11-5227-cv(L)

11-5375-cv(CON), 11-5242-cv(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellant-Cross-Appellee,

v.

CITIGROUP GLOBAL MARKETS INC.,

Defendant-Appellee-Cross-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

JURISDICTIONAL STATEMENT 5

STATEMENT OF ISSUES PRESENTED FOR REVIEW 7

STATEMENT OF THE CASE 7

STATEMENT OF FACTS 10

A. The SEC Files Securities Fraud Charges Against Citigroup and a Former Citigroup Employee. 10

B. The Parties Submit a Consent Judgment. 13

C. The District Court Conducts a Hearing to Evaluate Whether the Proposed Consent Judgment is Fair, Reasonable, Adequate, and in the Public Interest. 14

D. The District Court Properly Rules That, Absent An Evidentiary Basis, The Proposed Consent Judgment Does Not Warrant Approval. 18

E. The Parties Appeal to this Court. 20

F. This Court Stays the District Court Proceedings Pending Outcome of the Appeals. 21

G. A Trial Jury Rules That Stoker was Not Liable. 23

STANDARD OF REVIEW 23

SUMMARY OF ARGUMENT 24

ARGUMENT 27

I.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN, IN THE ABSENCE OF ANY EVIDENCE UPON WHICH IT COULD DETERMINE IF THE SETTLEMENT WAS FAIR, REASONABLE, ADEQUATE, OR IN THE PUBLIC INTEREST, IT DECLINED TO APPROVE A PROBLEMATIC CONSENT JUDGMENT EMPLOYING THE COURT'S INJUNCTIVE POWERS.....27

A. The District Court Did Not Require An Admission of Liability. 27

B. The District Court Did Not Abuse Its Discretion In Seeking An Evidentiary Basis to Exercise Independent Judgment. 31

C. The SEC's Request For Injunctive Relief Lacked The Requisite "Proper Showing." 38

D. The District Court Could Not Determine Whether The Proposed Consent Judgment Was Fair, Reasonable, Adequate, or in the Public Interest. 45

E. The District Court's Order Does Not Undermine the SEC's Ability to Enter Into Settlement Agreements. 53

F. The SEC's Position Threatens the Constitutional Independence of the Federal Judiciary.....54

II.

THIS COURT LACKS APPELLATE JURISDICTION TO REVIEW THE DISTRICT COURT'S INTERLOCUTORY ORDER, AND MANDAMUS IS ENTIRELY UNWARRANTED. 62

A. The District Court's Order Did Not "Refuse" An Injunction, And Appellants Cannot Demonstrate Irreparable Harm Justifying Interlocutory Review.....62

B. Citigroup Does Not Have Standing to Appeal. 68

C. Mandamus is Entirely Unwarranted. 70

CONCLUSION 76

TABLE OF AUTHORITIES

Page(s)

CASES

Aaron v. SEC,
446 U.S. 680 (1980)..39

Carson v. Am. Brands, Inc.,
450 U.S. 79 (1981)...63, 64, 66, 69

Carson v. Am. Brands, Inc.,
446 F. Supp. 780 (E.D. Va. 1977) 63

Cheney v. U.S. Dist. Ct.,
542 U.S. 367 (2004)..70

Citizens for a Better Env't v. Gorsuch,
718 F.2d 1117 (D.C. Cir. 1983)..47

City of Detroit v. Grinnell Corp.,
495 F.2d 448 (2d Cir. 1974) 36

City of New York v. Golden Feather Smoke Shop, Inc.,
597 F.3d 115 (2d Cir. 2010) 23

D'Amato v. Deutsche Bank,
236 F.3d 78 (2d Cir. 2001) 36

Digital Equip. Corp. v. Desktop Direct, Inc.,
511 U.S. 836 (1994)...6, 67

Dopp v. Franklin Nat'l Bank,
461 F.2d 873 (2d Cir. 1972) 38

Ebay Inc. v. MercExchange LLC,
547 U.S. 388 (2006)..39

FTC v. Bronson Partners, LLC,
654 F.3d 359 (2d Cir. 2011) 49

FTC v. Circa Direct, LLC,
No. 11-2172 RMB, 2012 U.S. Dist. LEXIS 81878 (D.N.J. Feb. 22, 2012).......37

FTC v. Onkyo,
No. 95-1378-LFO, 1995 U.S. Dist. LEXIS 21222 (D.D.C. Aug. 18, 1995)......46

FTC v. Standard Fin. Mgmt. Corp.,
830 F.2d 404 (1st Cir. 1987)..32, 56

Grant v. Local 638,
373 F.3d 104 (2d Cir. 2004) ....passim

Great Am. Audio Corp. v. Metacom, Inc.,
938 F.2d 16 (2d Cir. 1991) 7, 68, 69

H. K. Porter Co., Inc. v. Nat'l Friction Prods. Corp.,
568 F.2d 24 (7th Cir. 1977) 44

Hecht Co. v. Bowles,
321 U.S. 321 (1944)..39

Heckler v. Chaney,
470 U.S. 821 (1985)..57, 58

Hege v. Aegon USA, LLC,
780 F. Supp. 2d 416 (D.S.C. 2011) 61

In re City of New York,
607 F.3d 923 (2d Cir. 2010) 74, 75

In re IBM Corp.,
687 F.2d 591 (2d Cir. 1982) 74

In re Smith,
926 F.2d 1027 (11th Cir. 1991) 74

In re Touch Am. Holdings, Inc. ERISA Litig.,
563 F.3d 903 (9th Cir. 2009) 66, 73

In re Traffic Executive Association-Eastern Railroads,
627 F.2d 631 (2d Cir. 1980) 71, 73

Liberty Mut. Ins. Co. v. Wetzel,
424 U.S. 737 (1976)..69

Lynch v. City of New York,
589 F.3d 94 (2d Cir. 2009) 23, 24

Malchman v. Davis,
706 F.2d 426 (2d Cir. 1983) 36

Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights,
616 F.2d 1006 (7th Cir. 1980) 35

Miller v. French,
530 U.S. 327 (2000)..55

N. Pipeline Const. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982)..55

New York State Law Department v. FCC,
984 F.2d 1209 (D.C. Cir. 1993)..58

New York v. Dairylea Co-op., Inc.,
698 F.2d 567 (2d Cir. 1983) ....passim

Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC,
467 F.3d 73 (2d Cir. 2006) 50

Patterson v. Newspaper & Mail Deliverers' Union of New York and Vicinity,
514 F.2d 767 (2d Cir. 1975) 32

Sam Fox Publishing Co. v. United States,
366 U.S. 683 (1961)..60

Schlagenhauf v. Holder,
379 U.S. 104 (1964)...71, 74, 75

Schmidt v. Lessing,
414 U.S. 437 (1974)..44

SEC v. Bank of America Corp.,
No. 09 Civ. 6829 (JSR), 2010 WL 624581 (S.D.N.Y. Feb. 22, 2010) ....passim

SEC v. Bank of America Corp.,
No. 09 Civ. 6829 (JSR) (S.D.N.Y. Aug. 24, 2009) 51

SEC v. Bankosky,
No. 12 Civ. 1012 (HB) (S.D.N.Y. Mar. 15, 2012) 54, 72

SEC v. Bausch & Lomb Inc.,
565 F.2d 8 (2d Cir. 1977) 39

SEC v. Bear, Stearns & Co. Inc.,
626 F. Supp. 2d 402 (S.D.N.Y. 2009) 47, 48, 50, 51

SEC v. Citigroup,
No. 11 Civ. 7387 (JSR)...8, 67

SEC v. Citigroup Inc.,
No. 10. Civ. 1277 (ESH) (D.D.C. 2010) 16, 37, 43, 64

SEC v. Citigroup,
No. 11 Civ. 7387 (JSR) (S.D.N.Y. Nov. 5, 2011) 48

SEC v. Fischbach Corp.,
133 F.3d 170 (2d Cir. 1997) 47, 48, 51

SEC v. Globus Group, Inc.,
117 F. Supp. 2d 1345 (S.D. Fla. 2000) 41, 61

SEC v. Goble,
682 F.3d 934 (11th Cir. 2012) 43

SEC v. Goldman Sachs & Co.,
No. 10 Civ. 3229 (BSJ)...passim

SEC v. Harbert Mgmt. Corp.,
12 Civ. 5029 (PAC) (S.D.N.Y. July 3, 2012)..54, 72

SEC v. Koss Corp.,
No. 11-C-00991 (RTR) (E.D. Wisc. Dec. 20, 2011) 37, 72, 73

SEC v. Lane,
No. 07-cv-1920, 2009 U.S. Dist. LEXIS 75556 (M.D. Fla. July 10, 2009).42, 61

SEC v. Lane,
No. 07-cv-1920, 2009 U.S. Dist. LEXIS 75535, at *4-5 (M.D. Fla. Aug. 24 2009) 42, 43

SEC v. Magyar Telekom, PLC,
No. 11 Civ. 9646 (CMC) (S.D.N.Y. Jan. 3, 2012) 54, 72

SEC v. Manor Nursing Centers, Inc.,
458 F.2d 1082 (2d Cir. 1972) 39

SEC v. Mgmt. Dynamics, Inc.,
515 F.2d 801 (2d Cir. 1975) 38, 39, 40

SEC v. Nashwinter,
559 F. Supp. 33 (E.D. Va. 1983) 41

SEC v. Rajaratnam,
622 F.3d 159 (2d Cir. 2010) 74

SEC v. Randolph,
736 F.2d 525 (9th Cir. 1984) ....passim

SEC v. Sky Way Global, LLC,
710 F. Supp. 2d 1274 (D. Fla. 2010) 44

SEC v. Stoker,
No. 11 Civ. 7388 (JSR)....8, 10, 23, 53

SEC v. Unifund Sal,
910 F.2d 1028 (2d Cir. 1990) 40

SEC v. Vitesse Semiconductor Corp.,
771 F. Supp. 2d 204 (S.D.N.Y. 2011) 33

SEC v. Wang,
944 F.2d 80 (2d Cir. 1991) 23

SEC v. Washington Inv. Network,
475 F.3d 392 (D.C. Cir. 2007)....44

SEC v. Worldcom, Inc.,
273 F. Supp. 2d 431 (S.D.N.Y. 2003) 33

Stovall v. City of Cocoa, Fla.,
117 F.3d 1238 (11th Cir. 1997) 68

United States v. Akzo Coatings of Am., Inc.,
949 F.2d 1409 (6th Cir. 1991) 46

United States v. Armour & Co.,
402 U.S. 673 (1971)....................56

United States v. Atofina Chems., Inc.,
No. 01-7087, 2002 WL 1832825 (E.D. Pa. Aug. 5, 2002)....................46

United States v. Cannons Eng'g Corp.,
899 F.2d 79 (1st Cir. 1990)....................32

United States v. Charles George Trucking, Inc.,
34 F.3d 1081 (1st Cir. 1994)....................32

United States v. City of Miami, Fla.,
664 F.2d 435 (Former 5th Cir. 1981) 35

United States v. Colorado,
937 F.2d 505 (10th Cir. 1991) 68

United States v. Hialeah,
140 F.3d 968 (11th Cir. 1998) 67

United States v. Hooker Chem. & Plastics Corp.,
607 F. Supp. 1052 (W.D.N.Y. 1985)....................46

United States v. Int'l Bus. Machs. Corp.,
163 F.3d 737 (2d Cir. 1998) 37

United States v. Lexington-Fayette Urban Cnty. Gov't,
591 F.3d 484 (6th Cir. 2010) 37, 52

United States v. Microsoft Corp.,
56 F.3d 1448 (D.C. Cir. 1995)....................57, 58, 59, 60

United States v. N. Carolina,
180 F.3d 574 (4th Cir. 1999) 35

United States v. Oregon,
913 F.2d 576 (9th Cir. 1990) 46

United States v. Rohm & Haas Co.,
721 F. Supp. 666 (D.N.J. 1989)..46

United States v. Rojas,
53 F.3d 1212 (11th Cir. 1995) 55

United States v. Trucking Emp. Inc.,
561 F.2d 313 (D.C. Cir. 1977)..45

Winter v. NRDC, Inc.,
555 U.S. 7 (2008)...39

STATUTES

15 U.S.C. § 16(e)(1)...37

15 U.S.C. § 77t(b) 38, 61, 62

15 U.S.C. § 78u(d)(1)..41

28 U.S.C. § 1292(a)(1)..passim

Section 17(a)(2) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(2)...........passim

Section 17(a)(3) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(3)...........passim

RULES

Fed. R. Civ. P. 65(d) 43, 44

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http://www.huffingtonpost.com/dennis–m–kelleher/are–the–sec–and–
citigroup_b_1096270.html...48

Harvey L. Pitt, Chairman, Remarks Before the U.S. Department of Justice Corporate Fraud Conference (Sept. 26, 2002), www.sec.gov/news/speech/spch585.htm..51

http://www.huffingtonpost.com/2012/01/18/sec-mounts-defense-of-enforcement_n_1205318.html 44

John C. Coffee, Jr., *Is the SEC's Bark Worse Than Its Bite?*, NAT. L. J. (July 9, 2012). 50

Jonathan Weil, *Citigroup Finds Obeying the Law Too Darn Hard,* BLOOMBERG, Nov. 2, 2011, *available at* http://www.bloomberg.com/news/2011-11-02/citigroup-finds-obeying-the-law-is-too-darn-hard-jonathan-weil.html 16

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PRELIMINARY STATEMENT

This appeal raises important issues of judicial responsibility in the context of a case in which the parties failed to provide the district court with any factual record. The district court, asked to approve a problematic consent judgment that included a request for substantial injunctive relief enforced by the court's own contempt power, held that the proposed consent judgment could not meet the acknowledged standards of judicial review where the court had not been provided with any evidentiary basis upon which to exercise its independent judgment. (JA 236, 240, 245.)[1]

Contrary to appellants' claims, the district court did not impose some broad, bright-line rule that no consent judgment could be approved "unless **liability** has been conceded or proved" and "conclusively determined." (Citi Br. 1 (emphasis added).) Rather, the district court reiterated throughout its opinion that it was simply unable to fulfill its obligation in this particular case to independently determine whether the proposed consent judgment was fair, adequate, reasonable, and in the public interest, when it had not been provided with **any** "evidentiary basis," **any** "factual base," "**any** proven or acknowledged facts," or any other factual showing whatsoever on which to make the requisite determination. (JA

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[1] Citations in the form of "JA __" refer to pages in the Joint Appendix, citations in the form of "SPA __" refer to pages in the Special Appendix, and citations in the form of "SA __" refer to pages in the Supplemental Appendix. The parties' briefs are referred to, respectively, as "SEC Br." and "Citi Br."

236, 240, 245–46.) The ruling did not state that the "proof" or "facts" need be tantamount to proof of **liability**—a term which easily could have been employed had the court so intended. The court simply expressed an inability to apply the basic standard of review to the matter before it given the total absence of any evidence on which a ruling could be based.

The problem was compounded, as the district court noted, by the fact that the complaint filed by the United States Securities and Exchange Commission ("SEC") against Citigroup Global Markets Inc. ("Citigroup"),[2] a simultaneously filed parallel complaint against a Citigroup employee (Brian H. Stoker), and the proposed consent judgment presented an array of puzzling features that made it particularly difficult to assess the reasonableness, adequacy, and fairness of the proposed consent judgment in the absence of any evidence. For example, while the complaints against Citigroup and its employee effectively alleged intentional fraudulent conduct—conduct, indeed, almost identical to that which the SEC had alleged in its earlier, highly publicized case against Goldman Sachs for intentional misconduct[3]—the Citigroup complaint, without explanation, charged only negligence, and the parallel complaint against Stoker failed even to identify

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[2] Citigroup is the parent company of Citigroup Global Markets Inc. (Citi Br. 2 n.2.)

[3] *See SEC v. Goldman Sachs & Co.*, No. 10 Civ. 3229 (BSJ) (S.D.N.Y. Apr. 16, 2010), ECF No. 1.

whether it was charging negligence or intentional misconduct. Similarly, no explanation was offered for why the penalty in the proposed consent judgment was a fraction of the penalty imposed for similar conduct in the *Goldman* consent judgment, nor for why the proposed penalty was based on Citigroup's net profit, rather than the gross revenue figure allowed under law.

The failure of both sides to submit any proven or acknowledged facts, or to provide any explanation for these and other anomalies, was even more telling in view of the fact that both sides were intimately familiar with the SEC's earlier *Bank of America* case. There, the same district court approved a revised consent judgment after receiving from the SEC a 35-page "Statement of Facts" that, while not constituting a formal admission of liability in any respect, was agreed to by the parties for purposes of the revised consent judgment.[4] By contrast, in this case, neither party, though given ample opportunity, chose to present the court with any evidence of any kind. Nor did the SEC provide the court here with any kind of factual acknowledgement from Citigroup (not rising to an admission of liability) comparable to what it had received and proffered to the court in the *Goldman* case.

Appellants essentially contend that this Court should force the district court to rubber-stamp their agreement simply because "it reflects an agreement

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[4] *SEC v. Bank of America Corp.*, No. 09 Civ. 6829 (JSR), 2010 WL 624581, at *1 (S.D.N.Y. Feb. 22, 2010).

reached in arm's-length negotiations between experienced, capable counsel after meaningful [though undisclosed] discovery" and has been determined by the SEC to serve "the public interest." (Citi Br. 3–4.) Their argument ignores the well-settled law that federal judges have a responsibility to make an independent determination as to whether a federal agency's proposed consent judgment is fair, adequate, and reasonable, and—in the view of a number of courts—in the public interest.

Citigroup's suggestion that the district court could have consulted the "evidentiary record" (Citi Br. 42–43) ignores the fact that neither side ever offered any bit of the administrative record to the district court. Nor did the district court have any basis for speculating what that "record" might or might not have shown. Indeed, appellants' suggestion that the district court's ruling "virtually precludes the possibility of settlement" (Citi Br. 51; SEC Br. 6) ignores not only the successful approaches to settlement taken in *Bank of America* and *Goldman*, but also the SEC's ability to submit some or all of its investigative record to the court on an open or *ex parte* basis. As for the notion that approval of this settlement was necessary to "conserve agency resources" (SEC Br. 43, 45, 48–50), this stands effectively contradicted by the fact that the agency was required to expend those very resources in trying the same case against Citigroup's employee, Brian Stoker, who never offered to settle. (Indeed, now that the trial in the companion case

against Stoker has come to a close, the district court has a substantial evidentiary record upon which to assess the proposed consent judgment on remand if the appeal is denied or dismissed.)

Under all the circumstances of this specific case, it is clear that the district court did not abuse its discretion in declining to approve the problematic consent judgment, and its ruling should be affirmed in all respects.

JURISDICTIONAL STATEMENT

This Court does not have appellate jurisdiction to review the district court's order pursuant to 28 U.S.C. § 1292(a)(1). Nor does petitioner come close to meeting the standard for a grant of mandamus. Even without the benefit of adversarial briefing, the motions panel of this Court noted that "it is unclear whether interlocutory appeal lies from an order refusing to approve a proposed consent judgment," and further recognized that "the standard for grant of mandamus is more onerous than the standard for reversal on appeal." (JA 305–06.) While it is true that the consent judgment includes substantial injunctive relief, that alone does not suffice to bring the district court's disapproval of the consent judgment within the parameters of Section 1292(a)(1), which only authorizes appeals from "interlocutory orders of the district courts . . . refusing . . . injunctions." 28 U.S.C. § 1292(a)(1). Here, the district court did not refuse an injunction *per se*, but simply held that it could not approve the consent judgment in

the absence of any factual showing. Nor was any of the proposed injunctive relief designed to preserve the status quo. All of the injunctive relief authorized by the consent judgment remains fully available to the SEC should it prevail at trial or choose to provide the court with some evidentiary basis on which to approve the proposed, or a modified, consent judgment. In the meantime the status quo remains untouched.

Even if the case were to proceed to trial—a possibility the parties could easily avoid by coming forward with evidence—the SEC's claim that it would suffer irreparable harm by being forced to expend resources to litigate the case borders on the absurd, given the fact that it has already expended those very resources to litigate the same case against the former Citigroup employee, Stoker. Further still, the absence of any harm, much less irreparable harm, from the delay in obtaining injunctive relief seems self evident, given the SEC's acknowledgement that Citigroup discontinued the alleged illegal activity at the outset of the investigation five years ago and has already implemented some of the proposed remedial reforms. (JA 220, 226–27.)[5] As the Supreme Court has noted, if this type of harm were sufficient to justify interlocutory appeals, the final judgment rule would be rendered a nullity. *See Digital Equip. Corp. v. Desktop*

[5] Moreover, the SEC has admitted that it has not used the proposed "obey-the-law" injunction (part of the injunctive relief here sought) against any large financial entity in the past ten years. (JA 101.)

Direct, Inc., 511 U.S. 863, 872 (1994); *see also Grant v. Local 638*, 373 F.3d 104, 111 (2d Cir. 2004); *New York v. Dairylea Co-op., Inc.*, 698 F.2d 567, 570 (2d Cir. 1983).

As for Citigroup, since it was not a party to whom injunctive relief was denied, it has no standing to file an appeal under Section 1292(a)(1), *see Great Am. Audio Corp. v. Metacom, Inc.*, 938 F.2d 16, 19 (2d Cir. 1991), and, given that it did not file a petition for mandamus, it should be dismissed from this appeal.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court did not abuse its discretion when it declined to approve a problematic consent judgment, including an invocation of injunctive relief, in the absence of any facts or evidence upon which it could determine whether the proposed consent judgment was fair, reasonable, adequate, or in the public interest.
2. Whether the Court lacks jurisdiction to hear this appeal.

STATEMENT OF THE CASE

On October 19, 2011, the SEC filed parallel complaints against Citigroup and a former Citigroup employee, Brian H. Stoker, alleging securities fraud in violation of Sections 17(a)(2) and (3) of the Securities Act of 1933. (JA

14–34; SA 1–26.)[6] That same day the SEC filed a proposed consent judgment, seeking to have the court impose civil penalties and injunctive relief. (JA 54–60.) Citigroup filed a consent permitting entry of final judgment (JA 42–53), and the SEC filed a memorandum of law in support of the proposed consent judgment (JA 35–41). The district court scheduled a hearing on November 9, 2011, in advance of which the parties provided written submissions. (JA 72–107, 170–97.)

Following the hearing, the district court issued an Opinion and Order on November 28, 2011, rejecting the proposed consent judgment and consolidating the case with the Stoker action for purposes of discovery and trial. (JA 233–47; SPA 1–15.) The SEC and Citigroup each filed a notice of appeal from the district court's order on, respectively, December 15 and December 19, 2011. (JA 250, 271.)

On December 16, 2011, the SEC moved to stay the proceedings in the district court, and on December 20, 2011, Citigroup filed a memorandum in support of the SEC's motion. (JA 252–53, 274.) On December 27, 2011, the district court denied the SEC's stay motion. (JA 281.) Earlier that same day, the SEC filed an emergency motion in this Court to stay the proceedings pending the outcome of the appeal or, alternatively, to temporarily stay the proceedings below

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[6] *SEC v. Citigroup*, No. 11 Civ. 7387 (JSR); *SEC v. Stoker*, No. 11 Civ. 7388 (JSR). In accordance with the Southern District's related case rules, both cases were assigned to the Honorable Jed S. Rakoff.

and expedite the appeal. (*See* No. 11-5227, ECF No. 20.) On December 27, 2011, this Court issued a temporary stay of all proceedings.

On December 29, 2011, the SEC filed a petition for a writ of mandamus, asking this Court to direct the district court to enter the proposed consent judgment. (JA 291–94.) On January 3, 2012, this Court consolidated the SEC's mandamus petition with the pending appeals. (*See* No. 11-5227, ECF No. 45.) On January 9, 2012, Citigroup filed a memorandum in support of the SEC's unopposed motion for a stay. (*See* No. 11-5227, ECF No. 72.)

On March 15, 2012, a motions panel of this Court issued a *per curiam* non-dispositive opinion granting a stay of the proceedings in the district court pending appeal but denying that part of the SEC's motion seeking to expedite the appeals. (*See* No. 11-5227, ECF No. 118.)

On March 16, 2012, this Court appointed undersigned counsel to "argue in support of the district court's position." (*See* No. 11-5227, ECF No. 123.)

On May 14, 2012, the SEC and Citigroup filed their principal briefs.

On July 16, 2012, Stoker's trial on his participation in the alleged Citigroup securities fraud commenced, with the SEC arguing that Stoker's

fraudulent conduct was intentional but that the jury only need find negligence to hold him liable.[7] On July 31, 2012, the trial jury found Stoker not liable.

STATEMENT OF FACTS

A. The SEC Files Securities Fraud Charges Against Citigroup and a Former Citigroup Employee.

On October 19, 2011, the SEC filed two parallel complaints in the District Court for the Southern District of New York, alleging that Citigroup and a Citigroup Director of the CDO Structuring Group, Brian H. Stoker, had committed securities fraud in violation of Sections 17(a)(2) and (3) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(2), (3). (JA 16 ¶ 6, 33–34 ¶ 65; SA 4 ¶ 7, 24–25 ¶ 82.) The complaints alleged a Citigroup scheme to create a profitable proprietary trade by structuring and marketing a portfolio of hard-to-sell collateralized debt obligations ("CDOs") without disclosing to investors the role that Citigroup had played in selecting 50% ($500 million) of the portfolio and its pre-arrangement to short those securities in order to profit from the declining value of securities linked to the U.S. housing market. (JA 14–15 ¶¶ 1–2, 37; SA 1–2 ¶¶ 1–2.)

Specifically, the SEC alleged that "Citigroup's marketing materials . . . represented that the investment portfolio [known as Class V Funding III ("Class

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[7] *See* Pl.'s Mem. of Law in Supp. of Its Motion *in Limine*, *SEC v. Stoker*, No. 11 Civ. 7388 (JSR) (S.D.N.Y. July 3, 2012), ECF No. 61, at 17; Tr. of Record, July 30, 2012, *SEC v. Stoker*, No. 11 Civ. 7388 (JSR) (S.D.N.Y. Aug. 9, 2012), ECF No. 116, at 1916.

V")] was selected by Credit Suisse Alternative Capital, Inc. ["CSAC"] . . . , a registered investment advisor that was promoted as having experience and expertise in analyzing credit risk in CDOs, . . . [and] failed to disclose to investors that Citigroup had exercised significant influence over the selection of $500 million of the assets in the . . . investment portfolio, and that Citigroup had retained a short position in those assets. . . . By taking a short position with respect to the assets that it had helped select, Citigroup profited from the poor performance of those assets, while investors . . . suffered losses [in excess of $700 million]." (JA 15 ¶ 2, 95.)

A striking anomaly was presented by the fact that, even though the complaints appeared to describe intentional violations of the securities fraud laws, the Citigroup complaint expressly charged only negligence. The complaints' specific allegations of fraud included the following (here summarized):

- Aware that its hedge fund customers believed CDOs would experience significant losses in value from a downward turn in the U.S. housing market, Citigroup began discussions about creating and selling a CDO-squared portfolio known as Class V, which would include, among other assets, CDO tranches from CDOs structured by Citigroup that it had not been able to sell. (JA 20–21 ¶¶ 17, 19; SA 8–9 ¶¶ 20–21, 10 ¶ 24.) Part of Citigroup's rationale in pursuing such a transaction was that it would enable its CDO trading desk to establish naked short positions on these securities which would provide profits to Citigroup in the event of a downturn in the United States housing market. (JA 21 ¶ 18; SA 10 ¶ 23.)

- On October 23, 2006, Citigroup's CDO trading desk sent Stoker a list of 21 CDOs which the CDO trading desk wished to short by buying

protection from Class V. (JA 22 ¶ 22; SA 11 ¶ 27.) On October 26, Stoker, a Citigroup Director of the CDO Structuring Group, circulated to the CDO trading desk several models showing the potential profits from shorting Class V assets. (JA 22 ¶ 23; SA 11 ¶ 28.)

- On October 30, a Citigroup CDO sales person sent CSAC, the portfolio manager, a list of the 21 CDOs picked by the CDO trading desk, along with four added names he had received from the CDO trading desk, which he described as "contemplated to be in the [Class V] portfolio." (JA 22 ¶ 24, 23 ¶ 25; SA 11 ¶¶ 29–30.) When asked by his Citigroup supervisor "are we doing this?", Stoker replied: "I hope so. This is [CDO trading desk's] prop trade (don't tell CSAC). CSAC agreed to terms even though they don't get to pick the assets."[8] (JA 23 ¶ 27; SA 12 ¶ 32.) On November 22, Stoker's supervisor told Stoker to ensure that the structuring desk received "credit for [the CDO Trading Desk's] profits" on Class V. (SA 12 ¶ 33.)

The complaints further alleged that the 25 CDOs that Citigroup selected for Class V and in which Citigroup held a short position performed significantly worse than the other assets in Class V. (JA ¶ 60; SA 24 ¶ 76.) As a result, in November 2007, the assets in Class V were severely downgraded, with Class V suffering an event of default. (JA 32 ¶ 61; SA 24 ¶ 77.) The SEC estimated that the total investor loss with respect to the Class V CDO transaction was in excess of $700 million. (JA 95.) The SEC alleged that Citigroup realized net profits of approximately $160 million. (JA 33 ¶ 63; SA 24 ¶ 79.)

Although these allegations, on their face, alleged intentional misconduct, even more anomalous and puzzling was the fact that the SEC

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[8] The term "prop trade" refers to "proprietary trade," which is a trade undertaken for a firm's own account rather than on behalf of a firm's customer. (JA 23 ¶ 27; SA 12 ¶ 32.)

complaint against Stoker contained several allegations specifying Citigroup's scienter that did not appear in the complaint against Citigroup. For example (here quoted):

- "Undisclosed in the marketing materials and unbeknownst to investors, Citigroup exercised significant influence over the asset selection process **for the purpose of creating a tailored proprietary bet** against the collateral of Class V III." (SA 2 ¶ 2 (emphasis added).)

- "**Citigroup intended to use** the Class V III transaction as a means of establishing a position that would maximize Citigroup's profit in a falling market. . . ." (SA 20–21 ¶ 64 (emphasis added).)

- "**Citigroup knew** it would be difficult to place the liabilities of a CDO squared if it disclosed to investors its intention to use the vehicle to short a hand picked set of CDOs." (SA 10 ¶ 25 (emphasis added).)

- "[T]he Citigroup CDO trading desk **was aware** that many market participants were seeking to bet that [certain CDOs selected by Citigroup] would perform poorly." (SA 9 ¶ 21 (emphasis added).)

Even though the Citigroup complaint expressly charged negligence, the Stoker complaint was silent as to whether it was charging negligence or intentional misconduct. When viewed together, the intentional fraud allegations of the two complaints were hard to square with the negligence claim against Citigroup.

B. The Parties Submit a Consent Judgment.

Filed along with the complaints was a proposed consent judgment against Citigroup that imposed disgorgement of $160 million in net profits (plus

$30 million in pre-judgment interest), a civil penalty of $95 million, a permanent "obey-the-law" injunction prohibiting Citigroup from violating Sections 17(a)(2) and (3) of the 1933 Securities Act, and various prophylactic injunctive measures that Citigroup would adopt for a three-year period. (JA 42 ¶ 2, 44 ¶ 6; JA 54–59.)[9] Additionally, since the proposed obey-the-law injunction appeared to be unconstitutionally broad on its face, Citigroup consented to waive any objection to that apparent denial of due process. (JA 47 ¶ 11.)

C. The District Court Conducts a Hearing to Evaluate Whether the Proposed Consent Judgment is Fair, Reasonable, Adequate, and in the Public Interest.

In support of the proposed consent judgment, the SEC submitted a bare-bones and largely conclusory seven-page memorandum. While stating that, in order for the proposed consent judgment to be approved, the district court had to find that the proposed consent judgment was "fair, appropriate, reasonable, and in the public interest" (JA 40), the memorandum offered only bald conclusions in support of such a finding, *e.g.*, "[t]he proposed $95 million civil penalty will serve as an appropriate deterrent to Citigroup and other Wall Street firms from using

[9] The prophylactic remedies included review of all offerings of residential mortgage-related securities to ensure that the written marketing materials did not include any material misstatements or omissions. These materials would be reviewed by Citigroup's Legal or Compliance Department, along with review by any outside counsel retained to advise on a mortgage securities offering. Citigroup also would perform an internal audit review on at least an annual basis, and certify annually to the SEC its compliance with these reforms. (JA 64–66.)

false and misleading statements in connection with the marketing of structured products." (JA 40.)

The district court therefore convened a hearing on November 9, 2011 to determine whether the requisite standards had been met. (JA 68.) In advance of the hearing, the district court propounded several questions addressing a number of issues raised by the SEC's filings for the SEC and Citigroup to answer at oral argument or in written responses prior to the hearing. (JA 68–71.)

The SEC and Citigroup each filed written responses, and also presented oral argument, that, however, raised new questions. (*See* JA 72–106, 170–97.) For example, with respect to the standard that the consent judgment had to meet in order to be approved, the SEC partly reversed itself and asserted that the public interest no longer formed part of that standard. (JA 82 n.1.)

With respect to the district court's question as to why the $95 million penalty was less than one-fifth of the $535 million penalty imposed for the comparable, arguably less egregious, conduct in the *Goldman* case, *see infra*, the SEC simply stated that *Goldman* involved a scienter-based violation, without indicating why the allegations of the Citigroup and Stoker complaints, if true, did not likewise indicate intentional misconduct. (JA 96–97.) While acknowledging that the maximum potential penalty would be equal to the **gross** pecuniary gain realized from the illegal conduct, the SEC did not explain why it did not disclose

the gross gain figure or why the penalty here was half of the maximum penalty available even when based on Citigroup's **net** profit. (JA 96–97, 100.)

With respect to injunctive relief, the SEC conceded that in the last ten years it had not "brought any contempt proceedings against any large institutions" for violations of its broad obey-the-law injunctions. (JA 101, 215.) It argued that there were better and more appropriate ways to deal with repeat conduct by financial institutions, noting that "we have taken into account companies prior violations in determining what penalty was appropriate in the case of new conduct that we've uncovered." (JA 101, 215.) However, the SEC offered nothing to indicate how, if at all, Citigroup's five prior securities law violations alleged in the last 10 years had factored into the proposed penalty in this case.[10] (JA 99, 216.) Nor, conversely, was there any mention of why such an injunction was even necessary given that Citigroup was already subject to an SEC injunction prohibiting Section 17(a) violations, imposed a year earlier in *SEC v. Citigroup Inc*. *See* No. 10 Civ. 1277 (ESH) (D.D.C. Oct. 8, 2010), ECF No. 19, at 1–2.

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[10] The SEC brought enforcement actions against Citigroup in 2003, 2008, and 2010, as well as administrative proceedings in 2005 and 2006. For an overview of Citigroup's previous violations, see Jonathan Weil, *Citigroup Finds Obeying the Law Too Darn Hard*, BLOOMBERG, NOV. 2, 2011, *available at* http://www.bloomberg.com/news/2011-11-02/citigroup-finds-obeying-the-law-is-too-darn-hard-jonathan-weil.html (last visited July 3, 2012). The SEC has not enforced any of the previous injunctions against Citigroup via a contempt proceeding.

As for the proposed prophylactic measures, the SEC did not suggest that it could enforce the measures in any way except by resort to the court. (JA 101.) But Citigroup conceded that some of the measures had already been voluntarily undertaken. (JA 226–27.)

For its part, Citigroup, in its written response to the district court's questions, made clear that it did not agree that it had violated the securities laws in any respect. (JA 178.) Citigroup also argued that it had in fact made the very disclosures that the SEC alleged it had not. (JA 178.) And if there were any doubt, Citigroup's counsel made expressly clear at the hearing that it did not agree to a single one of the SEC's material allegations of fraud. (JA 210, 223–24.) When, despite these statements by Citigroup's counsel, the SEC's Chief Litigation Counsel suggested that it was unfair to infer that the only reason Citigroup would not want to admit an allegation was because it was not true, the Court's response reflected a genuine concern with governmental overreaching: "I think [Citigroup's] brief came pretty close, as close as [it] could consistent with your gag order, to suggesting that this was a settlement done to avoid litigation, not because they thought you were right." (JA 213.)

D. The District Court Properly Rules That, Absent An Evidentiary Basis, The Proposed Consent Judgment Does Not Warrant Approval.

On November 28, 2011, the district court ruled that "this problematic consent judgment" did not meet any of the established standards of review because the court had not been provided with any "evidentiary basis" upon which to exercise its judgment. (JA 236, 240; SPA 4, 8.) After canvassing the anomalies and conundrums referenced above, the court noted that, in the absence of any factual submissions, it had no basis for determining whether the consent judgment met any part of the requisite standard. (JA 246; SPA 14.) Thus, notwithstanding "the substantial deference due the S.E.C. in matters of this kind," it could not "approve this problematic consent judgment . . . because the Court has not been provided with **any** proven or admitted facts upon which to exercise even a modest degree of independent judgment." (JA 236; SPA 4 (emphasis added).)

The court further noted that approval was particularly problematic in light of the SEC's request for both a broad obey-the-law injunction and the various prophylactic forms of injunctive relief. (JA 240–41; SPA 8–9.) The opinion noted "that before a court may employ its injunctive and contempt powers in support of an administrative settlement, it is required, even after giving substantial deference to the views of the administrative agency, to be satisfied that it is not being used . .

. to enforce an agreement that is unfair, unreasonable, inadequate, or in contravention of the public interest." (JA 237; SPA 5.)

The district court was also "troubled" when it compared the $95 million penalty sought in Citigroup's proposed consent judgment with the $535 million penalty imposed in the consent judgment entered a year earlier between the SEC and Goldman Sachs involving remarkably similar alleged conduct in the same time period. Although the SEC argued that Goldman was charged with scienter-based violations, thus justifying a more significant sanction, the district court noted that the SEC's logic was circular because it could not explain, given the similarity in the allegations, "how Goldman's actions were more culpable or scienter-based than Citigroup's [alleged] actions here." (JA 245 n.13; SPA 13 n.13.)

Moreover, the court emphasized that the *Goldman* consent judgment included an express acknowledgement from Goldman "that the marketing materials for the ABACUS 2007 AC1 transaction contained incomplete information" and that "it was a mistake for the Goldman marketing materials to state that the reference portfolio was 'selected by' ACA Management LLC without disclosing the role of Paulson & Co. Inc. in the portfolio selection process and that Paulson's economic interest were adverse to [portfolio] investors." (JA 245 n.13; SPA 13 n.13.) In addition, Goldman agreed to cooperate with the SEC in a number of ways, such as making its employees available for interviews or

testimony, cooperation notably absent from Citigroup's consent judgment. Thus Citigroup's significantly less onerous settlement for similar (indeed, arguably more egregious) misconduct raised legitimate questions.

In light of all this, the Court then stated its holding as follows: "[T]he proposed consent judgment is neither fair, nor reasonable, nor adequate, nor in the public interest. **Most fundamentally**, this is because it does not provide the court with a sufficient **evidentiary basis** to know whether the requested relief is justified under any of these standards." (JA 240; SPA 8 (emphasis added).)

E. The Parties Appeal to this Court.

On December 15, 2011, the SEC filed a notice of appeal seeking review by this Court of the district court's November 28, 2011 order (JA 248–49), and the next day filed a motion in the district court for a stay pending the outcome of the appeal (JA 252). On December 19, 2011, Citigroup filed its own notice of appeal (JA 271–72; *see also* Nos. 11-5227, ECF No. 10; 11-5242, ECF No. 1), and the next day submitted a memorandum in support of the SEC's motion for a stay pending appeal (JA 274–80).

On December 27, 2011, the district court filed an opinion denying the SEC's motion for a stay. Earlier that same day, the SEC filed an emergency motion in this Court for a stay pending appeal and for expedited review of the appeal. (*See* No. 11-5227, ECF No. 20.) The SEC's memorandum supporting its

motion for a stay contained a number of assertions erroneously suggesting that the district court's November 28, 2011 ruling was based on the absence of any admission of **liability** by Citigroup. The SEC argued that it was likely to prevail on appeal "given the well established . . . practice of federal agencies entering into consent judgments in which defendants do not admit to the allegations in the complaint" (*id.* at 11), and reiterated "that the federal courts . . . have approved consent judgments in which defendants expressly **deny liability** without any suggestion that such a practice contravenes the public interest." (*id.* at 13 (first emphasis in original, second emphasis added).)

F. This Court Stays the District Court Proceedings Pending Outcome of the Appeals.

On March 15, 2012, the motions panel stayed the proceedings in the district court but denied the motion to expedite the appeals. (JA 317.) At the outset the panel recognized that it "has not had the benefit of adversarial briefing" and acknowledged that

> [t]he merits panel is, of course, free to resolve all issues without preclusive effect from this ruling. In addition to the fact that our ruling is made without benefit of briefing in support of the district court's position, our ruling, to the extent it addresses the merits, finds only that the movant has shown a likelihood of success and does not address the ultimate question to be resolved by the merits panel – whether the district court's order should in fact be overturned.

(JA 303.)

The motions panel's conclusion that the SEC had established a likelihood of success on the merits was based on a description of the district court's holding that appears to vary materially from the district court's actual ruling. The motions panel repeatedly described the district court's ruling as one that disapproved the proposed consent judgment on the ground that Citigroup's **liability** had not been admitted or proved. As noted above, however, the district court's actual holding repeatedly referred to its inability to determine whether the consent judgment met the well-established standards because it had not been provided with **any** evidentiary facts on which to make that determination. The district court's opinion never held that such evidence had to establish the defendant's liability, but only that mere allegations in a complaint could not substitute for an evidentiary or factual submission, however modest, in order to determine whether the proposed consent judgment was fair, adequate, reasonable, and in the public interest.

The motions panel also stated incorrectly that "the substantial evidentiary record amassed by the SEC over its lengthy investigation was available to the court." (JA 311.) In fact, the SEC never offered any of its putatively substantial evidentiary record to the district court. (*See* JA 94–100.) Nor were the parties in agreement as to what that record showed in **any** respect. Contrary to the

motions panel's assumption, therefore, the district court was not "free to assess the available evidence" since—as its ruling indicated—none was provided.

G. A Trial Jury Rules That Stoker was Not Liable.

On July 31, 2012, a federal trial jury concluded that the SEC had failed to prove Mr. Stoker liable for the alleged securities fraud. *SEC v. Stoker*, No. 11 Civ. 7388 (JSR) (S.D.N.Y. July 31, 2012), ECF No. 91.

STANDARD OF REVIEW

This Court reviews a district court's denial of a settlement agreement under an abuse of discretion standard. *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991). An abuse of discretion occurs if the district court "(1) based its ruling on an erroneous view of the law, (2) made a clearly erroneous assessment of the evidence, or (3) rendered a decision that cannot be located within the range of permissible decisions." *Lynch v. City of New York*, 589 F.3d 94, 99 (2d Cir. 2009) (internal quotation marks omitted).[11]

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[11] Citigroup's citation to *City of New York v. Golden Feather Smoke Shop, Inc.*, 597 F.3d 115, 120 (2d Cir. 2010) does not support *de novo* review. As that decision notes, the district court's application of the facts to the appropriate legal standard is reviewed for an abuse of discretion, and "the factual findings and legal conclusions underlying such decisions are evaluated under the clearly erroneous and de novo standards, respectively." *Id.* (internal quotation marks omitted). As demonstrated throughout this brief, the district court's determinations in the instant case were all premised on its conclusion that in the absence of any evidentiary submissions, it had insufficient basis on which to assess, let alone approve, the

SUMMARY OF ARGUMENT

Confronted with puzzling anomalies in the case in hand, the district court properly held that it could not determine whether a problematic consent judgment invoking the court's injunctive powers satisfied the well-established standards of judicial review because the parties had not provided the court with the slightest factual or evidentiary basis upon which to exercise its independent judgment. Contrary to appellants' basic claim, the district court did not abuse its discretion and did not impose a new rule of law that would disapprove all consent judgments unless a defendant's "liability has been conceded or proved" and "conclusively determined." This should have been evident to both parties, even before the court ruled, given their familiarity with the *Bank of America* case where the same judge approved a consent judgment based on the SEC's submission of an evidentiary basis in the form of a 35-page Statement of Facts, which was acknowledged without any admission of liability by a defendant represented by the same lawyers representing Citigroup in this case. Here, the SEC declined to provide the district court with any evidentiary statement of facts or any portion of the extensive factual record it had developed during four years of investigation. Nor did Citigroup, without admitting liability, tender any acknowledgement of the

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consent judgment. Under *Lynch*, this would appear to be, at worst, a mixed legal–factual determination entitled to be reviewed under a clearly erroneous standard.

conduct at issue similar to what Goldman Sachs had done a year earlier in an SEC case involving virtually identical conduct. Thus, as the district court's opinion repeatedly stated, the reason the court could not evaluate, let alone approve, the proposed consent judgment was because neither party had presented the court with any material facts whatsoever, and not because there had been a failure to admit liability.

The law is clear that a federal judge has a responsibility to independently determine whether a proposed consent judgment satisfies well-established standards of being fair, adequate, reasonable, and in the public interest. The deference due the SEC in considering a proposed consent judgment cannot and does not eliminate that responsibility, nor does the fact that the parties have agreed to the terms of a proposed court order require the judge to sign off on that order without inquiry into whether it meets those standards. In making that inquiry, depending on the particulars of the case before it, a federal judge has every right to seek an evidentiary basis where necessary to determine whether the proposed settlement conforms to the established standards.

It is axiomatic that every case must be considered and determined on the basis of its own particular facts. Here, the proposed consent judgment, on its face, raised numerous questions, including, among others: (1) the inconsistency between the intentional fraud allegations in the underlying Citigroup and Stoker

complaints and the unparticularized charge of negligence that was proposed in the consent judgment; (2) the gross discrepancy between the $95 million penalty proposed against Citigroup for conduct identical to the conduct for which a $535 million penalty had been imposed on Goldman Sachs a few months earlier; and (3) the request for broad injunctive relief despite the SEC's concessions that the conduct allegedly justifying the injunctive relief was mere negligence, that Citigroup had discontinued the alleged legal activity when the investigation started five years ago and had implemented many of the prophylactic measures requested, that the SEC had not enforced any injunction previously imposed on Citigroup or any other large financial institution in the last ten years, and that Citigroup was already subject to the same "obey-the-law" injunction imposed a year earlier in another SEC case. In the absence of any factual showing justifying such anomalies, the district court had no basis to evaluate the proposed consent judgment's compliance with the requisite standards.

There is also a substantial question whether an appeal from this interlocutory order of the district court is proper.

This Court should, therefore, affirm the district court's November 28, 2011 Order or, in the alternative, dismiss the appeal for want of jurisdiction and deny the petition for a writ of mandamus.

ARGUMENT

I.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN, IN THE ABSENCE OF ANY EVIDENCE UPON WHICH IT COULD DETERMINE IF THE SETTLEMENT WAS FAIR, REASONABLE, ADEQUATE, OR IN THE PUBLIC INTEREST, IT DECLINED TO APPROVE A PROBLEMATIC CONSENT JUDGMENT EMPLOYING THE COURT'S INJUNCTIVE POWERS.

A. The District Court Did Not Require An Admission of Liability.

After careful consideration of the puzzling particulars of the case before it, the district court expressly held that the problematic consent judgment did not meet the well-established standard of judicial review because the court had not been provided with any evidentiary basis upon which to exercise its independent judgment. Lest there be any doubt, the district court reiterated this holding on four separate occasions:

> **Applying these standards** [fair, reasonable, adequate and in the public interest] **to the case in hand**, the Court concludes, regretfully, that the proposed consent judgment is neither fair, nor reasonable, nor adequate nor in the public interest. **Most fundamentally**, this is because it does not provide the Court with a sufficient **evidentiary basis** to know whether the requested relief is justified under any of these standards. (JA 240; SPA 8 (emphasis added).)
>
> The Court has spent long hours trying to determine whether, in view of the substantial deference due the S.E.C. in matters of this kind the Court can somehow approve this **problematic** consent judgment. In the end,

> the Court concludes that it cannot approve it, because the Court has not been provided with **any proven or admitted facts** upon which to exercise even a modest degree of independent judgment. (JA 236; SPA 4 (emphasis added).)
>
> The parties successful resolution of their competing interests cannot be automatically equated with the public interest especially **in the absence of a factual base** on which to assess whether the resolution was fair, adequate, and reasonable. (JA 245; SPA 13 (emphasis added).)
>
> The Court is forced to conclude that a proposed Consent Judgment that asks the Court to impose substantial injunctive relief, enforced by the court's own contempt power, on the basis of allegations unsupported by **any proven or acknowledged facts whatsoever**, is neither reasonable, nor fair, nor adequate, nor in the public interest. (JA 246; SPA 14 (emphasis added).)

As these citations make abundantly clear, the gravamen of the parties' appeal—that the district court imposed a new bright-line rule of law that no consent judgment could be approved "unless liability has been conceded or proved" and "conclusively determined" (Citi Br. 1)—is based on a flat mischaracterization and distortion of the district court's ruling.[12] Even a

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[12] The parties' briefs recite this same mischaracterization repeatedly. (*See, e.g.*, Citi Br. 24 ("The District Court below erred by requiring CGMI to admit **liability** as a condition of approving the proposed Consent Judgment.") (emphasis added); SEC Br. 2 ("The district court rejected the consent judgment because, in essence, it disagreed with the Commission's policy of entering into consent judgments without obtaining admissions from defendants.").) Without the benefit of adversarial briefing, the motions panel of this Court that granted a stay was also subject to the same misunderstanding and misinterpretation of the district court's holding.

microscopic review of the district court's opinion will not find any such statement nor any claim that the absent "facts" or "evidentiary basis" had to establish proof of **liability**—a term missing from the opinion and which could easily have been employed had the court so intended.

That the SEC and Citigroup contend otherwise on appeal is also difficult to reconcile with the fact that the parties were undoubtedly mindful of the evidentiary basis submitted to the same judge a year earlier in the SEC's *Bank of America* case, where the plaintiff was the same (the SEC) and Bank of America was represented by the same lawyers now representing Citigroup in the instant case. *See SEC v. Bank of America Corp.*, No. 09 Civ. 6829 (JSR) (S.D.N.Y. Mar. 2, 2010), ECF No. 99. In *Bank of America*, the SEC provided the same district judge as here with a 35-page "Statement of Facts" attached as an exhibit to the consent judgment, and the Bank of America acknowledged the SEC's evidentiary basis for these facts without conceding their truth or admitting liability.[13] In its

[13] Specifically, Bank of America stated that it "acknowledges that there is an evidentiary basis for the statements in the Statement of Facts, prepared by the SEC based on discovery in the action 09 Civ. 6829, that is attached as Exhibit A to this Consent. . . . BAC's acknowledgement in this paragraph that there is an evidentiary basis for the statements in the Statement of Facts is not an admission as to the truth of any such statements or any inferences or legal conclusions based on such statements. BAC's acknowledgement does not bind BAC to such statements or any inferences or legal conclusions based on such statements in any other litigation or proceeding." *Bank of America*, No. 09 Civ. 6829 (JSR) (S.D.N.Y. Feb. 24, 2010), ECF No. 97, at 15 ¶ 14.

opinion then approving the consent judgment in that case, the district court expressly relied on this Statement of Facts as providing the basis on which the court was able to approve that settlement. *Bank of America*, No. 09 Civ. 6829 (JSR), 2010 WL 624581, at *5 (S.D.N.Y. Feb. 22, 2010).

Bank of America thus provides a model for the type of "proven or acknowledged facts" that would permit a district court in certain cases to exercise its independent judgment in evaluating a proposed consent judgment settlement. Similarly in *SEC v. Goldman Sachs*—an SEC case based on alleged conduct closely analogous to the instant case that was resolved by a consent judgment entered on July 20, 2010—the parties presented the district court with an express acknowledgment of key facts. *SEC v. Goldman Sachs & Co.*, No. 10 Civ. 3229 (BSJ) (S.D.N.Y. July 20, 2010), ECF No. 25 ¶ 3.

By contrast, in the instant case, no such factual submission was made, no such factual acknowledgement was offered, and neither side sought, jointly or severally, to present the court with any evidence at all. Indeed, even though the SEC had conducted a four-year investigation of the matter, it chose not to present the court (either directly or even on an *ex parte* basis) with any documents,

deposition transcripts, or other evidence of any kind from the presumably extensive record collected during that investigation.[14]

B. The District Court Did Not Abuse Its Discretion In Seeking An Evidentiary Basis to Exercise Independent Judgment.

Having materially misstated the district court's ruling, appellants contend that this Court should force the district court to rubber-stamp their settlement because "it reflects an agreement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery," includes "comprehensive monetary and injunctive relief and has been determined by the SEC to serve the public interest."[15] (Citi Br. 3–4, 45; SEC Br. 19.) This argument

[14] Citigroup claims that the district court had access to the SEC's "substantial evidentiary record." (Citi Br. 42.) This is patently untrue, as the SEC never offered, much less provided, access to its evidentiary record. Also, contrary to the SEC's repeated claims (SEC Br. 1, 3, 7, 10, 11, 16, 18, 19, 21, 28, 30, 34, 40), the court's reference at one point to the notion that facts could be established at trials did not in any respect suggest that proof at trial was the only way to inform a judge with facts helpful in evaluating a consent judgment. Indeed, as noted, the court's emphasis was at all times on the failure of the parties to provide it with any factual evidence in any form.

[15] While the parties challenge whether the district court, as opposed to the SEC, is required to find that the consent judgment is in the public interest, they do not challenge that the district court must find that the settlement is fair, adequate, and reasonable, a standard they concede is well established. (SEC Br. 23; Citi Br. 15.) The SEC's repeated attempts to justify the settlement by its need to conserve scarce agency resources (SEC Br. 7, 43, 45, 48, 49, 50)—as if that could save a consent judgment that was otherwise found to be unfair, unreasonable or inadequate—was in any event irrelevant here given the necessity to expend those resources trying the case against Stoker, who from the outset indicated his determination to go to trial if not otherwise exonerated.

ignores the firmly established law that federal judges have a responsibility to make an independent determination in each case as to whether an agency's proposed consent judgment satisfies specific well-established standards, including that the consent judgment is fair, adequate, reasonable, and in the public interest. *See, e.g.*, *SEC v. Randolph*, 736 F.2d 525, 529–30 (9th Cir. 1984).[16]

To fulfill its duty, the district court must, as it did here, evaluate the proposed consent judgment in the context of the particular facts pertaining to the particular case. *See, e.g.*, *United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1088 (1st Cir. 1994) (noting that, in the context of evaluating proposed settlements, fairness, reasonableness, and fidelity to the statute "are all mutable figures taking on different forms and shapes in different factual settings" and that "the district courts [should] treat each case on its own merits"); *see also Patterson v. Newspaper & Mail Deliverers' Union of New York and Vicinity*, 514 F.2d 767, 771 (2d Cir. 1975) ("Nor should we substitute our ideas of fairness for those of the district judge in the absence of evidence that he acted arbitrarily or failed to satisfy himself that the settlement agreement was equitable to all persons concerned and in

[16] *See also United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990) (asserting that "the district court should not mechanistically rubberstamp the agency's suggestions"); *FTC v. Standard Fin. Mgmt. Corp.,* 830 F.2d 404, 408 (1st Cir. 1987) ("When a public agency requests that a judicial stamp of approval be placed on a negotiated consent decree . . . [t]he court, rather than blindly following the agency's lead, must make its own inquiry into the issue of reasonableness before judgment." (quotation omitted)).

the public interest."). The SEC points to the fact that the district judge in this case had previously approved other consent judgments in other cases without factual admissions, but this only underscores the fact that a judge decides each case independently based on the specific factual particulars of each case. (SEC Br. 29–30).[17]

In undertaking that responsibility, the district court faced the fundamental problem that the SEC's complaint against Citigroup, the simultaneously filed parallel complaint against Stoker, and the proposed consent judgment presented an array of puzzlements and inconsistencies that made it particularly difficult to assess the adequacy, reasonableness, and fairness of this particular proposed consent judgment. As already noted, the allegations against Citigroup set forth in the Citigroup complaint, and even more so in the allegations against Citigroup set forth in the Stoker complaint, clearly alleged intentional misconduct resulting in a $700 million loss to investors—conduct, moreover, almost identical to the intentional fraudulent conduct alleged in the SEC's complaint against Goldman Sachs filed only a year earlier. Yet the Citigroup

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[17] It is also worth noting that several of the cited decisions reference approval of consent judgments involving corporate entities in a context where one or more of the corporations' employees had pled guilty to related criminal charges, thereby providing the district court with some factual basis upon which to determine that the proposed consent judgment was fair, reasonable, adequate, and in the public interest. *See SEC v. Worldcom, Inc.*, 273 F. Supp. 2d 431 (S.D.N.Y. 2003); *SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 204 (S.D.N.Y. 2011).

complaint charged negligence only, and mysteriously omitted some of the most damning allegations against Citigroup contained in the Stoker complaint, which, in turn failed even to specify whether it was charging negligence or intentional misconduct. Moreover, the proposed $95 million penalty was a small fraction of the $535 million penalty imposed for very similar conduct in the *Goldman* case, and the proposed penalty was based on Citigroup's purported net profit, not the allowable gross revenue noticeably missing from the complaint. Further still, the consent judgment proposed prophylactic measures enforceable only by the court's contempt power, plus a broad "obey-the-law" injunction whose validity was not only dubious on its face but appeared particularly problematic given that the alleged misconduct, purportedly the result only of negligence, had ceased five years earlier.

Confronted with this problematic proposed consent judgment, the district court solicited written submissions and conducted a hearing in an effort to ascertain some basic facts that would enable the court to engage in a reasoned exercise of its discretion. But the parties' responses, while confirming that there was not a single material fact on which the parties could agree, were notable in their total failure to present any evidence from either side. Thus, the district court was virtually forced to conclude, as it did, that it lacked any basis on which to

determine whether the proposed consent judgment was fair, reasonable, adequate, and in the public interest.

Contrary to Citigroup's position (Citi Br. 24, 28), nothing in this standard of judicial review precludes the district judge from seeking a modest evidentiary basis upon which to make an informed determination. On the contrary, in the absence of some basic facts, the court cannot reasonably fulfill its obligations:

> Because the consent decree does not merely validate a compromise but, by virtue of its injunctive provisions, reaches into the future and has continuing effect, its terms require more careful scrutiny. [. . .] This requires a determination that the proposal represents a reasonable factual and legal determination based on the facts of record, whether established by evidence, affidavit, or stipulation.

United States v. City of Miami, Fla., 664 F.2d 435, 441 (Former 5th Cir. 1981) (Rubin, J., concurring); *see also Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980) ("The trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable and appropriate *under the particular facts*. . . ." (emphasis added)); *United States v. N. Carolina,* 180 F.3d 574, 581 (4th Cir. 1999) (stating that "a district court . . . should not blindly accept the terms of a proposed settlement" and that, although a district court's "assessment does not require the court to conduct 'a trial or a rehearsal of the trial,' the court must take

the necessary steps to ensure that it is able to reach 'an informed, just and reasoned decision.'" (internal quotation marks omitted)).

Indeed, as this Court has noted in the context of class action settlements:

> When a District Court exercises its authority in approving a settlement offer, it must give comprehensive consideration to all relevant factors . . . . The Court must eschew any rubber-stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). Thus, in *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983), this Court concluded that it could not intelligently review a proposed class action settlement on the record before it and remanded for further findings.

> We have previously held that, while we do not expect the district judges to convert settlement hearings into mini trials on the merits, we do expect them to explore the facts sufficiently to make intelligent determinations of adequacy and fairness, and we have strongly hinted that making findings of fact and conclusions of law whenever the propriety of the settlement is in serious dispute is desirable.

Id. at 433 (internal citations omitted); *see also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (noting that, pursuant to Fed. R. Civ. P. 23(e)(2), the district court "must carefully scrutinize the [class action] settlement to ensure its

fairness, adequacy and reasonableness, and that it was not a product of collusion." (citations omitted)).

Likewise, in other similar contexts, courts routinely require a sufficient evidentiary or factual basis upon which to make an independent determination about the propriety of proposed settlements. *See, e.g.*, 15 U.S.C. § 16(e)(1) ("Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest."); *United States v. Int'l Bus. Machs. Corp.*, 163 F.3d 737, 738 (2d Cir. 1998) (stating that "consensual termination of antitrust decrees [is allowed] only upon the court's determination that termination will serve the 'public interest'"). The parties have provided no plausible reason why these precedents governing court approval of settlement agreements do not support the district court's application of the standard of review in this case.[18]

[18] Courts have, in the exercise of their discretion, carefully scrutinized proposed settlement agreements even in the absence of specific statutory authorization. *See, e.g.*, *United States v. Lexington-Fayette Urban Cnty. Gov't*, 591 F.3d 484 (6th Cir. 2010) (remanding case for district court to more fully explain its exercise of discretion in declining settlement agreement); *SEC v. Citigroup Inc.*, No. 10. Civ. 1277 (ESH) (D.D.C. 2010) (propounding questions to the parties and requesting written submissions to support entry of the proposed consent judgment as fair, reasonable, adequate, and in the public interest, and approving the judgment after the parties submitted memoranda accompanied by exhibits in support of the judgment); *FTC v. Circa Direct, LLC*, No. 11-2172 RMB, 2012 U.S. Dist. LEXIS 81878 (D.N.J. Feb. 22, 2012) (rejecting stipulated order that did not outline standard for court approval or facts that would justify approval under that standard); *SEC v. Koss Corp.*, No. 11-C-00991 (RTR) (E.D. Wisc. Dec. 20, 2011),

C. The SEC's Request For Injunctive Relief Lacked The Requisite "Proper Showing."

While, given the consent judgment's problems, the district court would still have been obliged to reject the proposed consent judgment on any terms, in the absence of any facts explaining why these provisions made sense, the district court's need, and authority, to require some modest evidence in support of the proposed consent judgment was even more obvious in regard to the proposed injunctive measures. *See, e.g.*, *Dopp v. Franklin Nat'l Bank*, 461 F.2d 873, 879 (2d Cir. 1972) ("[E]ven where a party can be deemed to have waived his right to a hearing, the movant is not relieved of his burden of establishing a reliable factual basis for the preliminary injunction."). The basic statute that authorizes the SEC to seek injunctive relief permits a court to issue an injunction only "upon a proper showing." 15 U.S.C. § 77t(b). As this Court has noted, "the Commission's determination that a violation occurred does not obviate the need for an independent judicial determination," *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 806–07 (2d Cir. 1975), and consequently, "[i]t is well settled that the Commission cannot obtain relief without **positive proof** of a reasonable likelihood that past

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ECF No. 5, at 1 (requesting that the SEC "provide a written factual predicate for why it believes the Court should find that the proposed final judgments are fair, reasonable, adequate, and in the public interest").

wrongdoing will recur." *SEC v. Bausch & Lomb Inc.*, 565 F.2d 8, 18 (2d Cir. 1977) (emphasis added).[19]

With respect to the statutory violations here alleged, the Supreme Court has held that "[i]n cases where the Commission is seeking to enjoin a person '*about* to engage in any acts or practices which . . . *will* constitute' a violation of those provisions [Sections 17(a)(2) and (3)], the Commission must establish a sufficient evidentiary predicate to show that such future violation may occur." *Aaron v. SEC*, 446 U.S. 680, 701 (1980). Even where a defendant nominally consents or acquiesces in the requested injunctive relief, having an evidentiary basis is critical to the district court's determination because "the proper exercise of equitable discretion is necessary to ensure a 'nice adjustment and reconciliation between the public interest and private needs.'" *Id.* (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).[20]

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[19] *See also SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972) ("The critical question for a district court in deciding whether to issue a permanent injunction in view of past violations is whether there is a reasonable likelihood that the wrong will be repeated.").

[20] This Court has emphasized that district courts must still assess all of the traditional equitable considerations in deciding whether to grant injunctive relief. *Mgmt. Dynamics*, 515 F.2d at 808. As the Supreme Court has made clear, consideration of the public interest is part of that assessment. *See, e.g.*, *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish . . . that an injunction is in the public interest."); *Ebay Inc. v. MercExchange LLC*, 547 U.S. 388, 391 (2006) (reciting same factor for plaintiff seeking permanent injunction). The SEC demonstrates that injunctive relief is in

This Court has repeatedly underscored that injunctive relief is "extraordinary," thus requiring the SEC to make a showing of a reasonable likelihood that the harm will be repeated:

> The prohibition against future securities law violations is among the sanctions that we have characterized as having grave consequences. Such an order subjects the defendant to contempt sanctions if its subsequent trading is deemed unlawful and also has serious collateral effects. Though the order is prohibitory in form, rather than mandatory, it accomplishes significantly more than preservation of the status quo. For this form of relief, the Commission has to make a substantial showing of likelihood of success as to both a current violation and the risk of repetition.

SEC v. Unifund Sal, 910 F.2d 1028, 1040 (2d Cir. 1990) (internal citation omitted). Here, the requirement was made even more acute by the fact that the proposed consent judgment sought not only an extremely broad ("obey-the-law") prohibiting injunction but also a variety of mandatory injunctions in the form of prophylactic measures Citigroup was ordered to implement.[21]

Because of the extraordinary nature of injunctive relief, courts have required the SEC to provide some evidentiary basis supporting the need for

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the public interest by making the required "proper showing." *Mgmt. Dynamics*, 515 F.2d at 808.

[21] Although not clearly labeled as such in the proposed consent judgment, the prophylactic remedies are plainly a form of proposed injunctive relief, both because the court's only authority to so-order them, as requested by the parties, is the court's broad injunctive powers and because the proposed consent judgment does not provide any mechanism or penalty for violation of these measures other than applying to the court for enforcement (through its contempt power).

injunctive relief even in the context of settlements.[22] For example, in *SEC v. Globus Group, Inc.*, 117 F. Supp. 2d 1345 (S.D. Fla. 2000), the SEC sought to enter consent judgments with several defendants, enjoining them from future violations of Section 10(b) of the Exchange Act and Sections 17(a) and 5(a),(c) of the Securities Act. *See* Complaint, No. 99-1968-CIV (S.D. Fla. July 16, 1999), ECF No. 1. The district court rejected the injunctive relief portion of the consent judgment and, in a subsequent opinion addressing the SEC's motion for reconsideration, reiterated that the provisions of the securities laws authorizing injunctive relief require the SEC to make a "proper showing." 117 F. Supp. 2d at 1346–47 (citing 15 U.S.C. §§ 77t(b), 78u(d)(1)). The district court pointed to the case law that held that an injunction issued pursuant to securities laws requires the SEC to establish, *inter alia*, a reasonable likelihood that the wrong will be repeated absent the injunction. *Id.* The district court concluded that the SEC had not made the requisite showing, noting that "federal courts do not merely rubber-stamp the SEC's requests for statutory injunctions but, rather, must exercise independent judgment to determine whether the SEC has made a 'proper showing.'" *Id.* at 1347, 1349.

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[22] *See also SEC v. Nashwinter*, 559 F. Supp. 33 (E.D. Va. 1983) (construing statutory provision authorizing injunctive relief to require a "proper showing" in an uncontested case as well and stating that this requires "[a]t least some verification that the standard was been met").

Similarly, in *SEC v. Lane*, No. 07-cv-1920, 2009 U.S. Dist. LEXIS 75556 (M.D. Fla. July 10, 2009), a magistrate judge examined proposed consent judgments seeking permanent injunctions and noted that "it is the SEC's burden to establish entitlement to that relief, and the SEC offers no evidence or argument in support of this relief in their motions." *Id.* at *9. Noting further that the defendants neither admitted nor denied the allegations in the complaint, and therefore there was no prima facie showing of past securities violations, the magistrate judge concluded that "[i]t would be inappropriate for the Court to merely 'rubberstamp' the proposed judgments, absent any evidentiary showing of the necessity for injunctive relief." *Id.* at *10–11. On appeal to the district court, the SEC objected to the denial of the consent judgments on the grounds that evidence in favor of a temporary restraining order it had previously sought in the case was sufficient to support injunctive relief and, furthermore, that "courts routinely enter permanent injunctions consented to [by defendants] on a no admit or deny basis." No. 07-cv-1920, 2009 U.S. Dist. LEXIS 75535, at *4–5 (M.D. Fla. Aug. 24, 2009). The district court responded:

> Had the SEC put in its motion the facts presented in its objection, the Magistrate Judge likely would have recommended that the motions be granted. It is not the Court's job to go through the record and find facts to support the injunction. The fact that 'numerous courts around the country, including the Middle District [of Florida] and this Court, routinely enter permanent injunctions' in similar circumstances **does not relieve the SEC of its burden of proving that injunctive relief is necessary in the instant action**.

Id. at *5 (emphasis added).

In the instant case, the limited claim of negligence, in the absence of any evidentiary submission, would normally weigh against imposing injunctive relief. Likewise, the fact that, according to the SEC, Citigroup had discontinued the alleged illegal activity at the outset of the investigation five years earlier and had already implemented some of the proposed remedial reforms, would seemingly make the need for injunctive relief doubtful. (JA 220, 226–27.) Moreover, an injunction prohibiting Citigroup from violating this same statute, Section 17(a)(2), was already in place having been imposed a year earlier in *SEC v. Citigroup Inc. See* No. 10 Civ. 1277 (ESH) (D.D.C. Oct. 8, 2010), EFC No. 19, at 1. And, of course, the SEC confessed that it had not sought to enforce any of its three previously entered injunctions against Citigroup or those entered against any other major financial institution in the last ten years. An independent federal judge could certainly consider these factors relevant to the request for injunctive relief in this case.[23]

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[23] It is worth noting that the vagueness of the broad prohibitory injunctive relief proposed here did not meet the requirements of Rule 65(d) of the Federal Rules of Civil Procedure which states, in pertinent part, that "[e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . ." Fed. R. Civ. P. 65(d). Courts have rejected similar "obey-the-law" injunctions as failing to comply with Rule 65(d). *See SEC v. Goble*, 682 F.3d 934, 949–50 (11th

The SEC contends that the allegations in its complaint that are not admitted or denied would suffice to constitute the requisite "showing" (SEC Br. 21), but as the district court noted at the hearing, "people bring law suits all the time making all sorts of allegations, some of which are proved, some of which are unproved and the unproved ones are no better than rumor and gossip." (JA 209.) This obvious reality is illustrated by the fact that in 2011 the SEC lost 25% of the cases that it tried in district courts.[24] Of more direct relevance, on July 31, 2012, a trial jury held the only Citigroup employee named in connection with this alleged fraud not-liable. Armed with the record of that case, the district court could now assess whether the proposed injunctive relief is reasonable, adequate, and fair; but

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Cir. 2012); *SEC v. Washington Inv. Network*, 475 F.3d 392, 407 (D.C. Cir. 2007); *SEC v. Sky Way Global, LLC*, 710 F. Supp. 2d 1274, 1288–90 (D. Fla. 2010). As a result, the SEC's proposed injunctive relief cannot be said to be "fair" because it potentially subjects a defendant to the formidable power of contempt without sufficient notice of the prohibited conduct. *See Schmidt v. Lessing*, 414 U.S. 437, 476 (1974) ("Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed."). This is all more the case where, as here, a defendant implicitly maintains that the actions taken did not violate the securities laws, which means that Citigroup would be hard pressed to know in the future whether its disclosures ran afoul of Sections 17(a)(2) and (3). As the Seventh Circuit starkly put it: "Rule 65(d) is no mere extract from a manual of procedural practice. It is a page from the book of liberty." *H. K. Porter Co., Inc. v. Nat'l Friction Prods. Corp.*, 568 F.2d 24, 27 (7th Cir. 1977).

[24] In 2011 the SEC commenced 19 trials, winning only 14 of them. *See* http://www.huffingtonpost.com/2012/01/18/sec-mounts-defense-of-enforcement_n_1205318.html (last visited Aug. 13, 2012).

at the time of the order that is the subject of this appeal, the district court had no basis to do so.

D. The District Court Could Not Determine Whether The Proposed Consent Judgment Was Fair, Reasonable, Adequate, or in the Public Interest.

As noted, the parties do not contest that the district court must assess whether the proposed consent judgment is fair, adequate, and reasonable. However, the district court concluded that the standard of review also required consideration of whether such relief contravened the public interest. (JA 236–38.) Although this Court could and should affirm the district court's order on the basis that the district court did not abuse its discretion in holding that, in the absence of any evidence, it could not determine whether the proposed consent judgment satisfied the other components of the standard of review—fair, adequate, and reasonable—nonetheless, since Citigroup vociferously argues that the district court erred in considering the public interest to be part of the standard of review (Citi Br. 21 n.3), a response is called for. The fact is that for decades courts have acknowledged that a district court's review of a proposed consent judgment between a federal agency and a defendant must also include consideration of the public interest.[25]

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[25] *See, e.g.*, *SEC v. Randolph*, 736 F.2d 525, 530 (9th Cir. 1984) (making its own independent determination that "the provisions of the proposed decree have an adequate deterrent effect for it to be in the public interest"); *United States v.*

In this regard, substantial deference is plainly due to the SEC's determination of what is in the public interest, and the district court fully acknowledged as much. (JA 236, 245–46; SPA 4, 13–14.) But, as the district court specifically noted, a district court must still exercise some independent judgment in assessing whether the proposed consent judgment accords with the public interest, not least because concern for the public interest is not meaningfully severable from the required consideration of the consent judgment's fairness, reasonableness, and adequacy. (JA 239; SPA 7.) *See, e.g.*, *Akzo Coatings*, 949 F.2d at 1435 ("Protection of the public interest is the key consideration in assessing

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Trucking Emp. Inc., 561 F.2d 313, 317 (D.C. Cir. 1977) ("[P]rior to approving a consent decree a court must satisfy itself of the settlement's overall fairness to beneficiaries and consistency with the public interest." (citations and internal quotations omitted)); *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1426 (6th Cir. 1991) (stating, in CERCLA context, that court must "ensure that the agency . . . has acted in the public interest."); *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990) (acknowledging that "a consent decree that affects the public interest or third parties imposes a heightened responsibility on the court to protect those interests"); *United States v. Atofina Chems., Inc.*, No. 01-7087, 2002 WL 1832825, at *4 (E.D. Pa. Aug. 5, 2002) ("A consent decree must fairly, adequately, and reasonably resolve the pending controversy, while remaining consistent with the public interest."); *FTC v. Onkyo*, No. 95-1378-LFO, 1995 U.S. Dist. LEXIS 21222, at *2 (D.D.C. Aug. 18, 1995) (entering consent judgment after court ordered and counsel submitted a statement demonstrating "the public interest in entry" of the judgment); *United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 680 (D.N.J. 1989) ("The court's core concern in deciding whether to approve this proposed decree is with ensuring that the decree furthers the public interest. . . ."); *United States v. Hooker Chem. & Plastics Corp.*, 607 F. Supp. 1052, 1057 (W.D.N.Y. 1985) ("[W]here significant public interests are at stake, the court must also determine whether the decree adequately protects the public interest and is in accord with the dictates of Congress." (internal quotation marks omitted)).

whether a decree is fair, reasonable and adequate."). The public interest is measured in part by the settlement's ability to further the goals of the statute that the judgment is designed to enforce. *See, e.g.*, *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1128 (D.C. Cir. 1983) ("[A] court fulfills its responsibility . . . by determining that the settlement is consistent with the statute the consent judgment is to enforce and fairly and reasonably resolves the controversy in a manner consistent with the public interest."). Accordingly, a settlement that does not further the goals of the statute, and thus does not further the public interest, cannot be said to be fair, reasonable, or adequate.

A principal goal of an enforcement action brought, as here, for violation of the antifraud provision of the securities laws is deterrence of such violations. *See SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997) ("The primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains."); *see also SEC v. Bear, Stearns & Co. Inc.*, 626 F. Supp. 2d 402, 406 (S.D.N.Y. 2009) ("The securities laws also authorize civil penalties to serve as a deterrent against securities laws violations. This is because to limit the penalty for fraud to disgorgement is to tell a violator that he may commit fraud with virtual impunity; if he gets away undetected, he can keep the proceeds, but if caught, he simply has to be give back the profits of his wrong." (internal quotation marks and citation omitted)). Thus, evaluation of the

public interest must include an evaluation of whether disgorgement and civil penalties are furthering the objective of deterrence. *See, e.g.*, *SEC v. Randolph*, 736 F.2d 525, 530 (2d Cir. 1984) ("The provisions of the proposed decree have an adequate deterrent effect for it to be in the public interest."). A further goal of the antifraud provisions of the securities laws, especially as amended by the Sarbanes-Oxley Act, is restitution to injured investors, *see Fischbach*, 133 F.3d at 175; *Bear, Stearns*, 626 F. Supp. 2d at 407, so this too must be evaluated.

The SEC correctly advised the district court that the maximum penalty permitted by law was equal to the "gross amount of pecuniary gain" realized by the defendant from the illegal conduct. But the SEC never provided the court with that gross gain figure.[26] Instead, noting that "the statutory maximum penalty that generally may be imposed is roughly equivalent to the amount of disgorgement and prejudgment interest," the SEC mistakenly advised the court that "the

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[26] Commentators have speculated that Citigroup's gross revenue may have exceeded $600 million—substantially more than the $160 million net figure proffered by the SEC. *See, e.g.*, Mem. by Intervener Better Markets, Inc. in Opp. to Proposed Settlement, *SEC v. Citigroup*, No. 11 Civ. 7387 (JSR) (S.D.N.Y. Nov. 5, 2011), ECF No.16, at 10–12. *See also* Dennis M. Kelleher, *Are the SEC and Citigroup Deceiving a Federal Judge?*, HUFFINGTON POST, Nov. 17, 2011, *available at* http://www.huffingtonpost.com/dennis–m–kelleher/are–the–sec–and–citigroup_b_1096270.html (last visited July 30, 2012).

maximum penalty available under the Securities Act is $190 million,"[27] using disgorgement and penalty amounts based on **net** profits**,** rather than **gross** gain. (JA at 97.) This was not fairly reflective of what the law allowed.[28] Moreover, even then, the SEC sought a proposed penalty of only half of that $190 million figure, *i.e.*, $95 million. More importantly, throughout the proceeding below, the parties failed to provide the district court with any information as to the amount of Citigroup's gross gain, thereby effectively preventing the court from having any ability to calculate the maximum possible disgorgement and the maximum possible penalty available under the law.

The parties' total failure to provide information as the amount of Citigroup's gross revenues that were derived from the alleged illegal conduct completely undermines the SEC's claim to this Court that the proposed monetary settlement provided 80% of what it could obtain under the "best-case-trial scenario." (SEC Br. 51.) More importantly, in the absence of the relevant

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[27] On appeal, the SEC inexplicably reduced its calculation of the maximum allowable penalty based on net profits from $190 million to $160 million. (SEC Br. 51.)

[28] *See FTC v. Bronson Partners, LLC*, 654 F.3d 359, 375 (2d Cir. 2011) (citing SEC cases for the proposition that "it is well established that defendants in a disgorgement action are not entitled to deduct costs associated with committing their illegal acts" and noting that, in the context of FTC actions, "three other circuits measure unjust gains in FTC actions by revenues instead of profits" (internal quotation marks omitted)).

information, the court was, once again, left without an adequate factual basis in considering the statutory objective of deterrence.

Although the SEC claims that the district court erred in comparing the penalty size to Citigroup's overall wealth (SEC Br. 53), that comparison is clearly relevant to any consideration of the penalty's deterrent effect.[29] As noted *supra*, the cases governing disgorgement and penalties make clear that disgorgement of ill-gotten gains *and* imposition of civil penalties are important for satisfying the statutory purpose of deterring future violations of securities laws. *Bear, Stearns*, 626 F. Supp. 2d at 406–07; *see also Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006).

Additionally, as the district court noted, the $95 million penalty imposed here was a small fraction of the $535 million penalty imposed by the SEC against Goldman for virtually identical conduct. (JA 145 n.13; SPA 13 n.13.) This discrepancy is especially troubling given the SEC's assertion here and in other cases that "maintaining consistency with penalty amounts previously imposed in

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[29] Assessment of whether the SEC's penalties are sufficient to have any deterrent effect—part of a court's assessment of whether a proposed consent judgment meets the public interest requirement of at least minimal furtherance of the statutory purpose—has not gone unnoticed by the academic community. *See* John C. Coffee, Jr., *Is the SEC's Bark Worse Than Its Bite?*, NAT. L. J. (July 9, 2012) (noting that the "quantitative evidence" as to whether SEC settlements generate "any meaningful deterrence" is "disquieting" and asserting that while the SEC's settlement model "produce[s] some modest compensation to victims, it does not deter").

similar cases" is an important consideration in evaluating the proposed sanctions. (JA 40.) "[T]he degree to which a proposed penalty amount is consistent with penalties previously imposed in comparable cases **is an important indicator of the settlement's fairness and reasonableness**." Mem. of Pl. Secs. and Exch. Comm'n in Supp. of Entry of the Proposed Consent Judgment, *SEC v. Bank of America Corp.*, No. 09 Civ. 6829 (JSR) (S.D.N.Y. Aug. 24, 2009), ECF No. 12, at 32 (emphasis added). Moreover, as the district court noted, the SEC's argument that *Goldman* is different because Goldman was charged with scienter-based violations is effectively refuted by the intentional fraud allegations articulated in the Citigroup and Stoker complaints. (JA 245 n.13; SPA 13 n.13.)

The district court also noted that this modest penalty, in addition to its minimal deterrent effect, did little to compensate injured investors whose loss exceeded $700 million. As previously noted, another important goal of the securities laws is restitution to injured investors. *Fischbach*, 133 F.3d at 175; *Bear, Stearns*, 626 F. Supp. 2d at 407. Indeed, former SEC Chairman Harvey Pitt has described the "agency's principal goal" as "taking care of innocent investors and trying to make them whole when they have been defrauded."[30] Where the SEC acknowledges that investors lost upwards of $700 million, a penalty of $95

[30] *See* Harvey L. Pitt, Chairman, Remarks Before the U.S. Department of Justice Corporate Fraud Conference (Sept. 26, 2002), www.sec.gov/news/speech/spch585.htm.

million that is only half of the *net* profits plus prejudgment interest—not the allowable undisclosed gross revenue—raises basic questions as to whether it adequately or fairly addresses the need for deterrence or the degree of harm to investors.[31]

Citigroup also argues that the district court overlooked the possibility that the SEC might lose at trial or that Citigroup perhaps did not mislead investors, and thus did not give deference to the SEC's concerns about litigation risk. (Citi Br. 44.) The district court did not, in fact, overlook these possibilities, but, absent any facts, had no basis to assess them. (JA 307.) The litigation risk in this case was not a function of any uncertain legal issue but rather was a function of the

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[31] To the extent that the SEC relies on *United States v. Lexington-Fayette Urban County Government*, 591 F.3d 484 (6th Cir. 2010), for the idea that the district court abused its discretion by considering the penalty (SEC Br. 53), the SEC misreads the case. There, the district court rejected a proposed consent judgment, asserting that the penalty was excessively high because those monies would be better spent on remedying Clean Water Act violations. The Sixth Circuit rejected that argument as in tension with the statutory language specifically requiring civil penalties. "If Congress thought a violator's money would be better spent [on remediation], Congress would hardly have provided for civil penalties." 591 F.3d at 487. On remand, the Sixth Circuit left open the possibility that a district court could reject a proposed consent judgment based on its disagreement with the penalty: "It may be that a district court record, without extensive elaboration in a court opinion, demonstrates that a proposed penalty is too high." *Id.* at 488.

parties' total disagreement about the facts—the evidence of which both parties studiously declined to furnish to the court.[32]

E. The District Court's Order Does Not Undermine the SEC's Ability to Enter Into Settlement Agreements.

Contrary to appellant's claims, the district court did not substitute its own views for what the settlement should have looked like. (*See* Citi Br. 31–34.) The district court did not indicate what the penalty should have been or propose additional or different remedial measures. Contrary to the SEC's claim, nothing in the district court's opinion denied the parties the opportunity "to return to the bargaining table to make reasonable adjustments of terms of settlement." (SEC Br. 6.) This and other options were available to be pursued during the seven-month interval between the district court's decision and the scheduled trial date. Even now, were this Court to affirm the district court's ruling, all options remain available to the parties, including asking the court to consider the evidentiary record from the *Stoker* trial as a means of supporting a renewed request for approval of the consent judgment.

Furthermore, appellants' needlessly alarmist claims that the SEC's enforcement program will be hamstrung by the inability to negotiate future settlements (SEC Br. 41; Citi Br. 35–39) ring hollow in light of the district court's

[32] Now, of course, as the result of the substantial record developed in the *Stoker* trial, the court would have a better basis for assessing litigation risk.

true holding and the multiple enforcement options available to the SEC. Since the need for an evidentiary basis does not require an admission of liability, the ability to compromise—the hallmark of all settlements—has hardly been wrested from the SEC.[33]

As the district court stated over and over, it simply lacked any factual basis upon which to determine whether the settlement was fair, reasonable, adequate, or in the public interest. Absent any factual basis, the problematic particulars of this case presented "substantial" reasons for not approving the proposed consent judgment and not serving as a "rubber stamp." (JA 316.) In sum, the district court's order was clearly a proper exercise of judicial discretion.

F. The SEC's Position Threatens the Constitutional Independence of the Federal Judiciary.

Finally, it would be remiss not to note that the position taken by the parties here threatens the constitutional independence of the federal judiciary. As

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[33] Indeed, while this case is on appeal, the SEC continues to settle cases on a "no admit, no deny" basis. *See, e.g.*, *SEC v. Magyar Telekom, PLC*, No. 11 Civ. 9646 (CMC) (S.D.N.Y. Jan. 3, 2012), ECF No. 3; *SEC v. Bankosky*, No. 12 Civ. 1012 (HB) (S.D.N.Y. Mar. 15, 2012), ECF No. 5; *SEC v. Harbert Mgmt. Corp.*, 12 Civ. 5029 (PAC) (S.D.N.Y. July 3, 2012), ECF No. 3. However, the SEC's abrupt change in policy after the district court's ruling—no longer permitting "no admit/no deny" settlements with defendants who have pleaded guilty to charges or been convicted in parallel criminal proceedings—underscores the fact that, in practice, the SEC's settlement policy has not always been an exemplar of reason. *See* Statement of Robert Khuzami (Jan. 7, 2012), *available at* http://www.sec.gov/news/speech/2012/spch010712rsk.htm (last visited Aug. 12, 2012).

the district court stated, it needed to "exercise a modicum of independent judgment" in evaluating the proposed consent judgment because "[a]nything less would not only violate the constitutional doctrine of separation of powers but would undermine the independence that is the indispensable attribute of the federal judiciary." (JA 238–39; SPA 6–7.) *See N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982) ("[O]ur Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary."). Although the district court cannot interfere with the SEC's responsibility to execute the securities laws, appellants give short shrift to the careful balance of authority inherent in the principles of separation of powers. *See Miller v. French*, 530 U.S. 327, 342 (2000). Depriving the district court of its capacity to reach a sound and reasoned judgment regarding the propriety of a proposed consent judgment and the imposition of injunctive relief would undermine the judiciary's independence and thereby threaten the constitutional balance of power. *United States v. Rojas*, 53 F.3d 1212, 1214 (11th Cir. 1995) ("[S]eparation of powers would be implicated when the actions of another Branch threaten an Article III court's independence and impartiality in the execution of its decisionmaking function.").

The SEC's and Citigroup's concept of deference—in which courts would be effectively reduced to potted plants—would surely undermine the

independence of the federal judiciary. Although appellants make the uncontroversial points that consent decrees involve compromise and that they are favored because they conserve judicial resources (SEC Br. 22, 24; Citi Br. 32)—a consideration not applicable here—those general characteristics do not relieve a district court of its obligation to ensure that any given consent judgment satisfies judicial review.[34] Nor does deference mean that courts mechanistically and mindlessly apply some formulaic standard. Rather, deference must be considered in the context of the particular demands of any given case, as displayed by the district court here. "The true measure of the deference due depends on the persuasive power of the agency's proposal and rationale, given whatever practical considerations may impinge and the full panoply of the attendant circumstances." *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987).[35]

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[34] Citigroup's quotation from *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971), which merely reiterates the basic characteristics of consent decrees, offers scant support for its claim that the district court's review should be extremely limited. In that case, the government argued in favor of enforcing an injunction against a non-party to a consent decree. The Supreme Court disagreed, noting that the scope of the decree, because it embodies a compromise, "must be discerned within its four corners." *Id.* at 682. *Armour* thus addresses the interpretation of the scope of consent decrees, not the standard of review or deference to a federal agency.

[35] Citigroup therefore errs in suggesting that the only situations in which a district court could reject a proposed settlement agreement are where the consent judgment exceeds the scope of the court's authority, would violate other laws, or would impose an unreasonable burden on judicial resources. (*See* Citi Br. 30.)

Furthermore, appellants' arguments in favor of deference—predicated as they are on a critical misconception that the district court arrogated to itself the power to determine the appropriate settlement policy for the SEC—find no support in the cases they cite repeatedly.

For example, the SEC argues that the district court's inquiry is foreclosed by the D.C. Circuit's decision in *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995), because "the district judge, when conducting a public interest inquiry, may not 'construct his own hypothetical case and then evaluate the decree against that case,' but rather must assess the complaint as presented against the proposed judgment," *id.* at 1459, and that, under *Heckler v. Chaney*, 470 U.S. 821 (1985), the district court cannot question the SEC's motives for bringing only negligence charges. (SEC Br. 54–55.) The SEC's reliance on these two cases is entirely misplaced.

In *Chaney*, plaintiffs attempted to compel the FDA to pursue an enforcement action on the ground that the use of certain drugs to carry out the death penalty violated the Federal Drug and Cosmetic Act. The Supreme Court held that the FDA's refusal to initiate an enforcement action was an agency decision that was presumptively unreviewable. 470 U.S. at 832. *Chaney* thus suggests that the district court cannot force the SEC to investigate or bring certain charges, because the decision to bring charges involves allocative decisions that

only the agency is equipped to make.[36] Here, the district court did not force or require the SEC to bring scienter-based charges against Citigroup as a condition for approving the consent judgment. (*See* SEC Br. 54–55.) It simply noted the puzzling discrepancy between allegations sounding in intentional fraud and a charge of mere negligence.

Appellants both rely heavily on *Microsoft* to assert that the district court exceeded its authority and did not give due deference to the SEC. (Pl. Br. 45–46; Citi Br. 22–23.) In fact, the two cases present strikingly different approaches to disapproval of proposed settlements.

The *Microsoft* district court's primary objection to the proposed settlement was that the government had not investigated and was not pursuing charges—not referenced in the government's complaint—that Microsoft had engaged in anticompetitive behavior known as "vaporware" (which the district

[36] The SEC argues that *New York State Law Department v. FCC*, 984 F.2d 1209 (D.C. Cir. 1993), applies *Heckler* to settlement decisions, thus suggesting deference to the SEC's decision to settle. (SEC Br. 43.) That case, however, addressed whether a third party could intervene in an enforcement action by the FCC against two affiliates of NYNEX, which resulted in the FCC and the NYNEX affiliates entering into a consent decree. The New York State Department of Law sought to challenge the entry of the consent decree and to require the FCC to pursue the action. The court held that a third-party action seeking judicial review of the consent decree with an eye to forcing the FCC to reopen the proceedings was not available. In no way did the court in *New York State Law Department* remotely touch on the original court's role in evaluating whether the consent decree between the FCC and the NYNEX affiliates was fair, reasonable, adequate, or in the public interest.

court learned by reading a book called *Hard Drive*, but which the government believed were not antitrust violations). 56 F.3d at 1452–53. Thus, in *Microsoft*, the D.C. Circuit did not reject a requirement that the district court have some evidentiary basis by which to determine whether a consent decree is fair, reasonable, and in the public interest, but rather, objected to the district court's efforts to pry open the government's investigative practices and assert claims that the government did not allege and maintained were not even violations of the antitrust laws.

The *Microsoft* district court sought "at a minimum": (1) "The broad contours of the investigation" such as the "particular practices and conduct of the defendant that were under investigation along with the nature, scope and intensity of the inquiry"; (2) What conclusions the government reached regarding those particular practices and conduct; (3) What areas were discussed in settlement discussions between the government and defendant and, specifically, "what, if any, areas were bargained away and the reasons for their non-inclusion in the decree"; (4) "With respect to the areas not discussed at the bargaining table or not bargained away, what are the plans for the Government to deal with them" and asking if "the investigation [is] to continue, and if so, at what intensity, or if the investigation is to be closed, then the Government must explain why it is in the public interest to do so." *Id.* at 1455. By contrast, the district court here simply found that the

parties had not provided *any* facts whatsoever to support the proposed consent judgment and did not inquire into what other CDO transactions the SEC investigated, how in-depth the investigation was, what areas were discussed in settlement negotiations, what concessions were made by the parties in reaching the proposed settlement, or whether the SEC would continue to pursue investigations into other practices by Citigroup. The district court here did not seek to acquire information about other practices outside the complaint, but rather, made the proper inquiry into whether "the decree was appropriate to the complaint." 56 F.3d at 1457.

Nor is the parties' reliance on *SEC v. Randolph*, 736 F.2d 525 (9th Cir. 1984), for the proposition that a district court must defer to the SEC's assessment of the public interest any more availing.[37] In reversing the district court's disapproval of a consent judgment because the disgorgement figure did not include what appeared to be an inconsequential $8,000 interest payment, *Randolph* noted that "[t]he initial determination whether the consent decree is in the public interest is best left to the SEC and its decision deserves our deference," but then

[37] The SEC's selective citation to *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961), to support its deference argument is somewhat misleading. (*See* SEC Br. 42.) There the Court was dealing with *private* plaintiffs' attempt to intervene on the ground that *their* private interests were not adequately represented by the government in negotiating a consent decree. The case does not address the role of a court in evaluating an original consent decree and determining whether the public interest is adequately represented.

made its own determination that the judgment's deterrent effect was sufficient to satisfy the public interest. *Id.* at 530.

Moreover, the particular facts of *Randolph* limit the case's relevance to that specific dispute. *Cf. Hege v. Aegon USA, LLC*, 780 F. Supp. 2d 416, 438 (D.S.C. 2011) (rejecting *Randolph*'s relevance to that case because *Randolph* did not "involve the peculiar factual record and circumstances that exist here"); *see also SEC v. Globus Grp., Inc.*, 117 F. Supp. 2d 1345, 1348 (S.D. Fla. 2000) (arguing that *Randolph* stands for the idea that "the SEC is entitled to *some deference* as to whether certain penalties for previous violations of the securities laws are in the public interest" but is not entitled to deference as to whether injunctive relief is warranted).[38] As the district court in *Globus Group* explained, *Randolph* only addressed the limited question of deference to the agency as to the deterrent effect of the penalty.

> Whether a court should issue an injunction under § 77t(b) or § 78u(d)(1) that would punish future violations under its contempt power is a completely different matter. The SEC has no particular expertise in determining whether a proper showing has been made to support an injunction under the law. . . . In contrast to the factual issue in *Randolph* regarding what penalty would sufficiently deter those particular defendants from future violations, questions relating to the sufficiency of the evidence presented and its legal significance are

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[38] *See also SEC v. Lane*, No. 07-cv-1920, 2009 U.S. Dist. LEXIS 75556, at *2 (M.D. Fla. July 10, 2009) (noting that the deference identified in *Randolph* "is not without limits" and stating that "the SEC must still show entitlement to the injunctive relief it seeks").

> within the peculiar expertise of the federal judiciary. The SEC is not entitled to deference on such questions.

Id. at 1348.

Appellants' concept of deference would deprive the court of its independence in determining the circumstances under which the court's formidable contempt powers are appropriately wielded.

II.

THIS COURT LACKS APPELLATE JURISDICTION TO REVIEW THE DISTRICT COURT'S INTERLOCUTORY ORDER, AND MANDAMUS IS ENTIRELY UNWARRANTED.

A. The District Court's Order Did Not "Refuse" An Injunction, And Appellants Cannot Demonstrate Irreparable Harm Justifying Interlocutory Review.

The merits aside, this Court does not have appellate jurisdiction to review the district court's order.[39] The parties' jurisdictional claim under 28 U.S.C. § 1292(a)(1) is effectively refuted by Supreme Court precedent and the prior decisions of this Court.

Section 1292(a)(1) authorizes appeals from "[i]nterlocutory orders of the district courts . . . refusing . . . injunctions." 28 U.S.C. § 1292(a)(1). As

[39] Even the motions panel, although lacking the benefit of adversarial briefing, recognized that "it is unclear whether interlocutory appeal lies from an order refusing to approve a proposed consent judgment" (JA 305), citing this Court's decision in *New York v. Dairylea Co-op., Inc.*, 698 F.2d 567, 570 (2d Cir. 1983), which denied interlocutory appeal from the denial of a consent judgment.

demonstrated above, the order of the district court declined to approve the proposed consent judgment in the absence of any facts, but the court did not issue an order "refusing" an injunction that is immediately appealable under Section 1292(a)(1). *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981) ("[T]he District Court's order declining to enter the proposed consent decree did not in terms 'refus[e]' an 'injunction.'"). Nor did the district court's order have the "practical effect" of refusing an injunction where such denial would result in "a serious, perhaps irreparable consequence" justifying immediate appeal. *See id*. at 84.

In other words, the mere inclusion of injunctive relief in a proposed consent decree is not "sufficient to render the disapproval of a proposed settlement agreement appealable." *New York v. Dairylea Co-op., Inc.*, 698 F.2d 567, 570 (2d Cir. 1983). Instead, appellate review is permitted "only of orders which might result in serious, irreparable harm *to the party to whom injunctive relief is denied*." *Id.* (emphasis added). Thus, in *Carson*, where seasonal employees of the Richmond Leaf Department brought a class action pursuant to Title VII of the Civil Rights Act of 1964 asserting racial discrimination by the defendant, the proposed consent decree, which the district court rejected, imposed immediate changes on the defendant's hiring practices. *See Carson v. Am. Brands, Inc.*, 446 F. Supp. 780, 783 (E.D. Va. 1977). The Supreme Court held that the district

court's refusal to enter the consent decree was immediately appealable because (1) "prospective relief was at the very core" of the decree, and (2) the refusal to approve it would have "serious, perhaps irreparable, consequences," particularly on former employees whom the district court had concluded with finality were precluded from any relief under any circumstances—even if plaintiffs prevailed at trial. 450 U.S. at 84, 87 n.12.

Neither of *Carson*'s criteria is met in this case. As to the first criterion—that prospective relief be at the "core" of the decree—while the injunctive relief proposed in the consent judgment is important in the sense of implicating the court's contempt power (which is why a factual basis was especially necessary), it is not at the "core" of any concern that implicates the need for immediate, interlocutory appeal. Thus, in *Dairylea*, this Court contrasted the *Carson* settlement with an agreement that "basically sets terms for money payments and . . . simply orders Dairylea not to violate the law," and held that the latter scenario does not justify interlocutory review. 698 F.2d at 570. Likewise here, the settlement seeks a monetary penalty, confirms some prophylactic measures that the parties agree are already largely in place (JA 226–27), and orders Citigroup not to violate the law in the future, an injunction already in place as a result of a prior consent judgment settlement entered in *SEC v. Citigroup Inc. See*

No. 10 Civ. 1277 (ESH) (D.D.C. Oct. 8, 2010), ECF No. 19.[40] That the proposed injunctive relief is not at the "core" of any issue implicated by the need for immediate appeal is further buttressed by the fact that appellants' arguments on appeal focus almost exclusively on being able to settle without an admission of liability by Citigroup, and not on the need to enjoin Citigroup. *Cf. Grant v. Local 638*, 373 F.3d 104, 108 (2d Cir. 2004) (noting that equitable relief in settlement was tangential to core settlement provision capping union's liability for back pay).[41]

As to the second criterion—that refusal to immediately approve the injunctive relief would have "serious, perhaps irreparable, consequences" —denial of injunctive relief at this stage of the proceedings would not cause serious, irreparable harm to the SEC, or, for that matter, to Citigroup, because the parties

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[40] The SEC, as it concedes, has done virtually nothing to enforce prior "obey-the-law" injunctions against either Citigroup or other financial institutions. (JA 101.)

[41] The SEC erroneously conflates the district court's statement that its refusal to deploy its injunctive powers in the absence of a sufficient factual basis was "central" to its finding that the proposed settlement was not fair, reasonable, adequate or in the public interest with *Carson*'s test that the injunctive relief be "at the core" of the proposed settlement. (*See* SEC Br. 4.) The former reflects the ground for the district court's inability to conclude that the standard of review was satisfied, whereas the latter refers to the centrality of the injunctive relief in the settlement. Put another way, the parties asked the district court to approve their entire settlement, including the injunctive relief, and the district court held it lacked a basis to approve any part of it, including the extraordinary remedy of injunctive relief; but this says nothing about whether any given part of the proposed consent decree is core or peripheral in the sense that pertains to interlocutory appeals. These are totally distinct and independent issues.

would not lose the ability "to compromise their dispute on mutually agreeable terms." *Carson*, 450 U.S. at 86. Indeed, the sole "harm" to the parties occasioned by the district court's order is that, because their settlement has not been approved, they must either come back to the district court with the evidentiary submission it needs to assess the settlement or else proceed with the litigation. This Court in *Dairylea* expressly held that that was not the kind of "harm" that met the criteria of *Carson*. 698 F.2d at 570. Similarly, the Ninth Circuit, in dismissing for want of jurisdiction an interlocutory appeal from the denial of a settlement, explained that:

> It is of course true that the parties were not permitted to settle the case on terms they found mutually agreeable; that's true of every order disapproving a proposed settlement. But it's not by itself sufficient to meet the second *Carson* requirement. *Carson*'s conclusion that the order would have serious and potentially irreparable consequences relied on its further finding that the order completely foreclosed any further settlement negotiations short of outright admission of [liability] . . . and complete restructuring of the class relief. If the parties are not being denied the right to settle the case on any mutually agreeable terms, but merely being denied the right to settle the case on the particular terms of the current proposed consent decree, which the district court found unreasonable, this is not a sufficiently serious consequence for the order to be appealable.

In re Touch Am. Holdings, Inc. ERISA Litig., 563 F.3d 903, 906 (9th Cir. 2009) (internal quotation marks and citations omitted).

At most, appellants have demonstrated only "the temporary loss of a bargain, which does not by itself constitute irreparable harm." *Grant*, 373 F.3d at 109. Mere postponement of injunctive relief would not cause the sort of serious

consequence worthy of interlocutory review. The SEC has already acknowledged that the conduct at issue had ceased by the time the SEC began its investigation five years ago (JA 220), and thus no irreparable consequence would follow from a delay in imposing the "obey-the-law" injunction (particularly where Citigroup was already subject to the same injunction entered in another case); the same can be said of the prophylactic remedies designed to insure against any repetition of that conduct, many of which have already been voluntarily instituted by Citigroup. (JA 226–27.) Citigroup's suggestion that the risk of litigation imposes a potentially irreparable harm on *Citigroup* (Citi Br. 51)—aside from not satisfying *Carson*'s test, as *Grant* suggests[42]—is also irrelevant since Citigroup was not the party denied injunctive relief and thus has no standing to appeal. *See infra* Point II.B. And none of the cases cited by appellants—most of which involve factual scenarios and legal claims that make them inapplicable to the instant dispute—compels a contrary conclusion. *See, e.g.*, *United States v. Hialeah*, 140 F.3d 968, 974 (11th Cir. 1998) (denial of Title VII consent decree is automatically

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[42] *See* 373 F.3d at 111 (finding "the disapproval of a consent decree solely because of the risks of litigation" does not constitute irreparable harm); *see also Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 836 (1994). In *Digital Equipment*, a unanimous Supreme Court stated that the "refusal to enforce a settlement agreement claimed to shelter a party from suit altogether" was not a sufficient basis for an interlocutory appeal. *Id.* at 884. Although the case addresses appeals pursuant to the collateral order doctrine under Section 1291, it nevertheless relies on a consistent rationale that denial of a settlement agreement—and thus having to litigate one's claims—is not the sort of harm that supports interlocutory review.

appealable); *Stovall v. City of Cocoa, Fla.*, 117 F.3d 1238, 1241 (11th Cir. 1997) (denial of restructuring plan changing method of electing city council members might not be resolved before next election); *United States v. Colorado*, 937 F.2d 505, 507–09 (10th Cir. 1991) (district court improperly shifted burden of proof of compliance with injunction from one party to the other).

B. Citigroup Does Not Have Standing to Appeal.

Citigroup lacks standing to appeal and should be dismissed outright. In *Great Am. Audio Corp. v. Metacom, Inc.*, 938 F.2d 16 (2d Cir. 1991), the plaintiff appealed from the district court's order denying preliminary and permanent injunctive relief pursuant to the Lanham Act, and the defendant appealed from the district court's findings of secondary meaning and likelihood of confusion. This Court held that jurisdiction was available under Section 1292(a)(1) to review the preliminary injunction. *Id.* at 18. After affirming that portion of the district court's order, the Court turned to the defendant's cross-appeal and stated:

> As to the cross-appeal of Metacom, we dismiss for lack of jurisdiction because even to the extent that the May 7, 1991 order is characterizable as an order that is appealable, it is not an order that is appealable by Metacom. In order to have standing to appeal, a party must be aggrieved by the judicial action from which it appeals. The May 7, 1991 order of the district court denied relief against Metacom. Thus, although Metacom is entitled to urge that we affirm the district court's decision on any basis submitted to that court and supported by the record, including the basis that the court should have made findings favorable to it, Metacom is not entitled to cross-appeal.

Id. at 19.

That Citigroup would need to establish that it is aggrieved by the denial of injunctive relief is confirmed by this Court's admonition that Section 1292(a)(1) authorizes appeals "only of orders which might result in serious, irreparable harm to the party to whom injunctive relief is denied." *Dairylea*, 698 F.2d at 570. *See also Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 745 (1976) (noting that "there was no denial of any injunction sought by [defendant] and [therefore] it could not avail itself of [Section 1292(a)(1)'s] grant of jurisdiction").[43] Since the SEC is the party seeking injunctive relief, Citigroup cannot claim any irreparable harm from its temporary denial that would grant standing to appeal the district court's order.

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[43] *Grant* is not to the contrary. Although it was the defendant Local 28 (the party to be enjoined) that appealed, that case involved the denial of a consent decree that modified a previously entered injunction. 373 F.3d at 106. This Court, in concluding that the union had not suffered any irreparable harm, expressly did not reach the issue of whether the right of appeal under *Carson* only applies where the appellant has sought an injunction *against* the other parties to the consent agreement. *Id.* at 108 and n.4. *Grant* simply noted that standing in that instance was complicated by the fact that the defendant had sought a *modification* of the existing injunctive relief against it, *id.* at 108 n.4, leaving open the possibility that the denial of that modification could give rise to an irreparable harm to the defendant. Citigroup has not demonstrated any harm, much less an irreparable one, from the denial of the injunctive portion of the consent decree, nor, for that matter, from the disapproval of the settlement itself.

C. Mandamus is Entirely Unwarranted.

The SEC has not remotely satisfied the stringent standard for mandamus relief.[44] Mandamus "is a drastic and extraordinary remedy reserved for really extraordinary causes," and the writ is issued only in "exceptional circumstances amounting to a judicial 'usurpation of power' or a 'clear abuse of discretion.'" *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004) (internal quotation marks and citations omitted). At a minimum, three conditions must be met before the writ may issue—the party seeking relief must have "no other adequate means to attain the relief he desires," the petitioner must show that his right to the writ is "clear and indisputable," and the issuing court must be satisfied that the writ is appropriate under the circumstances. *See id.* at 380–81. The SEC cannot meet any one of these requirements, much less all three.

The first condition is not satisfied because the SEC still has the opportunity to obtain entry of the relief it seeks by the simple expedient of submitting evidence to the district court. Although the SEC contends that it will be forced to go to trial and thus will expend resources and face the risk of litigation it sought to avoid by entering into a consent judgment (SEC Br. 59), that contention is meritless. The trial against Citigroup has been stayed pursuant to this Court's order. As previously noted, if the district court's order is affirmed on appeal,

[44] Citigroup did not petition this Court for a writ of mandamus.

nothing prevents the parties from returning to the district court and filing the same or a modified consent judgment along with the evidence now provided by the Stoker trial record, thereby obviating the problem underlying the district court's initial ruling. In short, the SEC has not lost the benefit of a consent judgment.

Even if the SEC were obliged to try the case against Citigroup, the denial of a consent judgment would not be grounds for mandamus relief. *See Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) ("It is, of course, well settled, that the writ is not to be used as a substitute for appeal, even though hardship may result from delay and perhaps unnecessary trial."); *In re Traffic Exec. Ass'n-E. R.R.s*, 627 F.2d 631, 634 (2d Cir. 1980) (denying writ where district court rejected settlement agreement on the ground that "[t]he likelihood that class members will find it tedious and time consuming to prove their losses does not make this an out-of-the-ordinary case"). Nor can the SEC plausibly claim irreparable harm from the expenditure of resources and risk of litigation given that it has already expended those very resources in trying the case against Stoker. Whether by consent judgment or successful adjudication at trial, the SEC still has the opportunity to obtain the principal relief (disgorgement, penalty, and injunctive relief) it sought to obtain in its settlement with Citigroup.

The second condition is not satisfied because the SEC's right to the writ is neither clear nor indisputable. As already fully demonstrated in Point I,

supra, the SEC fundamentally mischaracterizes the district court's holding when it claims that the district court established a rule barring all consent judgments absent an admission of liability. (SEC Br. 60.) Faced with a series of puzzling anomalies and a total disagreement between the parties as to the underlying facts, the district court properly exercised its independent judgment and concluded that, in the case at hand, the absence of any evidentiary basis prevented the district court from being able to determine whether the standard of review was satisfied. A district court's exercise of its discretion to review a consent judgment is neither novel nor an usurpation of power. Furthermore, the SEC cannot credibly argue that the exercise of discretion to reject this particular consent judgment imposed a "bright-line" rule that will affect the SEC's "entire enforcement program." (SEC Br. 59.) On the contrary, proposed SEC consent judgments, without admissions of liability, filed subsequent to the district court's decision in this case have regularly been approved, albeit sometimes only after the SEC has been obliged to submit some evidence to justify the proposed decree.[45]

[45] As to recent approvals in general, *see, e.g.*, *SEC v. Magyar Telekom, PLC*, No. 11 Civ. 9646 (CMC) (S.D.N.Y. Jan. 3, 2012), ECF No. 3; *SEC v. Bankosky*, No. 12 Civ. 1012 (HB) (S.D.N.Y. Mar. 15, 2012), ECF No. 5; *SEC v. Harbert Mgmt. Corp.*, 12 Civ. 5029 (PAC) (S.D.N.Y. July 3, 2012), ECF No. 3. As to recent approvals only after evidence was submitted, *see, e.g.*, *SEC v. Koss Corp.*, 11-C-991 (RTR) (E.D. Wisc. Dec. 20, 2011), ECF No. 5, at *1 (requesting that the SEC "provide a written factual predicate" justifying the settlement's entry). In *Koss*, after the SEC responded to the court with a written submission and exhibits, the

Finally, the third condition is not satisfied because there are no circumstances that would justify the grant of this extraordinary remedy. The scenario presented by this case is comparable to other cases in which this Court has denied mandamus petitions seeking to overturn the denial of a settlement agreement. For example, in *In re Traffic Executive Association-Eastern Railroads*, 627 F.2d 631 (2d Cir. 1980), defendants filed a writ of mandamus directing the district court to approve a proposed settlement of a class action that the district court, concerned about the adequacy of the settlement, rejected after holding several fairness hearings. *Id.* at 633. This Court indicated that it would not issue mandamus with respect to a discretionary order "except in most extraordinary circumstances" and that the district court's disapproval of the proposed settlement, even though no objections to the settlement had been voiced, did not fall within that category. *Id.* at 634. In concluding that the district court had not clearly abused its discretion, the Court noted that "[t]he district court was required to exercise its independent judgment to protect the interests of class absentees, regardless of their apparent indifference." *Id.*; *see also In re Touch Am. Holdings*, 563 F.3d at 907.

Furthermore, none of the cases relied on by the SEC provides even a sliver of support for its petition. (*See* SEC Br. 60–61.) Those cases did not involve the routine exercise of discretion by a district court in evaluating a settlement

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district court approved the settlement. *See id.* (E.D. Wisc. Feb. 22, 2012), ECF No. 9, at 3.

agreement. In *In re IBM Corp.*, 687 F.2d 591, 599–600 (2d Cir. 1982), this Court granted mandamus relief where the district court refused to enter a stipulation dismissing a thirteen-year antitrust suit and prolonged the case with protracted consideration of whether the Tunney Act applied to stipulations of dismissal, even though the plain language and statutory history clearly indicated that it did not. Similarly, in *Schlagenhauf*, 379 U.S. at 110, the Supreme Court held that mandamus relief was warranted to address the district court's power to order the mental and physical examination of a defendant whose condition was not in controversy. Finally, in *In re Smith*, 926 F.2d 1027 (11th Cir. 1991), the Eleventh Circuit found the district court's refusal to approve a settlement between a school board and a mother, involving a special education program for her daughter, exceeded the court's authority because the judge's stated refusal to approve the settlement based on the "'unrepresented interests' of Florida taxpayers" conflicted squarely with Florida law that only the child's interest could be considered in evaluating the settlement.[46] *Id.* at 1029.

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[46] For different reasons, *SEC v. Rajaratnam*, 622 F.3d 159 (2d Cir. 2010), which addressed the grant of a motion to compel production of wiretap recordings, is entirely irrelevant here. The Court in that case found that there were no adequate alternative remedies available, because the privacy interests harmed by the disclosure order could not be adequately remedied on final appeal and because the crucial, threshold issue of the legality of the wiretaps was pending before another judge. *Id.* at 170. No comparable issues of premature disclosure and otherwise irremediable invasions of privacy are presented by this dispute. The same is true of Citigroup's reliance on *In re City of New York*, 607 F.3d 923 (2d Cir. 2010),

In this case, the obligation of a district court to independently evaluate a consent judgment presented by a federal agency for approval is by no means novel, even if appellants disagree with the district court's determination that the standard was not met in this case. *See, e.g.*, *Schlagenhauf*, 379 U.S. at 112 ("The writ of mandamus is not to be used when the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction." (internal quotation marks omitted)); *In re City of New York*, 607 F.3d 923, 940 (2d Cir. 2010) (noting that "an allegedly incorrect application of a well-developed principle does not, by itself, give rise to such a novel and important issue as to warrant mandamus review" (internal quotation marks omitted)). Granting a writ under these circumstances would suggest that the denial of a settlement agreement always warrants mandamus relief, and in so doing, potentially runs the risk of eviscerating the strict mandate that mandamus relief be afforded only under extraordinary circumstances. Accordingly, the SEC's petition for mandamus should be denied.

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which found that the City had no other adequate means to challenge an order to disclose undercover police reports since the disclosure could not be remedied on appeal once the reports' contents had been divulged.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court affirm the district court's November 28, 2011 Order or, in the alternative, dismiss the appeal for want of jurisdiction and deny the petition for a writ of mandamus.

Dated: August 13, 2012
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(B)

I hereby certify that this brief complies with the Court's order granting an extension of the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B)(i) to permit an oversized brief of 21,000 words. This brief contains 19,969 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certificate, I relied on the word count program in Microsoft Word.

By: /s/ Patrick P. Garlinger
Patrick P. Garlinger

Dated: August 13, 2012

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff-Appellant Cross-Appellee,	:	Nos. 11-5227 (L) 11-5242 (XAP) 11-5375 (Con)
v.	:	
CITIGROUP GLOBAL MARKETS INC.,	:	
Defendant-Appellee Cross-Appellant.	:	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of August, 2012, a true and correct copy of the foregoing Brief of Appointed Pro Bono Counsel for the United States District Court was served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h)(1) & (2).

/s/ Patrick P. Garlinger
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