does not trump a full interest analysis." *Thomas H. Lee Equity Fund V, L.P. v. Mayer Brown, Rowe & Maw LLP*, 612 F. Supp. 2d 267, 284 (S.D.N.Y. 2009). "Interest analysis is a 'flexible approach intended to give controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.'" *Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 337 (2d Cir. 2005) (quoting *Cooney*, 81 N.Y.2d at 72). As a result, courts do not mechanically combine *lex loci delicti* and the "last event necessary" test when the "last event" at issue is not the conduct that the rule regulates.

Courts considering claims of fraud and negligent misrepresentation have instead focused on the place where the fraud was centered and where misrepresentations were made. *See In re Refco Inc. Sec. Litig.*, 892 F. Supp. 2d 534, 538 (S.D.N.Y. 2012) (focusing on "conduct carried out in New York" that gave rise to claims, not on location of "far-flung" investors' losses or domicile of primary fraudulent actor); *Amusement Indus., Inc. v. Stern*, 693 F. Supp. 2d 327, 341 (S.D.N.Y. 2010) (focusing on "overwhelming center of the events giving rise to the case," not place of loss); *Thomas H. Lee*, 612 F. Supp. 2d at 284 (choosing jurisdiction where "bulk of events surrounding the alleged negligent misrepresentation and the underlying fraud" occurred); *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 492 (S.D.N.Y. 2001) (where "injury has occurred in locations with only limited connection to the conduct at issue," governing law is that of "jurisdiction where the fraud originated and where substantial activities in furtherance of the fraud were committed").

Moreover, in *Sack* and the other cases on which plaintiffs rely, courts rigidly followed the location of the loss to determine the statute of limitations pursuant to New York's borrowing statute, not to determine governing law pursuant to a comprehensive interest analysis. *See Sack*, 478 F.2d at 365. The borrowing statute explicitly adopts the law of the state "where the cause of action *accrued*," which is the place of the last event. *See* N.Y. C.P.L.R. § 202 (emphasis added); *Sack*, 478 F.2d at 365.

In New York's flexible interest analysis, by contrast, courts look to all the "facts or contacts . . . which relate to the purpose of the particular law

in conflict." *Schultz*, 65 N.Y.2d at 197 (citation omitted). Here, common law fraud rules seek to deter the intentional deception of stockholders. New York, where Citigroup is based and where the individual defendants worked, is the site of defendants' allegedly deceptive acts. New York usually applies *lex loci delicti* because of "the locus jurisdiction's interests in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future." *Schultz*, 65 N.Y.2d at 198. Here, those goals are best served by applying the law of the site of the misrepresentations than by applying the law of the site of the loss. *See Amusement Indus.*, 693 F. Supp. 2d at 341. All parties could reasonably expect New York law to govern the conduct within its borders that forms the basis of both claims. And New York has the greater interest in regulating its vast securities industry to ensure that application of the law leads to the appropriate admonitory effects on industry participants. *See In re Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d at 226 (collecting cases).

If statements that defendants disseminated to the investing public were subject to the fraud laws of any jurisdiction in which a Citigroup investor lived at the time the statements were made, defendants would be subject to liability pursuant to the laws of all fifty states and an unknown number of foreign nations. That approach would paralyze actors in the securities markets, not regulate their conduct. Even here—despite plaintiffs' attempts to disregard the trust and corporate forms that non-party Arthur Williams chose for his investments by treating Williams himself as the sole plaintiff—at least one of the actual plaintiffs is a Nevada resident, not a Florida resident. (*See* Compl. ¶ 28 ("Plaintiff MFS Inc. [] is a corporation incorporated under the laws of Nevada, with a principal place of business in Nevada.").) Because most defendants are New York residents (*see* Compl. ¶¶ 17-25) and most plaintiffs are Florida residents (*see* Compl. ¶¶ 14-16), the parties' domiciles do not favor either jurisdiction.

Furthermore, plaintiffs allege they were injured only when they sold the stock at a loss. If so, holders of a stock that has fallen in value could establish residence in a state with holder-friendly laws before selling. That change in residence, according to plaintiffs' view, would ensure that the stockholder's chosen state's law applied to his fraud claims in state and

federal courts in New York, regardless of which state (or foreign nation) he had chosen as his new residence. Fortunately, the flexibility of New York's interest analysis prevents the forum shopping that plaintiffs' rigidly formalist reasoning would permit.

Wherever the loss was felt, New York is the jurisdiction with the greatest interest in litigation over claims regarding conduct based in New York. Accordingly, New York law governs these claims.

C. New York Law Requires Dismissal of the Action.

1. *Plaintiffs' Negligent Misrepresentation Claim Fails because They Have Not Alleged a "Special Relationship."*

New York law requires "the existence of a special or privity-like relationship" between the plaintiff and defendant for a successful negligent misrepresentation claim. *See Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 180 (2011). "[T]he bond between them [must be] so close as to be the functional equivalent of contractual privity." *Ossining Union Free Sch. Dist. v. Anderson LaRocca Anderson*, 73 N.Y.2d 417, 419 (1989). It "requires a closer degree of trust between the parties than that of the ordinary buyer and seller." *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 788 (2d Cir. 2003).

Here, because Citigroup is an issuer of shares to public investors, defendants are not in a special privity-like relationship with the investing public, or with actual purchasers (Compl. ¶ 256). *See Int'l Fund Mgmt. S.A.*, 822 F. Supp 2d at 388; *Prime Mover Capital Partners, L.P. v. Elixir Gaming Techs., Inc.*, 793 F. Supp. 2d 651, 674 (S.D.N.Y. 2011); *cf. Barron Partners, LP v. LAB123, Inc.*, 593 F. Supp. 2d 667, 674-75 (S.D.N.Y. 2009) (finding no special relationship pursuant to New York law because plaintiff and defendant "were merely a buyer and seller of corporate stock"). Moreover, plaintiffs do not even dispute defendants' contention that the Complaint does not meet New York's requirement—relying instead on the argument that Florida law governs. Accordingly, plaintiffs' negligent misrepresentation claim is dismissed.

2. ***Plaintiffs' Common Law Fraud Claim Fails because They Have Not Alleged Cognizable Damages Proximately Caused by the Fraud.***

New York law, as applied to plaintiffs' allegations, also requires dismissal of the fraud claims. As in *Starr*, the premise of plaintiffs' injuries is the "undeterminable and speculative" proceeds of an alternative bargain reached in "hypothetical market conditions." *See Starr*, 76 A.D.3d at 28. Likewise, New York law mandates that this Court find that the misstatements alleged here are not, as a matter of law, the proximate causes of the "paper 'loss'" that plaintiffs realized when they eventually sold their Citigroup stock in March 2009. *See id.* at 29.

Plaintiffs contend that the Court should distinguish *Starr* for three reasons. First, the *Starr* plaintiff had never sold its AIG shares; plaintiffs, by contrast, sold the Citigroup shares at issue here for $3.09. (Compl. ¶¶ 9, 172-73.) Second, the *Starr* plaintiff also did not realize a trading loss because AIG stock was still trading at a higher price than his acquisition price; here, Arthur Williams acquired these shares for roughly $32 more per share than the price at which plaintiffs sold them. (*Id.* ¶¶ 3, 173.) And third, the *Starr* plaintiff had not alleged precisely the time and terms of the sale it would have made absent the misstatements; plaintiffs, however, have alleged that in "May 2007" they would have sold "16.6 million shares" (*Id.* ¶¶ 48) at the "fraud-free price" of "$51.59" (*Id.* ¶ 171)—their estimate of what the price would have been on May 17, 2007 if defendants had not misled investors. Thus, plaintiffs have indeed pled facts different from those in *Starr*, but these distinctions do not yield a different outcome.

As to the first and second points, even assuming that Williams's 1998 acquisition price is imputed to plaintiffs,[8] *Starr* characterized such losses as

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[8] The Court need not address defendants' contention that plaintiffs have not pled any price at which they, as opposed to Arthur Williams, acquired the shares at issue. That contention, which relies on facts outside the complaint, takes two forms: First, the price *Williams* effectively paid to acquire Citigroup stock as part of the 1998 Citicorp-Travelers Group merger is immaterial because *plaintiffs* did not acquire Citigroup stock then. Second, in any event, Williams himself never actually paid $35 for his shares because the nature of the reverse-triangular merger between Citicorp

(*footnote continued on next page*)

mere "paper 'loss[es]'" that are not actually losses for purposes of New York common law fraud injuries. 76 A.D.3d at 29. While "holding [their] stock, [plaintiffs] did not lose . . . any value," even if the market price dropped. *Id.* at 28. In other words, plaintiffs' arguable paper loss might overcome the most literal element of New York's prohibition on the recovery of profits for a portion of the injuries alleged. *See Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 422 (1996). But that paper loss does not survive closer examination of the economic realities pursuant to *Starr*.[9]

As to the third point, plaintiffs misunderstand the *Starr* court's concerns about the speculation required to assess holder claims; *Starr* relied on obstacles to proving the specifics of a claim in court, not obstacles to alleging the specifics in a complaint. 76 A.D.3d at 29. In the passage on which plaintiffs rely, the court explains that holder claims are inherently speculative in part because "the *factfinder* must determine"—while

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and Travelers was such that Williams never exchanged his Travelers shares for Citigroup shares; Williams simply retained his share in Travelers, which was then renamed Citigroup. Whatever the force of these contentions, *Starr* compels the dismissal of plaintiffs' claims. The possibility that the technicalities of the 1998 Travelers-Citicorp merger might defeat a common law fraud claim regarding misstatements beginning in 2007 only confirms the Court's view that the New York Court of Appeals would agree with the *Starr* court that these purported out-of-pocket damages are not cognizable pursuant to New York law.

[9] The Court recognizes that *Starr* extends the reasoning of *Lama*. In *Lama*, the "undeterminable and speculative" contractual bargain at issue was an alternative to one that the plaintiff actually accepted in alleged reliance on a fraud. *Lama*, 88 N.Y.2d at 422. In *Starr*, there was no transaction to which the rejected speculative bargain was an alternative. Further, the damages sought in *Lama* constituted the taxes it had paid on the sale due to a new tax law but would not have paid under the alternative arrangement rather than the lost opportunity for a higher price; the court thus considered the new tax rule, not the misrepresentations, the cause of those alleged damages. *Lama*, 88 N.Y.2d at 422-23. But consistent with *Starr*'s reasoning, New York courts have applied *Starr* to bar holder claims even if the plaintiff alleged a paper loss that complies with *Lama*'s narrower pecuniary loss rule. *See Irvin v. Jones*, 966 N.Y.S.2d 346 (Sup. Ct. Suffolk Cnty. 2012) ("[T]o the extent that [a] cause of action may be read as asserting 'holder' claims, *i.e.*, that the plaintiffs[] were wrongfully induced by the defendants to hold rather than sell [certain] investments, such claims are not actionable under New York law.").

imagining a world without the misstatements—whether and when the plaintiff would have sold what number of shares at which price. *Id.* (emphasis added). That plaintiffs allege those details hardly reduces the speculation required for the factfinder to credit the allegations. Plaintiffs can hypothesize about what they would have done, but *Starr* prohibits the courts from doing so.[10]

Indeed, even accepting the allegations that *Starr* deems impermissibly speculative, the Complaint itself belies plaintiffs' assertion that no speculation is required here. Plaintiffs allege that "Williams decided to liquidate his entire 17.6 million share position" in mid-May 2007 and began with "the sale on May 17, 2007 of one million shares" for $55 per share. (*Id.* ¶ 170.) "*Thereafter,* he canceled the remainder of the planned sale in reliance on" the alleged misstatements. (*Id.* (emphasis added).) Plaintiffs do not allege how long "thereafter" Williams cancelled the remaining sales, nor when he had planned to execute the sales before the alleged misstatements caused him to "reverse course." (*Id.*) Plaintiffs also claim as damages the difference between the price they estimate would have prevailed on May 17, 2007 and the price they received in March 2009. (*Id.* ¶ 171-72.) And yet, by plaintiffs' own telling, they would have sold the 16.6 million shares at issue here at some point after May 17, 2007.

New York law bars claims that require a factfinder to cut through this many "layers of uncertainty" and speculation. *Starr*, 76 A.D.3d at 30. Therefore, the Court dismisses plaintiffs' common law fraud claims for failure to allege cognizable non-speculative damages that the misstatements proximately caused.

III. CONCLUSION

Having found that New York has a greater interest than Florida in regulating the conduct at issue here, the Court applies New York law.

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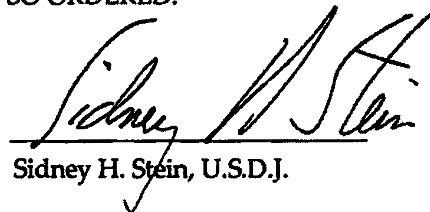
[10] Plaintiffs contend that they are not speculating about the price they would have received because they rely on an expert who used an event study to determine the effect of the misstatements on the market. But this response is inapposite because the proffered event study addresses at most only one of the several layers of speculation that the *Starr* court bemoaned. *See* 76 A.D.3d at 29-30.

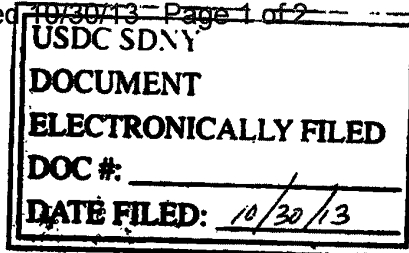
Concluding that the reasoning of the Appellate Division, First Department, in *Starr Foundation v. American International Group, Inc.*, 76 A.D.3d 25 (1st Dep't 2010), is the best predictor of how the New York Court of Appeals would decide the holder claims at issue here, the Court applies *Starr* to plaintiffs' claims. *Starr*, in turn, requires that the Court dismiss plaintiffs' fraud claims. Plaintiffs' negligent misrepresentation claims must also be dismissed because plaintiffs have not alleged that they had a special privity-like relationship with defendants. Accordingly, defendants' motion to dismiss the Amended Complaint is granted with prejudice.

Dated: New York, New York
October 30, 2013

SO ORDERED:



Sidney H. Stein, U.S.D.J.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AHW INVESTMENT PARTNERSHIP, MFS, INC., and ANGELA H. WILLIAMS as TRUSTEE of the ANGELA H. WILLIAMS GRANTOR, RETAINED ANNUITY TRUST UAD MARCH 24, 2006, the ANGELA WILLIAMS GRANTOR RETAINED ANNUITY TRUST UAD April 17, 2006, the ANGELA WILLIAMS GRANTOR RETAINED ANNUITY TRUST UAD MAY 9, 2006, the ANGELA WILLIAMS GRANTOR RETAINED ANNUITY TRUST UAD NOVEMBER 1, 2007,the ANGELA WILLIAMS GRANTOR RETAINED ANNUITY TRUST UAD MAY 1, 2008, the ANGELA WILLIAMS GRANTOR RETAINED ANNUITY TRUST UAD JULY 1, 2008, and the ANGELA WILLIAMS GRANTOR RETAINED ANNUITY TRUST UAD NOVEMBER 21, 2008,

Plaintiffs,

-against-

CITIGROUP INC., CHARLES PRINCE, VIKRAM PANDIT, ROBERT RUBIN, ROBERT DRUSKIN, THOMAS G. MAHERAS, MICHAEL STUART KLEIN, DAVID C. BUSHNELL and GARY CRITTENDEN,

Defendants.

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09 MD 2070 (SHS)
This document relates to:
10 CIVIL 9646 (SHS)

JUDGMENT

Defendants having moved to dismiss the action pursuant to Fed. R. Civ. P. 12(b)(6), and the matter having come before the Honorable Sidney H. Stein, United States District Judge, and the Court, on October 30, 2013, having rendered its Opinion and Order granting defendants' motion to dismiss the Amended Complaint with prejudice, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated October 30, 2013, defendants' motion to dismiss the Amended

Complaint is granted with prejudice.

Dated: New York, New York
October 30, 2013

RUBY J. KRAJICK

Clerk of Court

BY: ______________________

Deputy Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON ___________