11-5227

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellant/Cross-Appellee/Petitioner,

v.

CITIGROUP GLOBAL MARKETS INC.,
Defendant-Appellee/Cross-Appellant.

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

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION,
APPELLANT/PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

Cases (Continued) **Page**

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

<u>**Miscellaneous (Continued)**</u> <u>**Page**</u>

11-5277

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INTRODUCTION

To resolve charges that Citigroup Global Markets Inc. violated the antifraud provisions of the Securities Act of 1933, the Securities and Exchange Commission and Citigroup entered into a consent judgment that imposed injunctive and monetary relief. Citigroup consented to this relief without admitting or denying the allegations in the complaint. The district court rejected the consent judgment, holding that it was not fair, reasonable, adequate, or in the public interest because it was not based on "facts, established by either admissions or by trials." SPA 15.

The district court's order, which this Court has jurisdiction to review under either 28 U.S.C. 1292(a)(1) or its mandamus authority, should be reversed. It rests on the broad holding that an injunctive consent judgment cannot be approved "on the basis of allegations unsupported by any proven or acknowledged facts." SPA 14. Such a bright-line rule is erroneous. For over a century, courts have approved thousands of consent judgments that impose substantial injunctive relief based solely on allegations in complaints filed by federal government agencies. In doing so, they have given substantial deference to the agencies' decisions to settle on those terms. The district court, by contrast, failed to give any real deference to the Commission's judgment that the consent judgment served the public interest, and the court thus intruded upon the executive power vested in the Commission.

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. But it is not the court's role to dictate how the Commission should settle its cases, particularly when the Commission obtained in settlement most of what it could have obtained at trial without any litigation risk and without consuming the Commission's finite resources. The district court's justifications for rejecting the consent judgment constituted an abuse of its discretion, and this Court should accordingly vacate the district court's order and remand with instructions to enter the consent judgment as proposed.

STATEMENT OF JURISDICTION

The Commission alleged that Citigroup violated Sections 17(a)(2) and (3) of the Securities Act of 1933, 15 U.S.C. 77q(a)(2)–(3). JA 14–34. The district court exercised jurisdiction pursuant to Section 22(a) of the Securities Act, 15 U.S.C. 77v(a).

At the same time it filed its complaint, the Commission presented a consent judgment to the district court for approval. In addition to requiring Citigroup to pay $285 million, the judgment ordered prohibitory injunctive relief (permanently enjoining Citigroup from further violations of the charged provisions of the Securities Act) and mandatory injunctive relief (requiring Citigroup to change its policies for creating and selling certain securities). JA 42–51. The district court rejected the proposed consent judgment on November 28, 2011, stating that "the injunctive power of the judiciary" cannot be deployed if it "does not rest on facts—cold, hard, solid facts, established either by admissions or by trials." SPA 14–15. The court further directed the parties to prepare for trial. SPA 15.

The Commission filed a timely notice of appeal on December 15, 2011, JA 248–51, and Citigroup filed a timely notice of appeal on December 21, 2011, JA

271–72. The Commission separately petitioned for a writ of mandamus on December 29, 2011. JA 290–93. This Court stayed the district court proceedings pending resolution of the appeals and the mandamus petition, finding that the Commission had shown "a strong likelihood of success" on the merits and satisfied the other prerequisites for a stay. *SEC v. Citigroup Global Markets, Inc.*, 673 F.3d 158, 166 (2d Cir. 2012) (per curiam) (*Citigroup Stay Order*), reprinted JA 301–17.

This Court has jurisdiction to review the district court's order pursuant to 28 U.S.C. 1292(a)(1), which authorizes appeals from "[i]nterlocutory orders of the district courts * * * refusing * * * injunctions." The district court refused the Commission's request for "wide-ranging injunctive remedies" enforced by "the formidable power of contempt." SPA 8. The court's refusal to "deploy[] the "injunctive power of the judiciary" was central to its decision; the court stated that a request for "substantial injunctive relief, enforced by the Court's own contempt power, on the basis of allegations unsupported by any proven or acknowledged facts" is not "in the public interest." SPA 14–15. Under the "plain terms" of Section 1292(a)(1), such an order is immediately appealable without showing that the refusal had a "'serious consequence.'" *CFTC v. Walsh*, 618 F.3d 218, 224 (2d Cir. 2010), citing *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981) ("*Carson* does not impose an additional 'serious consequence' requirement for appellate jurisdiction over orders that explicitly * * * refuse * * * injunctions.").

At the very least, the order is immediately appealable because it "had the practical effect" of refusing an injunction and satisfied *Carson's* "serious consequence" test. 450 U.S. at 83. If the order were not "immediately appealable," it would have a "'serious, perhaps irreparable, consequence'" for the Commission and Citigroup—the loss of their right "to compromise their dispute on mutually agreeable terms." *Id*. at 86. Consent judgments are "predicated on an express or implied condition that the parties would, by their agreement, be able to avoid the costs and uncertainties of litigation." *Id*. at 87. The denial of the consent judgment—and the order to prepare for trial—would "radically affect" that condition. *Id*.

This case is directly in line with *Carson*, where a district court had rejected a proposed consent judgment requiring the defendants to undertake certain hiring reforms so as to prevent racial discrimination. *Id.* at 81. The district court had refused to "enter any decree containing remedial relief provisions that did not rest solidly on evidence of discrimination." *Id*. at 87 n.12, citing 446 F. Supp. 780, 788–90 (E.D. Va. 1977). Because the district court had "made clear that nothing short of an admission of discrimination" would allow it to approve the consent judgment, the Supreme Court held that the district court order had a "'serious, perhaps irreparable, consequence'"—it "effectively ordered the parties to proceed to trial and to have their respective rights and liabilities established within limits laid down by that court." *Id*. at 87 & n.12. Section 1292(a)(1) authorized an appeal, the Supreme Court held, because the district court had "effectively foreclosed" the parties' "opportunity to settle their case on the negotiated terms." *Id*. at 86, 87 n.12, 90.[1]

Applying *Carson*, this Court has jurisdiction. The district court's order, which rejected the proposed consent judgment and directed the parties to proceed to trial, had the "practical effect" of denying the injunctive relief. The district court did not afford the parties any opportunity "to return to the bargaining table to make reasonable adjustments of terms of settlement." *Citigroup Stay Order*, 673 F.3d at 166. Rather, like the district court in *Carson*, the district court here "made clear," 450 U.S. at 87 n.12, that any revised proposal would be rejected unless it was

[1] Numerous courts have relied on *Carson*'s interpretation of Section 1292(a)(1) and found that they had jurisdiction to review interlocutory orders rejecting injunctive consent judgments. *United States v. North Carolina*, 180 F.3d 574, 577 n.2 (4th Cir. 1999); *United States v. City of Hialeah*, 140 F.3d 968, 973–75 (11th Cir. 1998); *United States v. Microsoft Corp.*, 56 F.3d 1448, 1456–57 (D.C. Cir. 1995); *United States v. Colorado*, 937 F.2d 505, 507–09 (10th Cir. 1991); *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1353–54 (9th Cir. 1990); *Durrett v. Housing Auth. of Providence*, 896 F.2d 600, 602 (1st Cir. 1990); *Donovan v. Robbins*, 752 F.2d 1170, 1176 (7th Cir. 1985).

based on "cold, hard, solid facts, established either by admissions or by trials," SPA 14–15, a posture that "virtually preclude[d] the possibility of settlement," *Citigroup Stay Order*, 673 F.3d at 166.

By denying the Commission and Citigroup the right to end the litigation on "mutually agreeable terms," the district court's order will have a "serious, perhaps irreparable, consequence." *Carson*, 450 U.S. at 86. It will force the Commission to incur the costs and bear the risks of a trial that would not occur if the consent judgment were approved. *See infra* p. 45–50. This is the precise harm that the Court identified in *Carson*, although it is amplified here because the expenditure of resources on this case is the deprivation of resources from another. *Board of Trade v. SEC*, 883 F.2d 525, 531 (7th Cir. 1989).[2]

This Court's decisions in *Grant* and *Dairylea* do not command a different result. Those decisions "are substantially different," and the district court's order "rejecting the proposed settlement is far more similar to that in *Carson* than that in *Grant* and in *Dairylea*." *Citigroup Stay Order*, 673 F.3d at 166, 168, citing *New*

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[2] The district court consolidated this case with *SEC v. Stoker*, a related action. SPA 15. While these two cases are based on the same operative facts, the Commission will have to expend additional resources to prepare for trial against Citigroup, which has identified additional witnesses that Stoker did not identify and may identify expert witnesses separate from any experts that Stoker identifies. Deposing these witnesses, and preparing any rebuttal witnesses, will consume additional resources.

York v. Dairylea Coop., Inc., 698 F.2d 567 (2d Cir. 1983); *Grant v. Local 638*, 373 F.3d 104, 108 (2d Cir. 2004).

In *Dairylea*, New York officials entered into a settlement resolving charges that a defendant had violated the antitrust laws. Other similarly charged defendants objected, asserting that the proposed relief was itself anticompetitive, and the district court rejected the settlement. *Id.* at 569. On appeal, this Court concluded that it lacked jurisdiction and distinguished *Carson* on several grounds. The Court held that the parties did not show "serious, irreparable harm" because the district court "explicitly expressed a willingness to consider further proposals," and the parties were "free to return to the bargaining table" to devise a different settlement. *Id*. at 570. The Court further noted that the proposed consent judgment merely enjoined a party from "violating the law." *Id.* And the Court explained that the agreement would not have terminated the litigation because it did not resolve the charges against the other defendants. *Id*. at 571.

The characteristics that distinguished *Dairylea* from *Carson* do not exist here. Like the district court in *Carson*, the district court here "made clear that nothing short of an admission" would suffice. *Compare* SPA 14 *with Carson*, 450 U.S. at 87 n.12; *see also Grant*, 373 F.3d at 111 (emphasizing that "the *Carson* court relied heavily on the district court's warning that it would never approve a settlement similar to the one the parties made"). Thus, the district court's rejection "cannot be cured by the parties returning to the bargaining table to make relatively minor adjustments to the terms of the settlement." *Citigroup Stay Order*, 673 F.3d at 168. In any event, the district court did not express any willingness to consider further proposals; it directed the Commission and Citigroup to prepare for trial. As another point of distinction from *Dairylea*, the proposed consent judgment here not only enjoined the defendant from further violations of the law, but also required, as in *Carson*, that the defendant undertake certain business reforms to prevent future violations. Finally, whereas an approved settlement in *Dairylea* would not have ended the litigation, the consent decree here—like that in *Carson*—would terminate the action, dissipating the concerns about piecemeal appeals that motivated the Court in *Dairylea*. *See* 698 F.2d at 570–71.

Grant, in which the district court rejected a proposed modification of a decades-old injunction, also features differing circumstances. 373 F.3d at 106. This Court distinguished *Carson* on the ground that the district court did not "effectively foreclose the parties from negotiating a settlement modifying the previously existing injunction." *Id*. at 108–09. The district court "made no comments similar to those of the district court in *Carson*," and there was "no indication that it would never allow a modification of injunctive relief similar to that in the proposed consent decree." *Id*. By contrast, the district court here clearly indicated that it would not approve an injunctive consent judgment in the absence of facts "established either by admissions or by trials." SPA 15.

Accordingly, under Section 1292(a)(1) and *Carson*, this Court has jurisdiction over this appeal. If the court holds that it lacks jurisdiction under 1292(a)(1), it will have jurisdiction to issue a writ of mandamus pursuant to 28 U.S.C. 1651(a). *See infra* Section IV.

ISSUES PRESENTED

The Commission presented the district court with a proposed consent judgment pursuant to which Citigroup, without admitting or denying the allegations in the complaint, agreed to pay $285 million (in disgorgement, interest, and penalties), to be enjoined from violating the charged provisions of the Securities Act, and to implement a series of business reforms. The district court refused to approve the consent judgment because it held that a consent judgment imposing injunctive relief is not fair, reasonable, adequate, or in the public interest unless it is supported by admitted or judicially "established" facts. The issues presented are:

(1) Whether the district court erred by creating a bright-line rule that an injunctive consent judgment must be rejected unless it is based on facts

"established by admissions or by trials," a rule that conflicts with a century of judicial practice and intrudes upon the Commission's executive authority.

(2) Whether the district court exceeded its discretion when it rejected the proposed consent judgment as not fair, reasonable, adequate, or in the public interest after the Commission had reasonably decided that the consent judgment provided sufficient relief to achieve the Commission's objectives of protecting investors while avoiding the risks posed by litigation.

(3) Whether, if the Court rules that it lacks jurisdiction under Section 1292(a)(1), it should grant the Commission's petition for a writ of mandamus and order the district court to enter the consent judgment as proposed.

STATEMENT OF THE CASE

A. Nature of the Case

The Commission filed a complaint alleging that Citigroup violated the antifraud provisions of the Securities Act of 1933. On the same day, the Commission filed a proposed consent judgment that permanently enjoined Citigroup from further violations of those antifraud provisions, ordered it to institute a series of business reforms, and required it to pay $285 million. The district court rejected the consent judgment in an order that the Commission now appeals.

B. Statement of Facts

1. The Commission alleged that Citigroup violated the Securities Act by making materially misleading statements in connection with the structuring and marketing of a collateralized debt obligation.

Following an extensive investigation of Citigroup's marketing of collateralized debt obligations (CDOs), the Commission filed a detailed complaint charging Citigroup with violating Sections 17(a)(2) and (3) of the Securities Act of 1933, 15 U.S.C. 77q(a)(2), (3), in connection with a CDO called Class V Funding III. JA 14 (¶ 1).[3] Class V's portfolio consisted of credit default swaps that referenced other CDO securities backed by residential mortgage-backed securities. Thus, Class V's value was tied to the fortunes of the U.S. residential housing market. *Id*.

The complaint alleged that the marketing materials for Class V were materially misleading in two interrelated ways. First, the materials represented that

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[3] Sections 17(a)(2) and (3) make it unlawful "for any person in the offer or sale of any securities":

> "(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

a third party selected the underlying investment portfolio—a statement likely to facilitate investment in Class V—even though Citigroup had significantly influenced the selection of half the assets in Class V. JA 15, 21–23, 26–29 (¶¶ 2, 20, 24–34, 39–46). Second, the materials did not disclose that Citigroup established a short position on the $500 million in assets that it helped select and from which it stood to profit if the assets performed poorly. JA 15, 21–23, 28–29 (¶¶ 2, 19–23, 27, 43–46).

Citigroup began to offer Class V investments in January 2007, distributing materials containing these misrepresentations to several institutional clients. JA 29 (¶ 47). The Class V transaction closed on February 28, 2007. JA 29–30, 33 (¶¶ 48, 52, 63). In November 2007, Class V declared a default event. JA 32 (¶¶ 59, 61). The Commission alleged that Citigroup received ill-gotten gains of $160 million in connection with Class V. JA 33 (¶ 63).

2. The Commission submitted a proposed consent judgment for the district court's approval, along with materials establishing that the settlement was fair, reasonable, adequate, and in the public interest.

On the same day that the Commission filed its complaint, it submitted a proposed consent judgment to the district court. "Without admitting or denying the allegations of the complaint," Citigroup consented to the entry of a final judgment that ordered three forms of relief. JA 42. First, the judgment permanently enjoined Citigroup from violating the provisions of the Securities Act cited in the complaint. JA 42, 54–55. Second, it ordered Citigroup to disgorge $160 million, pay $30 million in pre-judgment interest, and pay a $95 million penalty—all of which would be placed into a Fair Fund for injured investors. JA 42–43, 55–57. Third, it ordered Citigroup to fortify its approval processes for initial offerings of residential mortgage-related securities, to enhance the role of legal counsel and compliance officers in reviewing the marketing materials for such securities, and to demonstrate its compliance with these undertakings by submitting to audits and to monitoring by the Commission. JA 43, 57–59.

The district court scheduled a hearing to determine "whether the proposed judgment is fair, reasonable, adequate, and in the public interest." JA 68. In advance of the hearing, the Commission provided detailed answers to nine questions that the district court had posed about the consent judgment. JA 72–107. The Commission explained that the proposed consent judgment reasonably reflected the scope of relief likely to be obtained by the Commission if successful at trial when taking into account several factors, including: litigation risk; the benefits of avoiding that risk; Citigroup's unwillingness to settle while admitting the factual predicates of the Commission's claims; the opportunity to detail publicly the Commission's factual conclusions; and the allocation of resources among the Commission's many enforcement actions.

In response to the court's question about how the proposed relief compared to the amount of investor loss, the Commission described the difficulty in calculating such losses and explained that, unlike private litigants, the Commission need not prove the amount of losses caused by the wrongdoing. The Commission nevertheless estimated that investor losses likely exceeded $700 million, but emphasized that it based the $285 million in the proposed consent judgment on the only remedies available under law: disgorgement of ill-gotten gains and a civil penalty that cannot exceed such gain. JA 94–96.

3. The district court rejected the proposed consent judgment on the ground that an injunctive consent judgment is not fair, reasonable, adequate, or in the public interest unless it is supported by facts that are admitted or judicially established.

The district court rejected the consent judgment. The court stated in its order that it could not approve the proposed consent judgment and deploy the injunctive power of the court—backed by the threat of contempt—when the court had "not been provided with any proven or admitted facts upon which to exercise even a modest degree of independent judgment." SPA 6. This asserted absence of "a sufficient evidentiary basis" was a major component of the court's conclusion that the proposed consent judgment was "neither fair, nor reasonable, nor adequate, nor in the public interest." SPA 8. The court emphasized that it needed "some knowledge of what the underlying facts are" because without such facts "the public is deprived of ever knowing the truth in a matter of obvious public importance," and investors "attempting to recoup their losses through private litigation" cannot "derive any collateral estoppel assistance" from the consent judgment. SPA 8–9, 12.

The district court thus held that a consent judgment cannot be approved where "it 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." SPA 14 ("[H]ow can it ever be reasonable to impose substantial relief on the basis of mere allegations?"). Instead, the court stated, the "deployment" of injunctive power must rest on "cold, hard, solid facts, established either by admissions or by trials." SPA 15.

4. This Court stayed the district court proceedings pending appeal.

The Commission appealed. Because the court directed the parties to prepare for trial, the Commission moved in the district court to stay the proceedings, which denied the motion, and again in this Court, which granted the motion. After considering "the various explanations given by the district court for its refusal to permit the settlement," this Court held that the Commission had "made a strong showing of likelihood of success in setting aside the district court's rejection of [the] settlement, either by appeal or petition for mandamus." 673 F.3d at 166, 169. The Court found it "doubtful whether the [district] court gave the obligatory deference to the [Commission's] views in deciding that the settlement was not in the public interest." *Id*. at 165. And the Court stated that it knew "of no precedent that supports the proposition that a settlement will not be found to be fair, adequate, reasonable, or in the public interest unless liability has been conceded or proved and is embodied in the judgment." *Id*. at 166. The Court further held that the Commission satisfied the other prerequisites for a stay because (1) the Commission and Citigroup would "incur significant harm absent a stay if they are prevented from settling their dispute and ordered to prompt trial," (2) there was "no appreciable harm to anyone from issuing a stay," and (3) the stay was "in the public interest." *Id*. at 166–68.

STANDARD OF REVIEW

This Court reviews the district court's rejection of the proposed consent judgment for an abuse of discretion, and it reviews the underlying legal conclusions de novo. *SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984); *County of Nassau v. Leavitt*, 524 F.3d 408, 414 (2d Cir. 2008); *United States v. City of Hialeah*, 140 F.3d 968, 973 (11th Cir. 1998). A court abuses its discretion when, among other things, its bases "its ruling on an erroneous view of the law" or renders a decision that "cannot be located within the range of permissible decisions." *In re Sims*, 534 F.3d 117, 132 (2d Cir. 2008). The district court's discretion is circumscribed here by the deference that it must give to "the government agency which has negotiated and submitted the proposed judgment." *Randolph*, 736 F.2d at 529; *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991).

SUMMARY OF ARGUMENT

The district court's order should be reversed because it is premised on an erroneous rule of law. In rejecting the proposed consent judgment, the district court held that a consent judgment containing injunctive relief cannot be fair, reasonable, adequate, or in the public interest unless it rests on "facts, established by either admissions or by trials." SPA 15. This Court should reverse the district court's order because it conflicts with well-established judicial practice and interferes with the executive power vested in the Commission, and this Court should direct the district court to enter the consent judgment as proposed.

For over a century, federal agencies have frequently entered into injunctive consent judgments with defendants who do not admit to or who outright deny the allegations against them in matters of public importance no less significant than "the transparency of financial markets." SPA 15. And for over a century, courts, including the district court here, have approved these consent judgments as consistent with the public interest without any suggestion that the absence of "proven or acknowledged facts" precludes the invocation of the court's injunctive power. In rejecting the Citigroup consent judgment, the district court departed from this long-standing practice by requiring "facts, established either by admissions or by trials" as precondition to approval.

The district court's rule interferes with the Commission's exercise of its law enforcement powers. The district court did not defer to the Commission's decision to resolve the matter through a consent judgment, which the Commission reached after years of investigation and lengthy negotiations with Citigroup. This decision reflected the Commission's judgment that settlement best served the public interest given the balance of various factors, such as litigation risk, resource allocation, and the relief contained in the judgment, which represented a substantial portion of what the Commission could have obtained after a successful trial. If left standing, the rule established by the district court will make it more difficult for the Commission to enter into settlements, forcing the Commission, with its limited budget, to pursue fewer cases. Such a rule intrudes upon the Commission's authority to allocate its resources, and ultimately harms investors.

The district court also exceeded its discretion because the consent judgment was fair, reasonable, adequate, and in the public interest. The Commission obtained the prohibitory injunctive relief it requested in the complaint, more than 80% of the monetary relief it could have obtained at trial if successful, and a mandatory injunction ordering Citigroup to alter its business practices—all while mitigating litigation risk and minimizing consumption of the Commission's finite resources. While the district court criticized the size of the penalty, the absence of scienter-based charges, and the inability of investors to harness the consent judgment for collateral estoppel purposes in private litigation, these criticisms do not justify rejecting the proposed consent judgment.

The district court's order should be reversed on appeal, but if this Court finds that it does not have jurisdiction under Section 1292(a)(1), the Court should grant the Commission's petition for a writ of mandamus because the Commission will have no other adequate means to obtain the entry of the consent judgment. Given the importance of the district court's ruling for the Commission—and many other federal agencies—mandamus is appropriate, and the Commission has a clear and indisputable right to the writ because the district court abused its discretion by rejecting the consent judgment based on its improper bright-line rule.

ARGUMENT

I. The district court's ruling that a consent judgment imposing injunctive relief cannot be fair, reasonable, adequate, or in the public interest unless supported by admitted or judicially established facts is contrary to established law.

The district court's ruling was broad and definitive. It stated that a proposed consent judgment seeking injunctive relief must be supported by "proven or acknowledged facts"—"cold, hard, solid facts, established either by admissions or by trials"—or it cannot be approved as reasonable, fair, adequate, and in the public interest. SPA 14–15. By requiring "established" facts as a precondition to approval— and disallowing any other evidentiary showing, such as detailed factual allegations that the defendant cannot deny under the terms of the consent judgment—the court created a bright-line rule that this Court should reject as contrary to long-standing precedent.

A. Government agencies frequently resolve matters through consent judgments, which are judicially enforced settlements.

Consent judgments, which are also referred to as consent decrees, trace their roots back nearly 800 years to English common law and appeared in the U.S. by the 19th century. Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 45, 50–53 (1987). They are unique forms of settlement because they possess "attributes both of contracts and of judicial decrees." *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975).

Consent judgments resemble contracts because they "are entered into by parties to a case after careful negotiation has produced agreement on their precise terms." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). A consent judgment "embodies a compromise" that reflects, among other things, litigation risk and the costs of trial. *Id*. As with any settlement, a consent judgment reflects a "balance of advantages and disadvantages" for a federal agency like the Commission: although the Commission does not obtain "findings of fact and court opinions clearly setting forth the reasons for the result," it is "able to conserve its own and judicial resources" while obtaining relief that benefits investors. *SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983) (per curiam).

Consent judgments also have attributes of judicial decrees because, unlike voluntary settlements, they always result in a judgment entered by a court. Historically, courts played a limited role when reviewing proposed consent judgments: they did not "make any determination of the merits" and they made no "inquiry into, or preliminary adjudication of, the facts or the law applicable thereto.'" *Resnick*, 1987 U. CHI. LEGAL F. at 53–54, quoting 3 A.C. Freeman, A TREATISE ON THE LAW OF JUDGMENTS § 1350, at 2773 (5th ed. 1925). The scope of this review has remained narrow over time: as this Court noted, "[u]nless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved." *Wang*, 944 F.2d at 85.

Federal government agencies utilize consent judgments extensively. The Commission commenced 154 civil actions in the district courts of the Second Circuit between 2005 and 2007. In 134 of those cases (87%), the Commission entered into—and a court approved—a consent judgment with one or more defendants. *Clifton*, 700 F.2d at 748 ("over 90% of the SEC's cases are resolved by [consent] decree"). In recent years, the EEOC resolved 80% of its cases and the FTC resolved 80% of its antitrust actions by consent judgment. U.S. EEOC, *Office of the General Counsel FY 2009 Annual Report*, at 62 (2009); U.S. FTC, *The FTC in 2010*, at 2 (2010). The "vast majority" of civil antitrust cases brought by the Department of Justice are resolved in this fashion. Acting Principal Deputy Assistant Attorney General John M. Nannes, *Termination, Modification, and Enforcement of Antitrust Consent Decrees*, 15 ANTITRUST 55, 55 (2000). Civil environmental enforcement actions follow a similar pattern. Kristi Smith, *Who's Suing Whom: A Comparison of Government and Citizen Suit Environmental Actions Brought Under EPA-Administered Statutes, 1995-2000*, 29 COLUM J. ENVTL. L. 359, 387 (2004) (asserting, based on a sample limited by year and statute, that 70% of enforcement actions are resolved by consent decree); Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL F. 327, 330 ("The vast majority of environmental enforcement actions [are] resolved by negotiated settlement.").

Consent judgments are crucial for agencies and courts. As this Court recognized at a time when the Commission's caseload was smaller, the Commission "can bring the large number of enforcement actions it does *only* because in all but a few cases consent decrees are entered." *SEC v. Everest Mgmt. Corp.*, 475 F.2d 1236, 1240 (2d Cir. 1972) (emphasis added). Courts also benefit because consent judgments conserve judicial resources, which is the primary reason for the "strong federal policy favoring the approval and enforcement of consent decrees." *Wang*, 944 F.2d at 85; *Anita Foundations, Inc. v. ILGWU Nat'l Retirement Fund*, 902 F.2d 185, 190 (2d Cir. 1990) (settlements "represent compromise and conservation of judicial resources, two concepts highly regarded in American jurisprudence"). By "lessening docket congestion," consent judgments "make[] it possible for the judicial system to operate more efficiently and more fairly while affording plaintiffs an opportunity to obtain relief at an earlier time." *Evans v. Jeff D.*, 475 U.S. 717, 760 n.15 (1986).

B. For over a century, courts have approved consent judgments that concern matters of extraordinary importance, that order wide-ranging injunctive relief, and that contain provisions in which defendants do not admit, or outright deny, the allegations in the complaint and liability for violations of the law.

1. Consent judgments without admissions are commonplace.

The district court criticized the "SEC's long-standing policy" of permitting "defendants to enter into consent judgments" without requiring them to admit liability or the underlying allegations. SPA 9. But that "policy" is not unique to the Commission; "[i]t is commonplace for settlements to include no binding admission of liability." *Citigroup Stay Order*, 673 F.3d at 166. As the Supreme Court has recognized, without any hint of condemnation, defendants entering into injunctive consent judgments "often admit no violation of the law." *ITT Continental Baking*, 420 U.S. at 236 n.10. In describing one such consent decree, which stated that nothing in the consent was "intended to constitute an admission of fault," the Supreme Court stated that it was "customary" that "the consent decree did not purport to adjudicate" the plaintiff's claims. *Maher v. Gagne*, 448 U.S. 122, 126 n.8 (1980). Contrary to the district court's ruling that this practice is never permissible, the Supreme Court has discussed consent judgments containing similar provisions without any suggestion that they are unfair, unreasonable, inadequate, or not in the public interest. *E.g., Swift & Co. v. United States*, 276

U.S. 311 (1928) (refusing to vacate consent judgment in which defendant denied allegations of complaint); *United States v. Armour & Co.*, 402 U.S. 673 (1971) (addressing same consent judgment).[4]

The district judge's criticism of the Citigroup consent judgment runs contrary not only to Supreme Court precedent, but also to the judge's previous rulings. Before this case, the judge approved numerous Commission consent judgments even though they contained "no admit/no deny" provisions that were functionally identical to those included in this consent judgment.[5] The judge also

[4] *Accord Arizona v. California*, 530 U.S. 392, 414 (2000); *Suter v. Artist M.*, 503 U.S. 347, 354 n.6 (1992); *Firefighters Local No. 1784 v. Stotts*, 467 U.S. 561, 565, 577 (1984); *United States v. Atlantic Refining Co.*, 360 U.S. 19, 23 & n.3 (1959); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 141 n.3 (1948).

[5] *See SEC v. Collins*, No. 07-11343 (JSR) (S.D.N.Y. Jun. 10, 2010); *SEC v. Forest Resources Mgmt. Corp*., No. 09-903 (JSR) (S.D.N.Y. Mar. 30, Apr. 29, Oct. 15, 2009); *SEC v. Ebbers*, No. 05-6378 (JSR) (S.D.N.Y. Jul. 22, 2005); *SEC v. Saad*, No. 05-3308 (JSR) (S.D.N.Y. May 18, 2005 & Jul. 31, 2006); *SEC v. Gulkin*, No. 03-9813 (JSR) (S.D.N.Y. Dec. 12, 2003); *SEC v. Worldcom*, No. 02-4963 (JSR) (S.D.N.Y. Nov. 26, 2002 & Jul. 7, 2003); *SEC v. Vinson*, No. 02-8083 (JSR) (S.D.N.Y. Nov. 26, 2002); *SEC v. Myers*, No. 02-7749 (JSR) (S.D.N.Y. Nov. 15, 2002); *SEC v. Yates*, No. 02-7958 (JSR) (S.D.N.Y. Nov 15, 2002); *SEC v. Platinum Investment Corp.*, No. 02-6093 (JSR) (S.D.N.Y. Aug. 12 & Oct. 15, 2002); *SEC v. Accornero*, No. 01-6452 (JSR) (S.D.N.Y. Jul. 20, 2001).

approved consent judgments negotiated by other agencies in which defendants did not admit, or even denied, the allegations against them and disclaimed liability.[6]

As these cases suggest, consent judgments in which "none of the issues are actually litigated"—because the defendants do not admit, or outright deny, the factual allegations or liability—are the norm. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). Almost a century ago, it was recognized that "[n]o hearing or trial" needed to be conducted and "no findings" needed to be made before a court entered a consent judgment imposing injunctive relief. 3 Freeman § 1349, at 2772. Consent judgments without admissions have been common enough that Black's Law Dictionary defined a "consent decree" as a judgment "whereby the defendant agrees to stop alleged illegal activity without admitting guilt or wrongdoing." BLACK'S LAW DICTIONARY 410 (6th ed. 1990). Similarly, a leading civil procedure treatise states that the "central characteristic of a consent judgment is that the court has not actually resolved the substance of the issues presented." 18A Charles A. Wright and Arthur R. Miller, FEDERAL PRACTICE AND

[6] *FTC v. Diet Coffee, Inc.*, No. 08-0094 (JSR) (S.D.N.Y. Jan. 10, 2008) (consent decree in false advertising suit; defendant agrees to judgment "without admitting" allegations); *United States v. New Puck, LP*, No. 04-5449 (JSR) (S.D.N.Y. Jul. 14, 2004) (consent decree in ADA suit stating that "the defendant denies liability"); *CFTC v. Kelly*, No. 98-5270 (JSR) (S.D.N.Y. Nov. 5, 1998) (consent order in commodities fraud suit in which defendant "neither admit[s] nor den[ies]" allegations).

PROCEDURE § 4443, at 256–57 (2d ed. 2002); *see also* 1 Talbot S. Lindstrom & Kevin P. Tighe ANTITRUST CONSENT DECREES ix (1974) (the antitrust consent decree's "principal characteristic is the provision that the consent implies no admission or determination that there has been a violation of the antitrust laws").

2. Courts have routinely and consistently approved consent judgments ordering injunctive relief and concerning matters of public importance despite the inclusion of provisions in which defendants do not admit, or deny, allegations and liability.

The district court ruled that any consent judgment that is premised on "mere allegations," SPA 14, or that does not advance the "truth"—by "cold, hard, solid facts, established either by admissions or by trials," SPA 14–15—must be rejected. The court emphasized that a consent judgment imposing injunctive remedies, "enforced by the formidable judicial power of contempt," SPA 8, must be supported by "proven or acknowledged facts," SPA 14, particularly when it touches "on the transparency of financial markets whose gyrations have so depressed our economy and debilitated our lives," giving rise "to an overriding public interest in knowing the truth," SPA 15. Yet matters of exceptional public importance, including lawsuits alleging violations of the securities, antitrust, consumer protection, environmental, public health, and civil rights laws have been routinely resolved, with judicial approval, through consent judgments that order significant injunctive relief even though they are premised on "mere allegations," SPA 14.

There are thousands of such consent judgments, a few of which are described below. In some consent judgments, a defendant does not admit or denies liability. In others, a defendant does not admit or denies the factual allegations in the complaint. In many, a defendant does both. The common thread linking them all is judicial approval without the fact-finding that this district court held is always required.

Securities—Courts have regularly approved injunctive consent judgments proposed by the Commission that are not based on "proven or acknowledged facts." SPA 14. In this circuit, every single consent judgment presented by the Commission between 2005 and 2007 contained language that was functionally identical to the language in the Citigroup consent judgment. All were approved.

The importance of the case has not precluded approval in the absence of admissions. As one example, the same district judge who rejected the consent judgment here approved a consent judgment in which Worldcom agreed to injunctive relief—and later, a $750 million penalty, one of the largest ever obtained by the Commission—without admitting or denying the fraud allegations in the complaint. *SEC v. WorldCom*, No. 02-CV-4963 (JSR) (S.D.N.Y. Nov. 26, 2002 &

Jul. 7, 2003). The injunctive relief ordered by the court was "substantial," SPA 14: it included a "complete overhaul of the company's corporate governance" and the hiring of "independent consultants" to monitor these changes. *SEC v. WorldCom, Inc.*, 273 F. Supp. 2d 431, 432–33 (S.D.N.Y. 2003). Yet the district court judge did not withhold his approval for lack of "facts, established either by admissions or by trials." SPA 15. Rather, he hailed the consent judgment as "not only fair and reasonable but as good an outcome as anyone could reasonably expect," *WorldCom*, 273 F. Supp. 2d at 436. He deemed it "a model of what should be attempted in a case of this sort." Seth Schiesel & Simon Romero, *WorldCom strikes a deal with the SEC*, N.Y. TIMES, Nov. 27, 2002, at C5.

Other district courts, including those in this circuit, have also approved Commission consent judgments containing "no admit/no deny" provisions. Some of the most substantial injunctive consent judgments proposed by the Commission in the past decade (as measured by monetary relief obtained) included language that is functionally identical to what appears in the Citigroup consent judgment.[7] Moreover, nearly all of the largest injunctive consent judgments proposed by the Commission in federal court in 2010 and 2011 contain "no admit/no deny"

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[7] *E.g.*, *SEC v. AIG*, No. 06-1000 (S.D.N.Y. Feb. 17, 2006) ($800 million); *SEC v. FNMA*, No. 06-959 (D.D.C. Aug. 9, 2006) ($350 million).

clauses.[8] District judges approved them without any suggestion that the absence of "proven or acknowledged facts" precluded their entry. SPA 14.

Antitrust—Antitrust consent decrees in which a defendant does not admit facts or liability have restructured entire industries, significantly affecting the economy. Richard A. Epstein, ANTITRUST CONSENT DECREES IN THEORY AND PRACTICE 1 (2007). In *United States v. Microsoft Corp.*, the Department of Justice used the "not uncommon technique" of entering into a consent decree to resolve allegations that Microsoft unlawfully monopolized the market for operating systems used by IBM-compatible PCs. 56 F.3d 1448, 1451–52 (D.C. Cir. 1995). The district court rejected the decree, which prohibited Microsoft from engaging in conduct that would deter the use of competing operating systems, in part because

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[8] *SEC v. Alexander*, No. 06-3844 (E.D.N.Y. Nov. 30, 2011) ($54 million); *SEC v. JP Morgan Secs. LLC*, No. 11-3877 (D.N.J. Jul. 7, 2011) ($51 million); *SEC v. Johnson & Johnson*, No. 11-686 (D.D.C. Apr. 13, 2011) ($49 million); *SEC v. UBS Fin. Servs.*, No. 11-2539 (D.N.J. May 6, 2011) ($47 million); *SEC v. Alcatel-Lucent, SA*, No. 10-24620 (S.D. Fla. Dec. 30, 2010) ($45 million); *SEC v. Goldman, Sachs & Co.*, No. 10-3229 (BSJ) (S.D.N.Y. Jul. 20, 2010) ($550 million); *SEC v. ENI, S.p.A*, No. 10-2414 (S.D. Tex. Jul. 20, 2010) ($125 million); *SEC v. Technip*, No. 10-2289 (S.D. Tex. Jul. 9, 2010) ($98 million); *SEC v. Citigroup Inc.*, No. 10-1277 (D.D.C. Oct. 8, 2010) ($75 million); *SEC v. ABB Ltd.*, No. 10-1648 (D.D.C. Oct. 12, 2010) ($39 million); *SEC v. Diebold, Inc.*, No. 10-908 (D.D.C. Jun. 14, 2010) ($25 million); *SEC v. General Elec. Co.*, No. 10-1258 (D.D.C. Jul. 30, 2010) ($23 million); *SEC v. Pequot Capital Mgmt.*, No. 10-831 (D. Conn. Jun. 2, 2010 ($23 million).

Microsoft did not admit the allegations in the complaint. *Id*. at 1461.[9] The D.C. Circuit reversed, holding that the judge's "criticism of Microsoft for declining to admit that the practices charged in the complaint actually violated the antitrust laws" was "unjustified." *Id*.

Courts have long approved antitrust consent decrees that order substantial injunctive relief and contain similar provisions. The very first antitrust consent decrees, which date back to 1906 and which enjoined an array of anticompetitive conduct, featured disclaimers of admissions and liability. *United States v. Otis Elevator Co.*, No. 13884 (N.D. Cal. Jun. 1, 1906); *United States v. American Coal Prods. Co.*, No. E 10-124 (S.D.N.Y. Mar. 4, 1913); *United States v. The New Departure Mfg. Co.*, No. 48-A (W.D.N.Y. May 27, 1913), cited in 1 Lindstrom & Tighe, at 1, 16–19. "No admit" clauses were central to consent decrees that fundamentally altered the meatpacking industry, *Swift*, 276 U.S. at 320; that dismantled AT&T, one of the world's largest corporations at the time, *United States v. AT&T*, 552 F. Supp. 131, 143 (D.D.C. 1982) (decree "would not constitute any evidence against, an admission by, or an estoppel against AT&T"),

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[9] The consent judgment stated that it did not constitute "any evidence or admission by any party with respect to any issue of fact or law." *United States v. Microsoft Corp.*, No. 94-1564 (D.D.C. Jul. 15, 1994), *available at* http://www.justice.gov/atr/cases/f0000/0047.htm.

aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983); that restricted CBS (and the other two major television networks, ABC and NBC) from acquiring financial interests and syndication rights in programs obtained from independent producers, *e.g., United States v. CBS*, 1980 U.S. Dist. Lexis 14679 (C.D. Cal. Jul. 3, 1980) (consenting to judgment "without trial or adjudication of any issue of fact or law"); and that resolved charges of price fixing asserted against six airlines, *United States v. Airline Tariff Publ'g Co.*, 1994 U.S. Dist. Lexis 11904 (D.D.C. Aug. 10, 1994) (consent judgment would "not be evidence against or an admission by any party with respect to any issue of fact or law").

Courts have approved antitrust consent judgments without admissions even after reviewing them under the Tunney Act, which requires courts to consider, among other things, "the public benefit, if any, to be derived from a determination of the issues at trial." 15 U.S.C. 16(e).[10] The Commission is not aware of any decision since Congress enacted the Tunney Act where a court rejected a consent judgment containing a no-admit provision because the public would not have the benefit of adjudicated facts. Thus, even where courts are statutorily required to

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[10] Congress recognized that "[o]rdinarily, defendants do not admit to having violated the antitrust or other laws," but it made no attempt to prohibit this practice. H.R. REP. NO. 93-1463, at 6 (1974); *see also* S. REP. NO. 93-298, at 5 (1973) (stating that a defendant agreeing to a consent decree "does not admit to having violated the law as alleged in the complaint").

consider the benefits of trial, no court has ruled that the absence of "facts, established by admissions or by trials," justifies the rejection of a consent judgment. SPA 14.

Consumer protection—The FTC frequently utilizes consent decrees in which a defendant makes no factual or legal admissions. Countrywide Home Loans, without "admitt[ing] any of the allegations" that it overcharged 500,000 borrowers, entered into a consent judgment in which it agreed to be enjoined from engaging in certain conduct, to change its lending practices, and to pay $108 million. *FTC v. Countrywide Home Loans*, No. 10-4193 (C.D. Cal. Jun. 15, 2010). And ChoicePoint, a data broker accused of unlawfully disclosing the records of nearly 200,000 consumers, agreed to injunctive relief and payment of the largest-ever civil penalty imposed by the FTC as part of a consent judgment that stated, "Defendant makes no admissions to, and denies, the allegations in the complaint." *United States v. Choicepoint, Inc.*, No. 06-0198 (N.D. Ga. Feb. 15, 2006).[11]

Environmental law—Courts have approved hundreds of consent judgments resolving environmental law enforcement actions in which there are no "proven or acknowledged" facts. SPA 14. In one of the largest consent judgments (as measured by the cost of the injunctive relief), the defendant, which denied that it

[11] Available at http://www.ftc.gov/os/caselist/indexc.shtm.

violated the Clean Air Act or was liable "for civil penalties or injunctive relief," agreed to spend approximately $4.6 billion to cut emissions and to pay a $15 million penalty. *United States v. American Electric Power Serv. Corp.*, No. 99-1250 (S.D. Ohio Dec. 10, 2007). In another instance, BP resolved charges that it violated the Clean Air Act in connection with the Texas City refinery explosion, which killed 15 people and injured 170, by entering into a consent judgment that ordered it to undertake an array of remedial measures and pay one of the largest civil penalties ever assessed for Clean Air Act violations at an individual facility. BP consented "without the adjudication or admission of any issue of fact or law" and did "not admit any liability to the United States arising out of the transactions or occurrences alleged in the complaint." *United States v. BP Prods. North America Inc.*, No. 10-3569 (S.D. Tex. Dec. 30, 2010).

Other consent judgments that ordered substantial injunctive relief along with large penalties contained similar provisions and were approved. *United States v. Massey Energy Co.*, No. 07-299 (S.D. W.Va. Apr. 9, 2008) (defendants, who did "not admit any liability," agreed to undertake various remedial measures and pay a $20 million penalty, one of the largest ever penalties for wastewater discharge violations); *United States v. Caterpillar, Inc.*, No. 98-02544 (D.D.C. Jul. 1, 1999), cited by *United States v. Caterpillar, Inc.*, 2002 U.S. Dist. Lexis 468, at *7 (D.D.C.

Jan. 17, 2002) (a group of defendants, which denied violating the Clean Air Act, agreed to spend nearly $1 billion dollars in remediation and pay a $83.4 million penalty, one of the largest civil penalties ever imposed); *United States v. Koch Indus.*, No. 95-1118 (S.D. Tex. Mar. 7, 2000) (defendant, which did "not admit any liability," resolved claims related to over 300 oil spills by agreeing to clean up the spills and pay a $30 million penalty, one of the largest penalties ever imposed upon a single company).[12]

Public Health—Consent decrees between the FDA and biomedical firms accused of violating the Food, Drug, and Cosmetic Act contain similar disclaimers of admissions and liability. In one consent judgment, Abbott Laboratories agreed to pay a $100 million fine and to cease manufacturing over 50 diagnostic products "without admitting the allegations of the Complaint." *United States v. Abbott*

[12] Courts have also approved numerous consent judgments in which municipal governments denied violating the Clean Water Act in connection with sewage overflows that contaminated public water supplies, but agreed to spend billions of dollars to prevent future violations. *E.g.*, *United States v. Metro. St. Louis Sewer Dist.*, No. 07-1120 (E.D. Mo. Apr. 27, 2012) (defendant "does not admit any liability" in consent decree imposing $4.7 billion in injunctive relief and $1.2 million penalty); *United States v. Northeast Ohio Regional Sewer Dist.*, No. 10-02895 (N.D. Ohio Jul. 7, 2011) (defendant "denies any liability"); *United States v. Kansas City*, No. 10-0497 (W.D. Mo. Jul. 27, 2010) ("without admission by the City of any of the non-jurisdictional allegations in the Complaint"). All of the EPA's consent decrees cited are available at http://www.epa.gov/compliance/resources/cases/index.html.

Laboratories, No. 99-7135 (N.D. Ill. Nov. 2, 1999). Schering-Plough paid a $500 million fine—the largest at the time—and halted production of nearly 75 drugs "without admitting or denying the allegations of the Complaint and disclaiming any liability in connection herewith." *United States v. Schering-Plough Corp.*, No. 02-2397 (D.N.J. May 20, 2002).[13]

Civil rights—The approval of consent judgments that order significant injunctive relief without admissions by defendants—or with outright denials—also occurs with great frequency in the civil rights context:

- State and municipal law enforcement agencies have altered their policing practices pursuant to approved consent judgments resolving allegations of unconstitutional conduct by police officers. *E.g.*, *United States v. City of Los Angeles*, No. 00-11769 (C.D. Cal. Jun. 15, 2001) ("defendants deny the allegations in the Complaint"); *United States v. New Jersey*, No. 99-5970 (D.N.J. Dec. 30, 1999) (the State "denies" the allegations).[14]

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[13] Available at http://www.fda.gov/downloads/MedicalDevices/ResourcesforYou/Industry/ucm111119.pdf (Abbott); http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm095873.htm (Schering-Plough).

[14] Available at http://www.lapdonline.org/assets/pdf/final_consent_decree.pdf; http://www.justice.gov/crt/about/spl/split_archive_findsettle_ 2004.php.

- Schools have desegregated and agreed to undertake other remedial steps to resolve charges of racial, gender, and ethnic discrimination. *E.g., A.B. v. Rhinebeck Central Sch. Dist.*, No. 03-3241 (S.D.N.Y. Mar. 24, 2006) (defendant "denies each and every" allegation of the complaint); *United States v. City of New York*, No. 04-2248 (E.D.N.Y. Jun. 1, 2004); *United States v. Board of Educ. of Chicago*, 88 F.R.D. 679, 681 n.2 (N.D. Ill. 1981) ("[T]he Board neither admits nor denies the allegations of the Complaint.").[15]
- Municipalities have changed their election procedures to remedy election law violations. *E.g., United States v. Salem County*, No. 08-03276 (D.N.J. Jul. 28, 2008) ("Defendants do not admit the allegations of the Complaint."); *United States v. Osceola County*, No. 02-738 (M.D. Fla. Jul. 22, 2002) ("Defendants deny any violation of the Voting Rights Act").[16]
- Defendants have modified their facilities and altered practices to comply with the Americans with Disabilities Act. *E.g., United States v. Inova Health Sys.*, No. 10-714 (E.D. Va. Mar. 30, 2011) (defendant "denies the allegation" that it violated the ADA); *United States v. NCAA*, No. 98-1290

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[15] Available at http://www.justice.gov/crt/about/edu/.

[16] Available at http://www.justice.gov/crt/about/vot/litigation/caselist.php.

(D.D.C. May 27, 1998) (defendant "disputes the allegations" in the complaint).[17]

- Banks and housing companies have resolved claims of unlawful discrimination in lending and leasing by agreeing to injunctive relief and penalties. *United States v. Albank FSB*, No. 97-1206 (W.D.N.Y. Aug. 13, 1997) (consent judgment "is not and is not to be considered an admission or finding of any violation of law"); *United States v. Hillman Housing Corp.*, No. 02-0626 (S.D.N.Y. Oct. 27, 2004) (defendants "do not admit any liability").[18]
- Large companies have altered their employment practices and paid fines to resolve charges of employment discrimination. *EEOC v. Eastman Kodak Co.*, 2006 U.S. Dist. Lexis 96433, at *3 (W.D.N.Y. Oct. 6, 2006) (defendant "expressly denies any and all liability or wrongdoing"); *EEOC v. Morgan Stanley & Co.*, 256 F.R.D. 124, 124 (S.D.N.Y. 2004) (defendant "denies any wrongdoing or liability").

These are just a few examples of the thousands of consent judgments approved by courts that order significant injunctive relief and impose considerable

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[17] Available at http://www.ada.gov/settlemt.htm.

[18] Available at http://www.justice.gov/crt/about/hce/caselist.php#pa.

monetary relief based only on a complaint's allegations. The district court asked rhetorically how it can "ever be reasonable to impose substantial relief on the basis of mere allegations," SPA 14, but this judicial practice shows that courts have repeatedly found it reasonable in a multitude of contexts.

C. Set against this judicial practice, the district court's rule has no support in the law and should be reversed.

As demonstrated above, courts have routinely approved consent judgments that contain provisions in which defendants either do not admit facts or liability—or outright deny facts and liability. These consent judgments have imposed substantial injunctive (and monetary) relief. They have affected the lives of millions of U.S. residents in matters of no less importance than the "transparency of financial markets," SPA 15, such as: the desegregation of our schools, the competitiveness of our industries, the civil rights of our citizens, the protection of our natural resources, and the safety of our pharmaceuticals and medical devices.

Despite this judicial history, the district court here rejected the proposed consent judgment because of the absence of "any proven or acknowledged facts." SPA 14. But the notion that a district court cannot "deplo[y]" its injunctive power without "facts, established either by admissions or by trials" has no foundation in the law, and the inclusion of the injunctive relief or the presence of important issues does not justify the district court's novel rule. SPA 15.

II. The district court did not give proper deference to the Commission's reasonable assessment that the consent judgment sufficiently satisfied its enforcement objectives, and the court thereby intruded upon the powers constitutionally entrusted to executive officials.

The district court's bright-line rule, in addition to disregarding long-standing judicial practice, interferes with the ability of agencies like the Commission to "'take Care that the Laws be faithfully executed.'" *Board of Trade v. SEC*, 883 F.2d 525, 531 (7th Cir. 1989), quoting U.S. CONST., ART. II, § 3. The district court did not properly defer to the Commission's decision to enter into a consent judgment after weighing its advantages and disadvantages. If left standing, the district court's rule will make it more difficult for the Commission and other agencies to enter into settlements, interfering with the Commission's ability to manage its enforcement program and allocate its resources. Such a rule would, in the Commission's view, ultimately harm investors.

A. The district court did not defer to the Commission's decision to enter into the consent judgment.

The district court did not afford the Commission the deference owed to "the judgment of the government agency which has negotiated and submitted the proposed judgment." *SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984).

Where, as here, "a government actor committed to the protection of the public interest," and a defendant, itself "knowledgeable and represented by experienced lawyers," have together "hammered out an agreement at arm's length and advocate[d] its embodiment in a judicial decree," the "[r]espect for the agency's role" is at its apex. *United States v. Cannons Eng'g Corp*., 899 F.2d 79, 84 (1st Cir. 1990). The Supreme Court, applying this deference, has declined "to assess the wisdom of the Government's judgment in negotiating and accepting" consent decrees, "at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting." *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 689 (1961).

In light of the deference afforded to government agencies negotiating consent judgments, judicial review is limited. As this Court has explained, "[u]nless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved." *Wang*, 944 F.2d at 85 (internal quotation marks omitted). The court's role is not to decide "whether the settlement is one which the court itself might have fashioned, or considers as ideal," *Cannons Eng'g Corp.*, 899 F.2d at 84, to withhold approval unless the court determines that the proposed judgment "is the best possible settlement that could have been obtained," *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991), or to "engage in an unrestricted evaluation of what relief would best serve the public," *United States v. BNS Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (internal quotation marks omitted).

Rather, courts must defer to agencies in keeping with the constitutionally mandated separation of powers that assigns to the Commission the responsibility to execute the securities laws.[19] The decision to investigate, to prosecute, and to settle is solely an executive function. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (decision to investigate or prosecute); *New York State Law Dep't v. FCC*, 984 F.2d 1209, 1213–15 (D.C. Cir. 1993) (applying *Heckler* to decision to settle). In deciding whether to settle, agencies such as the Commission must assess "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if its acts," *Heckler*, 460 U.S. at 831–32, and whether "the benefits of pursuing an adjudication" outweigh "the costs to the agency (including financial and opportunity costs)," *New York State*, 984 F.2d at 1213.

These decisions are entrusted to agencies, not courts, because an agency is "far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Heckler*, 460 U.S. at 831–32. "[C]ase-versus-

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[19] This deference also reflects "the federal policy encouraging settlement." *United States v. George A. Whiting Paper Co.*, 644 F.3d 368, 372 (7th Cir. 2011); *see also In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 118 (2d Cir. 1992); *In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 207 (3d Cir. 1993).

case is the daily tradeoff" that the agencies like the Commission must face, and the Commission's considerable experience overseeing its enforcement program puts the Commission in the best position to "compare the value of pursuing one case against the value of pursuing another." *Board of Trade*, 883 F.2d at 531. This experience, which the Commission has applied for decades when negotiating consent judgments that ultimately benefit investors, is deserving of deference.

Such deference is compatible with judicial review of consent judgments. A court may conclude that a proposed injunctive consent judgment is not fair, reasonable, adequate, or in the public interest because it proposes relief that disregards applicable law or adversely affects the rights of those who did not consent. *E.g.*, *St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 268 (8th Cir. 2011) (rejecting a proposed consent judgment because the parties agreed to violate local zoning laws); *City of Hialeah*, 140 F.3d at 975. A court may reject a proposed consent judgment because implementing the injunctive relief would commit an inappropriate level of judicial resources. *E.g., In re United States*, 503 F.3d 638, 641 (7th Cir. 2007) (a judge may reject a consent decree if its implementation "would create a drain on judicial resources"). And a court, paying "special attention to the decree's clarity," may seek to resolve any ambiguity in a consent decree prior to approval since the court "must preside over [its] implementation." *Microsoft*, 56 F.3d at 1461–62.

But rejecting a consent judgment because the proposed injunctive relief is "unsupported by any proven or acknowledged facts" goes too far. SPA 14. "There is no indication in the record that the court in fact gave deference" to the Commission's decision—reached after years of investigation and lengthy negotiations with Citigroup—to settle the matter as opposed to proceeding to trial. *Citigroup Stay Order*, 673 F.3d at 164. The court disregarded the Commission's balancing of numerous factors, including "the value of the particular proposed compromise, the perceived likelihood of obtaining a still better settlement, [and] the prospects of coming out better, or worse, after a full trial." *Id*. Nor did the court acknowledge the Commission's determination that forgoing a formal adjudication in order to obtain guaranteed and immediate relief—which permits the Commission to pursue other investigations and enforcement actions while still aiding investors—constituted "the optimal allocation of its limited resources." *Id*. at 165. By not deferring to the Commission's judgment on these issues, the district court simply "imposed what it considered to be the best policy to enforce the securities laws," *id*. at 165, and "impermissibly arrogated to [itself] the President's role 'to take care that the laws be faithfully executed.'" *Microsoft*, 56 F.3d at 1457.[20]

B. The district court's rule interferes with the Commission's allocation of resources by restricting its ability to resolve matters by consent judgment and mitigate the risk of trial.

The power to allocate resources across an entire enforcement program rests with the Commission. The rule created by the district court, if left standing and adopted by other courts, would usurp that power by limiting the Commission's ability to enter into consent judgments, which would have significant implications for the Commission's enforcement program.

A court's refusal to accept a proposed consent judgment has "enormous practical consequences for the government's ability to negotiate future settlements." *Microsoft*, 56 F.3d at 1456 (reversing the rejection of the Microsoft antitrust consent decree). Here, the main consequence is a severe limitation on the Commission's ability to enter into consent judgments at all. The Commission's policy of allowing defendants to enter into consent judgments without admitting the underlying allegations is "hallowed" by reason as much as it is "by history."

[20] *See SEC v. Blinder, Robinson & Co.*, 855 F.2d 677 (10th Cir. 1988) (holding that the Commission's exercise of its law enforcement authority is constitutionally valid and consistent with Article II); *FTC v. American Nat'l Cellular*, 810 F.2d 1511, 1514 (9th Cir. 1987) (reaching same conclusion with regard to FTC).

SPA 9. The reason is that many, and perhaps most, defendants will not admit to factual allegations because they are concerned about, among other things, the collateral estoppel effect of admissions on parallel private actions. *Citigroup Stay Order*, 673 F.3d at 161; Business Roundtable Br. 5 (Dkt. No. 82); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331–32 (1979). As a result, successful negotiation of consent judgments, in the Commission's experience, often hinges upon the inclusion of provisions where a defendant expressly does not admit the allegations in the complaint. The prevalence of similar provisions in settlements negotiated by other federal government agencies likely reflects the same dynamic.

Notably, the Commission has adopted a more stringent policy than many other agencies; it does not permit defendants *to deny* the allegations in the complaint. 17 C.F.R. § 202.5(e). Because "it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur," the Commission does not allow a defendant "to consent to a judgment" that "imposes a sanction while denying the allegations in the complaint." *Id*. The no admit/no deny language that stems from this policy and that appears in many Commission consent judgments factors into the "balance of advantages and disadvantages" that the Commission considers in each case and that courts have been reluctant to disrupt. *Clifton*, 700 F.2d at 748; *Randolph*, 736 F.2d at 530.[21]

The district court's order upsets this balance. "A settlement is by definition a compromise." *Citigroup Stay Order*, 673 F.3d at 166; *Armour*, 402 U.S. at 681 (a consent judgment "embodies a compromise"). But, if left standing and adopted by other judges (particularly those in financial centers like New York), the district court's rule would curtail the Commission's ability to reach such compromises. A rule requiring the rejection of a consent judgment unless liability "had been either proved or disproved at trial or one side or the other had conceded the issue" is "tantamount to ruling that in such circumstances, a court will not approve a settlement that represents a compromise." *Citigroup Stay Order*, 673 F.3d at 166.

Without the ability to compromise, the Commission would face a difficult dilemma. "Congress gives the [Commission] a budget, setting a cap on its personnel," and consequently time spent on one case "means less time for something else" because trials consume significant resources. *Board of Trade*, 883

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[21] In a policy change unrelated to this case, the Commission announced in early 2012 that it would no longer allow the inclusion of "no admit/no deny" clauses in consent judgments reached with defendants who have admitted to or have been convicted of criminal violations in parallel criminal proceedings involving factual or legal claims that overlap with those asserted in the Commission's civil complaint. *See* Statement of Robert Khuzami (Jan. 7, 2012), *available at* http://www.sec.gov/news/speech/2012/spch010712rsk.htm.

F.2d at 531. The Commission could not try the substantial percentage of district court cases currently resolved by consent judgments each year—roughly 90%, *see supra* p. 23—given the agency's limited budget and its manifold statutory obligations to regulate the securities markets for the protection of investors. The Commission would then be unable to pursue some district court enforcement actions that would benefit investors if they were resolved by consent judgment. Or it would find it necessary to bring more administrative proceedings, losing the benefits of litigating in district court and frustrating Congress's objective in opening the federal courts to Commission enforcement actions.

The Commission should not have to face this quandary, and the district court's rule impermissibly intrudes upon the Commission's power to allocate its finite resources in a manner that it believes will best benefit the public. The Seventh Circuit has explained why the judiciary "cannot intelligently supervise the Commission's allocation of its staff's time." *Board of Trade*, 883 F.2d at 531. While judges "compare the case at hand against a rule of law," they "do not see the opportunity costs of reallocations within the agency," which are "governed by budgets and opportunities." *Id.* Judges "could make allocative decisions only by taking over the job of planning the agency's entire agenda, something neither authorized by statute nor part of their constitutional role." *Id.*

The district court's order crosses the threshold into making allocative decisions for the Commission. The end result would be an enforcement program driven not by the Commission's ability to obtain the best outcome for investors in the greatest number of cases given the resources that Congress provides, but rather by a judicial imperative requiring a factual adjudication in every instance.

III. The district court abused its discretion in rejecting the consent judgment proposed here, which is fair, reasonable, adequate, and in the public interest because the Commission obtained the injunctive relief it sought in the complaint and monetary relief totaling $285 million, which is more than 80% of what it could have reasonably expected to obtain if it prevailed at trial.

The district court should have approved the consent judgment, which ordered most of the monetary relief and all the injunctive relief that the Commission requested in its complaint, while completely eliminating the Commission's exposure to litigation risk. In its complaint, the Commission sought a permanent injunction against further violations of Sections 17(a)(2) and (3) of the Securities Act, disgorgement plus prejudgment interest, and a civil penalty that could not exceed "the gross amount of pecuniary gain to such defendant as a result of the violation." Section 20(d)(2) of the Securities Act, 15 U.S.C. 77t(d)(2). Based on the allegation that Citigroup received $160 million in ill-gotten gains, it is reasonable to estimate that, if the Commission were successful at trial, the court would have permanently enjoined Citigroup, ordered it to disgorge $160 million (plus prejudgment interest), and ordered it to pay a $160 million penalty.

The relief proposed in the consent judgment closely tracks this best-case trial scenario. The judgment permanently restrained and enjoined Citigroup from violating Sections 17(a)(2) and (3) of the Securities Act. It ordered Citigroup to disgorge $160 million in profits, to pay $30 million in prejudgment interest on that disgorgement, and to pay a $95 million penalty. Altogether, the monetary relief represented 81% ($285 million/$350 million) of what the Commission could have reasonably expected to obtain at trial if it prevailed. And the consent judgment further imposed mandatory injunctive relief, requiring Citigroup to change its approval and review processes for residential mortgage-backed securities and submit to monitoring by the Commission and enforcement by the court.

The proposed consent judgment thus obtained a significant portion of the relief sought without any litigation risk. While the district court's order "assumes that the SEC would succeed at trial in proving Citigroup's liability," there is at least some chance—as there always is—that the Commission would lose at trial and obtain nothing for investors, or win at trial and obtain lesser remedies than those ordered in the consent judgment. *Citigroup Stay Order*, 673 F.3d at 163. The consent judgment allowed the Commission to obtain substantial relief for investors without risk and without delay, as the proposed consent judgment orders the prompt creation of a fund for distribution to injured investors.[22] Under these circumstances, the proposed judgment was fair, reasonable, adequate, and in the public interest.

The district court nevertheless rejected the proposed consent judgment based on an unprecedented bright-line rule that should be rejected for the reasons discussed above. The district court also criticized the proposed judgment because, in its view: (1) the penalty was "very modest," SPA 10; (2) the Commission did not charge Citigroup with scienter-based fraud, SPA 12; and (3) the consent judgment did not provide "collateral estoppel assistance" to private litigants or reveal "the truth" to the public, SPA 11, 15. None of these criticisms justifies the rejection of the consent judgment.

[22] The district court stated that the proposed consent judgment "does not commit the [Commission] to returning any of the $285 million obtained from Citigroup to the defrauded investors" because the inclusion of the word "'may'" in the judgment "only suggests that the [Commission] 'may' do so." JA 244. The judgment used the word "may" because distributions to injured investors cannot commence until the district court approves them. The Commission intends to seek the district court's leave to distribute these proceeds.

A. Under the Securities Act, the maximum penalty turns on a defendant's pecuniary gain, not its size or investor losses, and the $95 million penalty ordered in the judgment is not "modest" when compared to the $160 million penalty that the Commission could have reasonably expected to obtain at trial.

The district court remarked that the consent judgment "results in a very modest penalty" that "is pocket change to any entity as large as Citigroup" and does not compensate investors for their losses. SPA 11; *see also* SPA 10 (describing the relief as including "only very modest penalties"). The $95 million penalty, however, is not "modest" when compared to the penalty the Commission could have reasonably obtained if successful at trial—it is 60% of that amount ($95 million/ $160 million). *Cf. United States v. Lexington-Fayette Urban County Gov't*, 591 F.3d 484, 489–91 (6th Cir. 2010) (holding that district court wrongly rejected a consent judgment because it disagreed with the amount of the penalty).

By comparing the penalty size to Citigroup's wealth and the estimated amount of investor loss, the district court disregarded the securities laws, which do not link penalties to a defendant's revenues or investors' losses. The law does not permit the imposition of a penalty that is greater than the "gross amount of pecuniary gain," no matter how that "pecuniary gain" compares to the defendant's wealth. Similarly, the law does not permit a court to tie disgorgement or penalties to investors' losses. *See* Andrew Ackerman & Jean Eaglesham, *SEC Pushes to*

Toughen Penalties for Offenders, WALL ST. J., Nov. 30, 2011, at C1 (discussing the Commission's request for authority to calculate penalties based on losses).[23]

B. The district court is not permitted to evaluate the consent judgment based upon claims that the Commission did not bring.

The district court further erred by asserting that the consent judgment was not in the public interest because the Commission charged "Citigroup only with negligence," not scienter-based fraud. This precise issue arose in *Microsoft*, where the D.C. Circuit "flatly reject[ed]" the "district judge's efforts to reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made." 56 F.3d at 1459 (emphasis in original). As that court explained, 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*. The *Microsoft* ruling is entirely consistent with the Supreme

[23] The district court also improperly compared the penalty imposed here and the penalty imposed in a 2010 consent judgment with Goldman Sachs. SPA 13 n.7. That "dissimilar facts resulted in dissimilar penalties" does not justify rejecting this consent judgment, particularly when the Commission charged Goldman Sachs with scienter-based violations, but did not similarly charge Citigroup. *Van Cook v. SEC*, 653 F.3d 130, 144 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1582 (2012); *Hiller v. SEC*, 429 F.2d 856, 858 (2d Cir. 1970) ("[W]e cannot disturb the sanctions ordered in one case because they were different from those imposed in an entirely different proceeding.").

Court's decision in *Heckler*, which commits the decision about whether to bring certain charges—or any charges at all—"to an agency's absolute discretion." *Heckler*, 470 U.S. at 831; *see Microsoft*, 56 F.3d at 1459–60 ("The court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place."). As in *Microsoft*, the consent judgment proposed by the Commission here may not be rejected because the Commission, having conducted an exhaustive investigation of Citigroup's conduct, declined to assert scienter-based allegations against Citigroup in an exercise of its prosecutorial discretion.

C. The district court is not permitted to reject the consent judgment because it does not provide "collateral estoppel assistance" to private litigants or because it does not produce adjudicated facts.

The district court's concern that investors "cannot derive any collateral estoppel assistance," SPA 12, from the consent judgment in private litigation against Citigroup is removed from any factor that is relevant to determining whether the consent judgment is fair, reasonable, adequate, or in the public interest.[24] The Commission supports the use of well-founded private civil actions as a vehicle for investors to recoup losses and as a supplement to the Commission's

[24] This focus on "collateral estoppel" assistance belies any argument that the district court was not insisting on a determination (whether by adjudication or admission) of the underlying facts as a prerequisite to approval.

own enforcement powers. But as Congress recognized when it prohibited the consolidation of Commission enforcement actions and private actions without the Commission's consent (*see* Section 21(g) of the Exchange Act, 15 U.S.C. 78u(g)), Commission suits and private litigation serve "very different" purposes. S. REP. NO. 94-74 at 76 (1975), reprinted at 1975 U.S.C.C.A.N. 179, 254. Private plaintiffs seek to obtain damages from other private actors for harm that they suffer, whereas the Commission fulfills Congress's "mandated scheme of law enforcement in the securities area." *Id*. In making decisions about settling its own enforcement actions, the Commission (like other government agencies) is not required to consider whether a consent judgment will provide private litigants with "collateral estoppel assistance." The district court should not have rejected this consent judgment, which provided guaranteed relief without litigation risk, because proceeding to a trial with an uncertain result *might* afford private litigants "collateral estoppel assistance."

The district court also erred by asserting that the Commission failed in its "duty" to "see that the truth emerges." JA 247. The district court's conception of the Commission's "duty" cannot trump the Commission's responsibility to consider the "balance of advantages and disadvantages" presented by a consent judgment. *Clifton*, 700 F.2d at 748. The district court's order plainly reflects its views about the Commission's role in establishing "the truth," but it is not "the proper function of federal courts to dictate policy to executive administrative agencies." *Citigroup Stay* Order, 673 F.3d at 163.

Moreover, the district court ignored that the public *was* adequately informed about Citigroup's actions. The Commission filed a complaint with detailed allegations describing the Commission's investigative conclusions. *Clifton*, 700 F.2d at 748 (explaining that a consent decree protects "the public by informing potential investors that a certain person has violated SEC rules in the past"). Citigroup cannot deny these allegations under the terms of the consent judgment. Moreover, in the memorandum that the Commission submitted to the court in order to answer its questions about the consent judgment, the Commission "did provide information to the court regarding how the evidence supported the proposed consent judgment." *Citigroup Stay Order*, 673 F.3d at 165. In light of the information already available to the public, the Commission made the reasonable decision that expending additional resources to proceed to trial in an attempt to adjudicate the facts was not justified in light of the adequacy of the relief obtained, the litigation risks associated with trial, and the need to devote resources to other matters.

IV. If this Court does not exercise jurisdiction under Section 1292(a)(1), it should issue a writ of mandamus because the district court committed a clear error of law by creating a new bright-line rule regarding consent judgments that restricts the Commission's ability to settle cases.

This Court should exercise jurisdiction over the district court's order pursuant to Section 1292(a)(1) and the Supreme Court's decision in *Carson*. *See supra* pp. 3–10. But if this Court determines that it lacks appellate jurisdiction under that provision, it should grant the Commission's petition for a writ of mandamus because (1) the Commission will "have no other adequate means to attain the relief it desires"; (2) "the writ is appropriate under the circumstances"; and (3) "the right of issuance of the writ is clear and indisputable." *SEC v. Rajaratnam*, 622 F.3d 159, 169 (2d Cir. 2010) (internal quotation marks omitted)*;* *Kensington Int'l Ltd. v. Rep. of Congo*, 461 F.3d 238, 242 (2d Cir. 2006) ("We may treat appeals dismissed for lack of jurisdiction as petitions for a writ of mandamus."). The "exceptional circumstances" here justify "the invocation of this extraordinary remedy," because the district court's order creates a novel rule that has significant implications for the Commission and other government agencies. *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 380 (2004).

If the Court rules that it lacks jurisdiction under Section 1292(a)(1), the Commission will have no other adequate remedy to obtain the entry of the consent judgment it negotiated. *Rajaratnam*, 622 F.3d at 169–70. The district court directed the parties to prepare for trial, and absent the issuance of a writ, the Commission will lose the benefit of the bargain it struck. An appeal after final judgment will not be adequate because in the interim the Commission will have expended resources and faced the litigation risks that it sought to avoid when it exercised its reasonable judgment to enter into the consent judgment.

Mandamus is appropriate because the issue raised by the district court's order—whether injunctive consent judgments must be based on "facts, established either by admissions or trials," SPA 15—is novel and is exceptionally important. *Rajaratnam*, 622 F.3d at 171; *Cheney*, 542 U.S. at 381. In addition to committing the Commission to proceed to trial in this case, the district court's ruling could have significant implications for the Commission's entire enforcement program, which frequently utilizes consent judgments with "no admit/no deny" clauses. *Supra* pp. 23, 29, 46–50. The district court's rule could also affect the enforcement programs of other federal government agencies that rely heavily on consent judgments in which defendants do not admit, or outright deny, facts and liability. *Supra* pp. 23, 31–39. Resolution of the novel and significant question of law presented here will provide certainty to the Commission—and other agencies—regarding future enforcement activities. *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964) (authorizing use of mandamus "to settle new and important problems"); *In re IBM Corp.*, 687 F.2d 591, 599–600 (2d Cir. 1982) (granting writ of mandamus in a case related to approval of antitrust consent decrees in "light of the underlying issue of first impression").

A writ should issue because the district court's ruling constitutes a "clear abuse of discretion" and a "judicial usurpation of power." *Cheney*, 542 U.S. at 380; *Stein v. KPMG, LLP*, 486 F.3d 753, 759 (2d Cir. 2007). A rule barring consent judgments that are "unsupported by any proven or acknowledged facts" conflicts with a century-old judicial practice and intrudes upon the powers vested in executive agencies. *Supra* pp. 25–40; *see also Citigroup Stay Order*, 673 F.3d at 166 ("We know of no precedent that supports the proposition that a settlement will not be found to be fair, adequate, reasonable, or in the public interest unless liability has been conceded or proved and is embodied in the judgment."). That rule, if left standing, would interfere with the ability of the Commission, and other government agencies, to enter into consent judgments, which in turn would interfere with the power of agencies to exercise their reasonable judgment about how their finite law enforcement resources should be allocated. *Supra* pp. 41–50.

The district court erred by adopting this novel rule, and its rejection of the consent judgment proposed here was a clear abuse of discretion because the consent judgment was reasonable, fair, adequate, and in the public interest. *Supra* pp. 50–57; *cf. In re Smith*, 926 F.2d 1027, 1030 (11th Cir. 1991) (granting mandamus and ordering district court to enter settlement that it had rejected). Accordingly, if the Court concludes that it lacks jurisdiction under Section 1292(a)(1), it should issue a writ of mandamus ordering the district court to enter the consent judgment.

CONCLUSION

The Court should reverse the district court's order rejecting the proposed consent judgment and remand with instructions to enter the judgment as proposed. Alternatively, if the Court concludes it lacks appellate jurisdiction under Section 1292(a)(1), it should issue a writ of mandamus ordering the district court to enter the judgment.

Respectfully submitted,

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May 2012

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,833 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word Perfect in 14-Point Times New Roman.

/s/ *Jeffrey A. Berger*

May 14, 2012 Jeffrey A. Berger

CERTIFICATE OF SERVICE

I hereby certify that, on May 14, 2012, I electronically filed the Brief of the Securities and Exchange Commission, Appellant/Petitioner using the CM/ECF system. In addition, on the same day, I sent the original and six copies of the brief to the following address: U.S. Court of Appeals for the Second Circuit, Thurgood Marshall U.S. Court House, 40 Foley Square, New York, NY 10007.

/s/ *Jeffrey A. Berger*
Jeffrey A. Berger

To be argued by Brad S. Karp

11-5227-cv(L),

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

United States Court of Appeals
for the
Second Circuit

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

BRIEF OF DEFENDANT-APPELLEE-CROSS-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee-Cross-Appellant hereby certifies that Citigroup Global Markets Inc. is a direct wholly-owned subsidiary of Citigroup Financial Products Inc., and is an indirect wholly-owned subsidiary of Citigroup Global Markets Holdings Inc., which is a wholly-owned subsidiary of Citigroup Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

PRELIMINARY STATEMENT

The district court's imposition of a condition precedent to approving a proposed consent judgment—specifically, that the settling parties provide "proven or acknowledged facts"—is a clear error of law, as unprecedented as it is unwise. The district court's new hurdle for approving consent judgments is contrary to the well-established standard applied by every federal court in the country, which requires district courts to approve consent judgments so long as they are "fair, reasonable and adequate." This Court's March 15 opinion granting a stay of further proceedings in the district court confirmed that there is "*no precedent* that supports the [district court's] proposition that a settlement will not be found to be fair, adequate, reasonable, or in the public interest unless liability has been conceded or proved and is embodied in the judgment." ("March 15 Opinion" or "*CGMI II*" at 12, JA-312 (emphasis added).)[1]

Nor is the lack of precedent supporting the district court's position surprising. This Court's March 15 Opinion reaffirmed the principle, consistent with decades of unbroken precedent, that it is not "within a court's proper discretion to reject a settlement on the basis that liability has not been conclusively determined." (*Id.*) As the federal courts repeatedly have held, a district court's role in reviewing a proposed consent judgment is extremely limited: "'[u]nless a

[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.

consent decree is unfair, inadequate, or unreasonable, it ought to be approved.'" *SEC* v. *Wang*, 944 F.2d 80, 85 (2d Cir. 1991) (quoting *SEC* v. *Randolph*, 736 F.2d 525, 529 (9th Cir. 1984)). (*See CGMI II* at 12, JA-312.) Consistent with this standard, the primary role of a federal district court in reviewing consent judgments is to give effect to the terms negotiated by the parties, and where, as here, a federal agency is a settling party, "the scope of a court's authority to second-guess an agency's discretionary and policy-based decision to settle is at best minimal." (*CGMI II* at 8, JA-308.)

This sharply circumscribed standard of review is rooted in important policy considerations and reflects the strong policy encouraging parties to settle disputes. As this Court noted in its March 15 Opinion, "[r]equiring such an admission would in most cases undermine any chance for compromise." (*Id.* at 10, JA-310.) This certainly is true in this matter, where Citigroup Inc. ("Citigroup")[2] and its affiliates, including Citigroup Global Markets Inc. ("CGMI"), are defending extensive civil litigation—numerous class actions and individual actions seeking billions of dollars in damages—in which plaintiffs assert claims concerning the very CDO transaction and CDO practices at issue in the complaint the Securities

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[2] The district court and this Court's motions panel refer to CGMI as "Citigroup" throughout their opinions and orders. Citigroup is CGMI's ultimate parent. In this memorandum, we will use "CGMI" when referring to the defendant-appellee-cross-appellant and party to the proposed consent judgment, and "Citigroup" when referring to CGMI's publicly traded parent company.

and Exchange Commission ("SEC") filed in this action. Citigroup's Board of Directors appropriately exercised its business judgment in determining to resolve this matter on a "no admit, no deny" basis precisely to avoid the litigation risks in the pending civil litigations that would be associated with an adverse ruling in this matter. The district court erred as a matter of law in overriding the terms of the parties' negotiated resolution of this matter by imposing its own preferred view of what would be an appropriate outcome of this dispute—either requiring the settling parties to provide "proven or acknowledged facts" as a condition of approving the proposed consent judgment, or, failing that, directing the parties to proceed to a trial on the merits.

The district court's order rejecting the parties' proposed consent judgment on the grounds that it is "neither fair, nor reasonable, nor adequate, nor in the public interest" expressly because it was not supported by proven or acknowledged facts constitutes an abuse of the district court's extremely limited discretion. ("November 28 Order" or "*CGMI I*" at 8, SPA-8.) The parties' proposed consent judgment plainly satisfies the standard this Court and federal courts nationwide apply in reviewing consent judgments of this type: (i) the settlement is fair—it reflects an agreement "reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery," *Wal-Mart Stores, Inc.* v. *Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005); (ii) the settlement is reasonable and adequate—it provides for comprehensive relief, negotiated and agreed to by the parties after each weighed the significant litigation risk involved in proceeding to trial; and (iii) the settlement serves the public interest—as determined by the SEC, in the appropriate exercise of its authority to regulate the federal securities laws. (*See CGMI II* at 6–12, JA-306–12.)

For these reasons, and others set forth herein, the district court erred in refusing to approve the parties' proposed consent judgment. This Court should reverse the district court's order, and remand with instructions that the district court approve the proposed consent judgment.

JURISDICTIONAL STATEMENT

The district court has subject matter jurisdiction over the underlying action, pursuant to sections 20(b), 20(d) and 22(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77t(b), 77t(d), 77v(a). On November 28, 2011, the district court issued an opinion and order refusing to approve a proposed final judgment and permanent injunction ("Consent Judgment," JA-42–60) agreed to by the SEC and CGMI for purposes of resolving the claims asserted in the SEC's underlying complaint. (*CGMI I*, SPA-1.) On December 19, 2011, CGMI filed a timely notice of appeal from the November 28 Order. (JA-271.) This Court has jurisdiction over CGMI's appeal pursuant to 28 U.S.C. § 1292(a)(1). Alternatively, this Court has jurisdiction over the issues presented by this appeal based on the SEC's petition for a writ of mandamus, filed on December 29, 2011 ("Mandamus Petition," JA-291), pursuant to 28 U.S.C. § 1651(a). (*See CGMI II* at 5–6, JA-305–06.)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in rejecting the proposed Consent Judgment on the ground that the settling parties failed to provide "proven or acknowledged facts." (*CGMI I* at 14, SPA-14.)

2. Whether the district court abused its discretion in finding that the Consent Judgment is "neither reasonable, nor fair, nor adequate, nor in the public interest" because it was not based on "proven or acknowledged facts." (*Id.*)

STATEMENT OF THE CASE

On October 19, 2011, the SEC filed a complaint against CGMI in the district court, alleging violations of sections 17(a)(2) and (3) of the Securities Act. ("Complaint," JA-14). Simultaneously, and with the consent of CGMI, the SEC submitted for the district court's approval the Consent Judgment agreed to by the SEC and CGMI for purposes of resolving the claims asserted in the Complaint. (JA-42–60.) On October 27, 2011, the district court (Rakoff, J.) issued an order scheduling a November 9, 2011 hearing regarding the proposed Consent Judgment and directing the parties to address several questions concerning the proposed settlement. ("October 27 Order," JA-68). On November 7, 2011, CGMI and the

SEC each provided written responses to these questions, and the district court conducted a hearing on November 9, 2011. (JA-72; JA-108; JA-170; JA-198.)

Following the November 9 hearing, the district court issued the November 28 Order, refusing to approve the Consent Judgment, including the proposed permanent injunction, and directing the parties to be ready to try the case on July 16, 2012. (*See CGMI I*, SPA-1.) The SEC and CGMI each noticed an appeal from the November 28 Order, on December 15 and 19, 2011, respectively. (JA-250; JA-271.)

On December 16, 2011, the SEC filed a motion before the district court seeking to stay further proceedings in the district court pending resolution of its appeal; on December 20, 2011, CGMI filed a memorandum with the district court in support of the SEC's stay motion. (JA-252; JA-253; JA-274.) The district court denied the SEC's stay motion in a memorandum order entered on December 27, 2011. ("December 27 Order," JA-281.) Also on December 27, 2011, while its stay motion in the district court was pending, the SEC filed an unopposed emergency motion in this Court to stay the proceedings below pending appeal or, in the alternative, for a temporary stay and to expedite the appeal ("Motion for Stay"). That same day, this Court issued a temporary stay of all proceedings in the district court. (JA-290.)

On December 29, 2011, the SEC filed a Mandamus Petition with this Court, seeking an order directing the district court to enter the Consent Judgment. (JA-291.) On January 3, 2012, this Court consolidated the Mandamus Petition (No. 11-5375-cv) with the pending appeals (Nos. 11-5227-cv, 11-5242-cv). On January 9, 2012, CGMI filed in this Court a memorandum in support of the SEC's Motion for Stay.

In a *per curiam* opinion dated March 15, 2012, a Second Circuit motions panel (Walker, Leval, Pooler, JJ.) granted a stay of further proceedings in the district court pending resolution of the parties' appeals, concluding that "the S.E.C. and Citigroup have a strong likelihood of success in their joint effort to overturn the district court's ruling." (*CGMI II* at 12, JA-312.)

STATEMENT OF FACTS

A. The Parties Decide to Forgo a Trial and Resolve the Matter Consensually Through a Negotiated Settlement.

The SEC's Complaint alleges that CGMI violated sections 17(a)(2) and (3) of the Securities Act in connection with its structuring and sale of a single, highly complex synthetic collateralized debt obligation transaction ("CDO") called Class V Funding III ("Class V"). (JA-33–34.) CGMI structured Class V more than five years ago and marketed it to a handful of ultra-sophisticated institutional investors. (JA-21–26, JA-29–31.) These investors were among the most sophisticated commercial players in the global financial markets, all with extensive experience investing in and, in many cases, managing CDO transactions. Notwithstanding the extensive disclosures CGMI made to these ultra-sophisticated investors in the Class V offering documents and marketing materials, the Complaint alleges that certain disclosures regarding the selection of assets for inclusion in Class V as well as CGMI's or its affiliates' interests in the transaction were incomplete and misleading. (JA-26–29.)

The SEC filed its Complaint on October 19, 2011 at the conclusion of a four-year investigation into CGMI's mortgage-related structured credit business activities, which was part of the SEC's industry-wide review of CDO sales practices issues. During its investigation of CGMI, the SEC reviewed over 31 million pages of documents and took testimony from numerous current and former CGMI employees, as well as many other witnesses. (JA-221, JA-224.) At the conclusion of its investigation, after reviewing and evaluating this substantial record, and after engaging CGMI and its counsel in extensive settlement discussions, the SEC decided to resolve its potential claims against CGMI through settlement. (JA-35.) Accordingly, with the consent of CGMI, the SEC submitted the Consent Judgment to the district court for the purpose of resolving the claims asserted in the Complaint. (JA-42–60.) This Consent Judgment, which was filed at the same time as the Complaint, included a proposed permanent injunction for the district court's approval. (JA-54–55.)

The Consent Judgment provides for substantial injunctive relief, including requiring CGMI to implement and maintain for a period of three years extensive modifications and enhancements to its review and issuance of residential mortgage-related securities offerings. (JA-57–59.) The Consent Judgment also requires that CGMI disgorge its alleged $160 million profit earned in connection with Class V, along with $30 million in pre-judgment interest, and imposes a $95 million penalty against CGMI, providing for a total payment of $285 million. (JA-55.) The Consent Judgment further provides that the $285 million payment may be distributed through a fair fund to the handful of ultra-sophisticated institutional investors in Class V, subject to the district court's approval. (JA-56.) Consistent with the longstanding practice of federal regulatory agencies, including the SEC, the Consent Judgment provides that CGMI consents to the judgment "without admitting or denying the allegations of the Complaint." (JA-54.)

B. The District Court Conducts a Hearing to Consider the Consent Judgment, After Receiving Information Regarding the Factual and Legal Bases for the Proposed Settlement.

In its October 27 Order, the district court scheduled a November 9 hearing to "assist" it in determining whether the "proposed judgment is fair, reasonable, adequate, and in the public interest." (JA-68.) In aid of this determination, the district court posed nine questions to the parties (as to which it solicited written responses) concerning the SEC's underlying investigation, the particulars of the Class V transaction, and the terms of, and rationale supporting, the proposed settlement. (JA-68–70.)

On November 7, 2011, the SEC and CGMI submitted memoranda and supporting materials, together totaling over 100 pages, in response to the questions posed by the district court. The SEC informed the court that, taking into account a broad range of considerations, it had determined that the proposed Consent Judgment was "fair, adequate, and reasonable." (JA-79.) The SEC expressly stated that the proposed $285 million payment by CGMI reflected the SEC's balancing of the relief likely to be secured if the SEC prevailed against CGMI at trial and the risks of proceeding with litigation, given the substantial defenses available to CGMI and the substantial resources a trial would consume. (JA-87.) The SEC also explained why it believed the negligence charges against CGMI and the monetary sanctions were appropriate, including, specifically, that "[t]he Commission did not uncover evidence to support a conclusion that there was widespread illicit conduct by individuals throughout Citigroup in connection with the Class V CDO transaction." (JA-99; *see* JA-94–100, JA-102–06.) Of particular note, the SEC observed that:

> The proposed settlement with Citigroup—like the settlements with Goldman Sachs and J.P. Morgan [that were approved by other district courts in the Southern District of New York]—resulted from an extensive, industry-wide investigation into certain abuses that contributed to the recent financial crisis. Given these substantial investigative efforts, the SEC is well-positioned to make comparative

> judgments regarding the relative culpability of the entities and individuals involved.

(JA-97.)

In its written submission to the district court, CGMI detailed why it wished to avoid protracted litigation with its primary regulator. (JA-180–85.) In particular, CGMI noted that Citigroup's Board "appropriately considered the potential substantial adverse collateral consequences to Citigroup if it chose to litigate (and ultimately were to lose) a lawsuit against the SEC or settle in a manner in which it was required to 'admit' liability," particularly in view of the numerous pending class action lawsuits and related litigations asserting claims concerning the very CDO transaction and CDO practices at issue in the SEC's Complaint. (JA-181–82.) CGMI also described how the Consent Judgment's remedial measures would address directly the putative weaknesses in CGMI's internal controls that the SEC alleges resulted in CGMI's negligent disclosures. (JA-193–94.) Finally, CGMI provided corroboration for certain of the factual bases of the SEC's Complaint. (JA-185–89, JA-190–92.)

On November 9, 2011, the district court conducted a hearing to consider whether to approve the Consent Judgment. During the hearing, among other issues, the SEC addressed the agency's practice of allowing defendants to settle claims without admitting or denying the asserted allegations (JA-205–14), and advised the district court that, "based on the facts and circumstances, including our interview of witnesses, our review of hundreds of thousands, if not millions, of pages of documents, the numerous instances of testimony we took, our evaluation of the law that applies, we concluded that in this instance, there was not sufficient evidence to support a finding of scienter" (JA-221).

C. The District Court Refuses to Approve the Parties' Proposed Consent Judgment.

In its November 28 Order, the district court refused to approve the Consent Judgment. (*CGMI I* at 4, SPA-4.) Finding that "[a] large part of what the S.E.C. requests [in the Consent Judgment] . . . is injunctive relief," the district court held that it could not "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." (*Id.* at 5, 14, SPA-5, SPA-14.) The district court refused to approve the Consent Judgment expressly because the settling parties did not provide the court with "proven or acknowledged facts" upon which to base its decision. (*Id.* at 14, SPA-14.)

The district court's November 28 Order rests on three essential, and related, determinations. First, the district court concluded that *any* consent judgment—unsupported by "proven or acknowledged facts"—would not serve the public interest because it would prevent "the public . . . [from] ever knowing the truth in a matter of obvious public importance," and deprive private litigants from using the consent judgment to pursue their own claims because the consent judgment would have "no evidentiary value and no collateral estoppel effect" in any private civil litigation. (*Id.* at 8–10, SPA-8–10.) Second, the district court concluded that *any* consent judgment—unsupported by "proven or acknowledged facts"—would be unfair because it would create "the potential for abuse in imposing penalties on the basis of facts that are neither proven nor acknowledged." (*Id.* at 14, SPA-14.) Finally, the district court concluded that *any* consent judgment—unsupported by "proven or acknowledged facts"—would be unreasonable and inadequate because it would deprive a court of any "assurance that the substantial injunctive relief it is being asked to impose has any basis in fact." (*Id.* at 9, SPA-9.) For these reasons, the district court rejected the Consent Judgment, concluding that it is "neither reasonable, nor fair, nor adequate, nor in the public interest." (*Id.* at 14, SPA-14.)

D. This Court Stays Further District Court Proceedings, Finding a Strong Likelihood of Success on the Merits.

In its March 15 Opinion granting a stay of further proceedings before the district court pending resolution of the pending appeals and the Mandamus Petition, a panel of this Court expressly found that "the S.E.C. and Citigroup have a strong likelihood of success in their joint effort to overturn the district court's ruling," whether by interlocutory appeal or under the higher burden imposed by mandamus. (*CGMI II* at 12, JA-312.) This Court rejected, as unprecedented and unwarranted, the district court's holding that a consent judgment may be approved only if "liability has been conceded or proved and is embodied in the judgment." (*Id.*) In its ruling, this Court rejected each of the three core premises underlying the district court's reasoning.

First, the Second Circuit panel concluded that the district court's determination that consent judgments must be based on "proven or acknowledged facts" to serve the public interest and avoid adverse policy consequences "does not appear to have given deference to the S.E.C.'s judgment on wholly discretionary matters of policy." (*Id.* at 7, JA-307.) In this regard, this Court determined that the parties to this appeal likely would succeed in demonstrating that the district court exceeded its "at best minimal" authority to "second-guess an agency's discretionary and policy-based decision to settle" by "simply disagree[ing]" with the SEC and "impos[ing] what it considered to be the best policy to enforce the securities laws." (*Id.* at 8–10, JA-308–10.)

Second, with respect to the potential for abuse and unfairness, the Second Circuit panel expressed substantial doubt as to whether it was the district court's "legitimate concern to protect a private, sophisticated, counseled litigant," such as CGMI, "from a settlement to which it freely consents." (*Id.* at 10, JA-310.)

Finally, the Second Circuit panel rejected the district court's stated concern that it lacked the ability to evaluate the Consent Judgment in the absence of "proven or acknowledged facts," observing that the district court had an adequate "basis available to assess the underlying facts"—namely, the SEC's "substantial" investigatory record. (*Id.* at 11, JA-311.) This Court further noted that a rule requiring "proven or acknowledged facts" to support a settlement would "undermine any chance for compromise." (*Id.* at 10–12, SPA-10–12.)

Accordingly, for these and other reasons, this Court determined that there was a strong likelihood that the November 28 Order would be reversed by a merits panel of this Court and stayed all further proceedings in the district court pending the disposition of the instant appeals and the Mandamus Petition.

SUMMARY OF ARGUMENT

The district court's order refusing to approve the proposed Consent Judgment on the ground that the settling parties failed to provide the district court with "proven or acknowledged facts" should be reversed, for the following reasons:

First, the district court's new rule, requiring settling parties to provide "proven or acknowledged facts," is inconsistent with the standard uniformly applied by hundreds of federal district courts that have considered—and approved—federal regulatory agency consent judgments over the past several decades. The standard—applied by courts in this Circuit and around the country—is that district courts should approve consent judgments so long as they are "fair, reasonable and adequate." As noted by this Court, there is "*no precedent* that supports the [district court's] proposition that a settlement will not be found to be fair, adequate, reasonable, or in the public interest unless liability has been conceded or proved and is embodied in the judgment." (*CGMI II* at 12, JA-312 (emphasis added).)

Second, the district court's imposition of this unprecedented requirement exceeds its extremely circumscribed authority in reviewing consent judgments. As courts consistently have held, the district court's role in reviewing a consent judgment is extremely narrow: "'[u]nless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved.'" *Wang*, 944 F.2d at 85 (quoting *Randolph*, 736 F.2d at 529). Where, as here, a consent judgment is voluntarily negotiated between a federal regulator and a sophisticated, well-represented party, a court should give effect to the terms negotiated by these parties and should not second-guess their decision to settle. (*See CGMI II* at 8, JA-308.) The district court's decision turns this standard on its head, effectively forcing the parties to go to trial (unless the settling defendant concedes liability) and denying "their right to compromise their dispute on mutually agreeable terms." *Carson* v. *Am. Brands, Inc.*, 450 U.S. 79, 87–88 (1981).

Third, the district court's refusal to follow this established standard for reviewing consent judgments vitiates the strong policy encouraging negotiated resolutions. A key consideration in resolving a litigation short of trial for a defendant like CGMI is to avoid the risks and collateral consequences associated with ongoing litigation and potentially adverse findings. By forcing defendants to make admissions of liability as a condition of settlement, the district court's proposed standard "would in most cases undermine any chance for compromise." (*CGMI II* at 10, JA-310.)

Finally, the district court abused its limited discretion in determining that the proposed Consent Judgment is "neither reasonable, nor fair, nor adequate, nor in the public interest" expressly because it was not based on "proven or acknowledged facts." (*CGMI I* at 8, SPA-8.) As this Court determined, there were sufficient facts in the record for the district court to determine that the Consent Judgment (i) is fair, because it reflects an agreement "reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery," *Wal-Mart Stores*, 396 F.3d at 116; (ii) is reasonable and adequate, because it provides for comprehensive relief when balanced against the significant litigation risks faced by both parties; and (iii) serves the public interest, because the SEC has determined that its terms reflect an appropriate exercise of its authority to regulate the federal securities laws.

STANDARD OF REVIEW

The question whether the district court erred in rejecting the proposed Consent Judgment on the ground that the settling parties failed to provide "proven or acknowledged facts" is an issue of law that is reviewed *de novo*. *See City of New York* v. *Golden Feather Smoke Shop, Inc.*, 597 F.3d 115, 120 (2d Cir. 2010). The question whether the district court erred in finding that the proposed Consent Judgment was not fair, adequate, reasonable, or in the public interest because it was not supported by "proven or acknowledged facts" is reviewed under an abuse of discretion standard. *See id*. A district court necessarily abuses its discretion if it "(1) base[s] its ruling on an erroneous view of the law, (2) ma[kes] a clearly erroneous assessment of the evidence, or (3) render[s] 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 quotations omitted).

ARGUMENT

I.

THE DISTRICT COURT ERRED IN REFUSING TO APPROVE THE CONSENT JUDGMENT WITHOUT PROVEN OR ACKNOWLEDGED FACTS

A. The District Court Erred by Imposing an Unprecedented Condition to Approving the Proposed Consent Judgment.

After spending "long hours trying to determine whether, in view of the substantial deference due the S.E.C. in matters of this kind, the Court [could] somehow approve [the] problematic Consent Judgment," the district court concluded that it could *not* because it had "not been provided with any proven or admitted facts upon which to exercise even a modest degree of independent judgment." (*CGMI I* at 4, SPA-4.) The district court elaborated, holding that:

> [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. Purely private parties can settle a case without ever agreeing on the facts, for all that is required is that a plaintiff dismiss his complaint. But when a public agency asks a court to become its partner in enforcement by imposing wide-ranging injunctive remedies on a defendant, enforced by the formidable judicial power of contempt, the court, and the public, need some knowledge of what the underlying facts are: for otherwise, the court becomes a mere handmaiden to a settlement privately negotiated on the basis of unknown facts, while the public is deprived of ever knowing the truth in a matter of obvious public importance.

(*Id.* at 8–9, SPA-8–9 (footnotes omitted).)

In other words, although it purported to evaluate the proposed Consent Judgment under the well-established "fair, reasonable and adequate" rubric, the district court in fact imposed a new, unprecedented requirement: consent judgments may be approved—may be found "fair, reasonable and adequate"—*only if* they are supported by "proven or acknowledged facts." The district court erred as a matter of law in imposing this new requirement—one that conflicts with decades of established precedent in this Circuit and across the country.

The district court cited no precedent in support of its new standard, which is not surprising: as this Court noted in its March 15 Opinion, there exists "*no* precedent" that supports the district court's proposed standard. (*CGMI II* at 12, JA-312 (emphasis added).) In fact, all existing reported authority holds precisely the opposite: federal district courts should approve consent judgments so long as they are fair, reasonable and adequate. For the reasons set forth in Part II, *infra*, the Consent Judgment easily satisfies this well-established standard.

There is no requirement, in any reported decision, that settling parties must provide district courts with "proven or acknowledged facts." For decades, district courts have approved literally hundreds, if not thousands, of proposed consent judgments *without* requiring proven or admitted facts—including two other judges in the Southern District of New York presented with similar consent judgments arising out of the very same SEC CDO sales practices investigation. The district court's order refusing to approve the Consent Judgment on the ground that it failed to satisfy this new requirement—that it was not supported by "proven or acknowledged facts"—should be reversed as a clear error of law.

1. The Well-Established Standard for Approving Consent Judgments Does Not Require Settling Parties to Provide Proven or Acknowledged Facts.

The standard for judicial review and approval of a proposed consent judgment in an SEC enforcement action—indeed, the *only* standard imposed by federal courts across the country—is whether the proposed settlement is fair, reasonable and adequate. *Randolph*, 736 F.2d at 529; *see Wang*, 944 F.2d at 85 (quoting *Randolph*).[3] (*See also CGMI II* at 12, JA-312.) This standard has been consistently applied by courts approving settlements of SEC enforcement actions. *See, e.g.*, *SEC* v. *WorldCom, Inc.*, 273 F. Supp. 2d 431, 436 (S.D.N.Y. 2003) (Rakoff, J.) (noting that "a Court reviews a settlement proposal . . . on the basis of whether the settlement is fair, reasonable, and adequate" (citing *Wang*, 944 F.2d at 85)).

Prior to the district court's ruling in this case, no court of which CGMI is aware had ever required settling parties to provide "proven or acknowledged facts" as a condition precedent to approving a consent judgment in the SEC enforcement context.

Indeed, prior to the ruling below, the only two federal district court decisions ever to have required a party to admit wrongdoing as a condition of

[3] The district court considered a fourth prong in evaluating whether to approve the Consent Judgment: whether the proposed consent judgment served the "public interest." As this Court noted in its March 15 Order, the district court misapplied its analysis of this factor. Specifically, "when a court orders injunctive relief, it should ensure that injunction does not cause harm to the public interest." (*CGMI II* at 7 n.1, JA-307.) A federal district court should not, as the district court did below, affirmatively evaluate whether the proposed consent judgment *serves* the public interest. That determination should be made by the executive branch—specifically, the administrative agency vested with administrative and regulatory authority: the "initial determination whether the consent decree is in the public interest is best left to the SEC and its decision deserves [the court's] deference." *Randolph*, 736 F.2d at 530. In all events, if the "public interest" factor is considered as part of the consent judgment approval analysis, such an analysis should be satisfied by a finding that the consent judgment is fair, reasonable and adequate. *See, e.g.*, *id.* at 529 (courts should defer to an "agency's decision that the decree is appropriate and simply ensure[] that the proposed judgment is reasonable"). *See infra* Part II.C.

approving a proposed consent judgment both were reversed on appeal. In the first, the D.C. Circuit, evaluating an antitrust consent decree under the Tunney Act, expressly rejected the district court's holding that a corporate defendant must be required "to admit that the practices charged in the complaint actually violated the antitrust laws" in order for an antitrust consent decree to be approved. *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995). As in this case, the *Microsoft* district court objected to the fact that the proposed "decree explicitly state[d] that it does not constitute 'any evidence or admission by any party with respect to any issue of fact or law,'" proclaiming that "[i]f a court is asked to approve a decree without information regarding the effect of the decree, then the Court's role becomes a nullity." *United States* v. *Microsoft Corp.*, 159 F.R.D. 318, 324, 327 (D.D.C. 1995). As a result, the *Microsoft* district court held that it could not "find the proposed decree to be in the public interest . . . [because] the Government has declined to provide the Court with the information it needs to make a proper public interest determination." *Id.* at 332 (requiring facts so the court could determine what "the Government has bargained away").

The D.C. Circuit emphatically rejected the district court's proposed heightened standard of review and remanded the case—to a different district judge—with instructions requiring the approval and entry of the proposed consent decree. In so ruling, the D.C. Circuit specifically noted that "a district judge must be careful not to exceed his or her constitutional role." *Microsoft*, 56 F.3d at 1462. The D.C. Circuit emphasized the substantial deference that should be accorded a government regulator's judgment of how to proceed in an enforcement action, and expressly observed that "a district judge [cannot] assume the role of Attorney General." *Id.* The D.C. Circuit further emphasized that "the district judge's criticism of Microsoft for declining to admit that the practices charged in the complaint actually violated the antitrust laws was [ ] unjustified." *Id.* at 1461.

In the second case, *Carson* v. *American Brands, Inc.*, 654 F.2d 300, 301 (4th Cir. 1981) (per curiam), the Fourth Circuit remanded the matter to the district court (following remand of the case from the Supreme Court) with instructions to enter a proposed consent decree, adopting the reasoning of the dissent from the prior Fourth Circuit decision, which stated that "a ruling that litigation may not be settled unless a party formally admits liability, or formally concedes legality, or a court determines liability or a lack thereof, would defeat the general policy of the law to foster settlements since the very purpose of a settlement is usually to avoid an adjudication or a concession of rights." *Carson* v. *Am. Brands, Inc.*, 606 F.2d 420, 431 (4th Cir. 1979) (Winter, J., dissenting) (adopted on remand).[4]

[4] *See also Carson*, 450 U.S. at 87–88.

Like the district courts in *Microsoft* and *Carson,* the district court below erred by requiring CGMI to admit liability as a condition of approving the proposed Consent Judgment.

2. District Courts Have Not Required Settling Parties to Provide Proven or Acknowledged Facts as a Condition to Approving Consent Judgments.

The district court did not cite a *single* case in support of its proposed standard for approving a consent judgment. Nor could it: other than the decisions issued by the district courts in *Microsoft* and *Carson*—both of which were reversed on appeal—CGMI is not aware of a single federal district court in the United States that has ever required parties to provide "proven or acknowledged facts" as a condition precedent to obtaining approval of a proposed federal regulatory agency consent judgment.[5] In fact, over the past several decades, federal district

[5] Following the district court's November 28 Order, at least two other district courts have questioned the factual bases for proposed consent judgments with regulators and delayed approval of such settlements. *See, e.g.*, *FTC* v. *Circa Direct LLC*, No. 11 Civ. 2172 (RMB), 2012 WL 589560, at **1–2 (D.N.J. Feb. 22, 2012) (citing *CGMI I* in questioning appropriateness of proposed consent judgment between Federal Trade Commission and private company where proposed consent judgment "provide[d] no factual predicate" for approval); *SEC* v. *Koss Corp.*, No. 11-C-991 (RTR), D.E. # 5, at *1 (E.D. Wisc. Dec. 20, 2011) (citing *CGMI I* and 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"). In addition, prior to issuing its November 28 Order, the district court below in a prior matter required the SEC to submit a statement of facts in support of a proposed consent judgment prior to granting approval. Notably, however, although the defendant in that case acknowledged that there was an "evidentiary basis" to the statement of facts submitted by the SEC, the consent judgment specifically provided that the defendant's "acknowledgment . . . is not an

courts have approved more than 800 federal regulatory agency consent judgments providing for injunctive relief, without *once* requiring the settling parties to provide proven or admitted facts or otherwise to admit liability.[6] These settlements have involved a broad array of federal regulators, including the SEC, the Department of Justice, the Equal Employment Opportunity Commission, the Environmental Protection Agency, and the Federal Trade Commission, among many others.[7] Moreover, district court orders approving such settlements without

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admission as to the truth of any such statements or any inferences or legal conclusions based on such statements." *SEC* v. *Bank of Am. Corp.*, No. 09 Civ. 6829 (JSR), D.E. # 97, at *15 (S.D.N.Y. Feb. 24, 2010) (Rakoff, J.). Finally, in the recent *Goldman* case, discussed *infra* at 27, the parties agreed to a negotiated acknowledgment of certain facts in the consent judgment, but that acknowledgment was made "[w]ithout admitting or denying the allegations of the complaint." *SEC* v. *Goldman, Sachs & Co.*, No. 10 Civ. 3229 (BSJ), D.E. # 25, at **1–2 (S.D.N.Y. July 20, 2010).

6 CGMI has identified 805 court orders approving federal regulatory agency consent judgments without requiring proven or admitted facts, and has prepared a chart briefly summarizing and providing citations to these orders. The chart is attached as Exhibit A to the Declaration of Brad S. Karp in Support of CGMI's Motion to Submit an Addendum of Citations to Additional Authorities in Support of Its Appeal, filed with the Court on May 14, 2012.

7 *See, e.g.*, *SEC* v. *Option One Mortg. Corp.*, No. 12-CV-633 (JST), D.E. #5, at *2 (C.D. Cal. Apr. 26, 2012) ; *EEOC* v. *Luihn Food Sys.*, No. 09-CV-387 (JCD), D.E. #46, at *1 (E.D.N.C. Nov. 30, 2011); *United States* v. *Atl. Veal & Lamb LLC*, No. 11 Civ. 1034 (JG), D.E. # 7, at *2 (E.D.N.Y. April 19, 2011) (Dep't of Ag.); *United States* v. *LaFarge N. Am., Inc.*, No. 11-CV-3426 (RDB), D.E. #7, at *2 (D. Md. Feb. 10, 2011) (Envtl. Prot. Agency); *United States* v. *Portland Shellfish Co.*, No. 11-CV-01 (JAW), D.E. # 8, at *1 (D. Me. Jan. 20, 2011) (Food & Drug Admin.); *United States* v. *PrimeLending*, No. 10-CV-2494-P (JAS), D.E. # 3, at *2 (N.D. Tex. Jan. 11, 2011) (Dep't of Hous. and Urban Dev.); *Chao* v. *Meixner*, No. 07-CV-595 (WSD), D.E. # 62, at *2 (N.D. Ga. Jan. 15, 2008) (Dep't of Labor); *FTC* v. *Diet Coffee, Inc.*, No. 08 Civ. 94 (JSR), D.E. #4, at *2 (S.D.N.Y. Jan. 4, 2008) (Rakoff, J.); *CFTC* v. *Commodity Inv. Group, Inc.*, No. 05 Civ. 5741 (HB), D.E. # 47, at *3 (S.D.N.Y. Feb. 27,

requiring proven or acknowledged facts have been affirmed or cited with approval by the Supreme Court, this Court, and other federal courts of appeal.[8]

In this Circuit, district courts repeatedly have approved proposed SEC consent judgments "not on the basis of what [they themselves] determine is the appropriate penalty but on the basis of whether the settlement is fair, reasonable, and adequate." *WorldCom, Inc.*, 273 F. Supp. 2d at 436 (Rakoff, J.) (citing *Wang*, 944 F.2d at 85); *accord SEC* v. *Bear, Stearns & Co.*, No. 03 Civ. 2937 (WHP), 2003 WL 22466156, at *1 (S.D.N.Y. Oct. 31, 2003) ("A court reviews a proposed settlement to determine whether it is fair, reasonable, and adequate." (citing *Wang*, 944 F.2d at 85)).[9] Federal district courts have also approved consent judgments in SEC enforcement actions providing for relief similar to that provided in the proposed Consent Judgment. *See, e.g.*, *Bear, Stearns*, 2003 WL 22466156, at *2; *SEC* v. *Universal Express, Inc.*, 646 F. Supp. 2d. 552, 562–69 (S.D.N.Y. 2009);

2007); *United States* v. *Am. Radio Sys. Corp.*, No. 96-2459 (NHJ), 1997 WL 226227, at *1 (D.D.C. Jan. 31, 1997) (Dep't of Justice (Antitrust)); *SEC* v. *Broadwall Secs., Inc.*, 514 F. Supp. 488, 489 n.1 (S.D.N.Y. 1967).

[8] *See Swift & Co.* v. *United States*, 276 U.S. 311, 320 (1928) (approving consent decrees in which defendants did not make admissions of facts or concessions of liability); *United States* v. *Lexington-Fayette Urban Co. Gov't*, 591 F.3d 484, 486, 491 (6th Cir. 2010) (same); *Microsoft Corp.*, 56 F.3d at 1461–62 (same); *Randolph*, 736 F.2d at 529–30 (same); *Carson*, 654 F.2d at 301 (same).

[9] In the Second Circuit alone, over the past several decades, federal district courts have issued at least 115 orders approving federal regulatory settlements involving injunctions without requiring proven or acknowledged facts. *See supra* note 6 and accompanying materials.

SEC v. *Beacon Hill Asset Mgmt. LLC*, No. 02 Civ. 8855 (LAK), 2004 WL 2404096, at **1–3 (S.D.N.Y. Oct. 28, 2004).

In fact, two district courts in this Circuit approved proposed SEC consent judgments settling similar claims arising out of the *same* SEC CDO sales practices inquiry and involving the *same* material terms as CGMI's proposed settlement with the SEC, *prior* to the district court's order refusing to approve the SEC's proposed Consent Judgment with CGMI. *See SEC* v. *J.P. Morgan Sec. LLC*, No. 11 Civ. 4206 (RMB), D.E. #4 (S.D.N.Y. June 29, 2011) (approving consent judgment providing for disgorgement, civil penalty, prejudgment interest, internal undertakings by defendant and injunctive relief); *SEC* v. *Goldman, Sachs & Co.*, No. 10 Civ. 3229 (BSJ), D.E. #25 (S.D.N.Y. July 20, 2010) (same). Those consent judgments were approved by the district courts *despite* the presence of the "no admit/no deny" language.

The district court in this matter erred by refusing to apply the standard used by hundreds of its sister courts and that it previously had consistently applied in reviewing the proposed Consent Judgment—the "fair, reasonable and adequate" standard.

B. The District Court Exceeded Its Authority in Requiring Settling Parties to Provide Proven or Acknowledged Facts as a Condition of Approving the Proposed Consent Judgment.

A district court's role in reviewing a proposed consent judgment is extremely circumscribed. As federal courts consistently have held, "[u]nless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved." *Randolph*, 736 F.2d at 529. The district court expressly rejected this limited role, instead requiring the parties to provide proven or acknowledged facts as a condition of approving the Consent Judgment. As this Court observed in its March 15 Opinion, the district court exceeded its limited authority in imposing this requirement in reviewing the proposed Consent Judgment. (*See CGMI II* at 11, JA-311.)

1. The Scope of a Federal District Court's Authority to Review and Modify the Negotiated Terms of a Consent Judgment Is Extremely Limited.

While district courts do have a limited role in reviewing proposed consent judgments (*see id.* at 8, JA-308), "when evaluating a settlement agreement, the court is not to substitute its judgment for that of the parties." *In re Sony Corp. SXRD.*, 448 F. App'x 85, 87 (2d Cir. 2011) (summary order) (citing *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974), *abrogated on other grounds, Goldberger* v. *Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000)); *see also Petrovic* v. *Amoco Oil Co.*, 200 F.3d 1140, 1148–49 (8th Cir. 1999). Nor is it a court's "function to determine whether this is the best possible settlement that could have been obtained, but only whether it is fair, adequate and reasonable." *United States* v. *Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991); *United States* v. *Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990) ("The relevant standard, after all, is not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute.").

Further, because of the strong public policy favoring settlement, "when evaluating a settlement agreement, the court is not . . . to turn consideration of the adequacy of the settlement 'into a trial or a rehearsal of the trial.'" *In re Sony*, 448 F. App'x at 87 (quoting *Grinnell*, 495 F.2d at 462); *Janus Films, Inc.* v. *Miller*, 801 F.2d 578, 582 (2d Cir. 1986) (noting that when reviewing consent judgments, courts do not make a "determination of the merits of the controversy"); *United States* v. *Oregon*, 913 F.2d 576, 582 (9th Cir. 1990). Indeed, making such a determination is contrary to a "long-standing rule that a district court has power to enter a consent decree without first determining that a statutory violation has occurred." *Citizens for a Better Env't* v. *Gorsuch*, 718 F.2d 1117, 1125 (D.C. Cir. 1983); *see also Swift & Co.* v. *United States*, 276 U.S. 311, 326–27 (1928).

When one of the settling parties is a federal agency, such as the SEC, the scope of a court's authority to review a consent judgment is even more limited.

As this Court noted in its March 15 Opinion, a court's authority to "second-guess" an agency's decision to settle is "at best minimal." (*CGMI II* at 8, JA-308.) This is because of the strong deference owed "to the government agency which has negotiated and submitted the proposed judgment." *Randolph*, 736 F.2d at 529; *see also Microsoft*, 56 F.3d at 1461 (noting that when reviewing a proposed consent decree "that may well reflect weaknesses in the government's case, the district judge must be even more deferential to the government's predictions as to the effect of the proposed remedies").

Given this limited scope of review, the factors courts permissibly may consider generally concern whether the proposed consent judgment exceeds the scope of the court's authority, *see Kozlowski* v. *Coughlin*, 871 F.2d 241, 244 (2d Cir. 1989) (holding that courts may reject a consent decree that falls outside the scope of the court's subject matter jurisdiction or the scope of the pleadings); whether the proposed consent decree would violate other laws, *see Conservation Law Found. of New England, Inc.* v. *Franklin*, 989 F.2d 54, 58–59 (1st Cir. 1993) (observing that a proposed consent judgment should be reviewed to ensure that it does not violate statutes or law); or whether it would impose an unreasonable burden on judicial resources, *see In re United States*, 503 F.3d 638, 641 (7th Cir. 2007) (noting that a court in a civil action may reject a consent decree if "implementing the decree would create a drain on judicial resources"). These factors never have included whether the parties provided proven or acknowledged facts in connection with the consent decree. *See supra* Part I.A.

2. The District Court Exceeded the Scope of Its Authority by Attempting to Substitute Its Preferred Outcome for the Negotiated Terms of the Consent Judgment.

In requiring the parties to provide proven or acknowledged facts as a condition of approving the proposed Consent Judgment, the district court exceeded the scope of its authority. As the Second Circuit panel noted, the district court's imposition of this novel requirement, purportedly to advance its conception of the "public interest," violates the well-established principle that the judiciary must defer to the executive branch on "wholly discretionary matters of policy." (*CGMI II* at 7, JA-307.) As this Court observed:

> The S.E.C.'s decision to settle with Citigroup was driven by considerations of governmental policy as to the public interest. The district court believed it was a bad policy, which disserved the public interest, for the S.E.C. to allow Citigroup to settle on terms that did not establish liability. It is not, however, the proper function of federal courts to dictate policy to executive administrative agencies. "[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: Our Constitution vests such responsibilities in the public branches."

(*Id.* at 7–8, JA-307–08 (quoting *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984) (internal quotation and citation omitted)).)

The district court's imposition of a novel condition precedent to approving the proposed Consent Judgment also violated the parties' right to compromise a litigation on mutually agreeable terms. While consent judgments have the "attributes both of contracts and of judicial decrees," the "construction of a consent decree is essentially a matter of contract law." *Gorsuch*, 718 F.2d at 1124 (citation omitted); *see also EEOC* v. *N.Y. Times*, 196 F.3d 72, 78 (2d Cir. 1999) (observing that, while they are judicial orders, consent decrees "should be construed basically as contracts"); *SEC* v. *Levine*, 881 F.2d 1165, 1178–79. As such, a federal district court's review of a consent judgment should be limited because, as noted by the Supreme Court:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. *Armour & Co.,* 402 U.S. 673, 681 (1971). Simply stated, the primary role of federal courts in reviewing a consent judgment should be "to give effect to the terms negotiated by the parties." *Levine*, 881 F.2d at 1181 (construing SEC consent decree after approval by district court); *see also N.Y. Times*, 196 F.3d at 78 (observing that courts "may not replace the terms of a consent decree with its own, no matter how much of an improvement it would make in effectuating the decree's goals").

Here, the parties bargained for a negotiated resolution with no admission of liability and the avoidance of a trial. In rejecting this proposed outcome, and instead imposing its own requirement of proven or acknowledged facts, the district court impermissibly deprived CGMI and the SEC of their right to a mutually agreeable negotiated compromise. As the Supreme Court explained in *Carson*, requiring parties to admit liability as a condition of settlement effectively orders the parties to "proceed to trial and to have their respective rights and liabilities established within limits laid down by that court." *Carson*, 450 U.S. at 87. Such a requirement "den[ies] the parties their right to compromise their dispute on mutually agreeable terms." *Id.* at 88; *see also Armour,* 402 U.S. at 682 (noting that "because the defendant has, by the decree, waived his right to litigate the issues raised . . . the conditions upon which he has given that waiver must be respected").

The district court attempted to justify its novel approach as one designed to police the "potential for abuse" by the government in imposing penalties beyond those supported by the facts of a case. (*CGMI I* at 14, SPA-14.) This policing function, whether it might ever be appropriate, manifestly is inappropriate here. CGMI is a highly sophisticated entity, represented by sophisticated counsel, that entered into this settlement at the conclusion of the SEC's four-year investigation, after weighing all of the risks and benefits of settlement versus litigation. As the Second Circuit panel appropriately noted, it should not be "part of the court's legitimate concern to protect a private, sophisticated, counseled litigant from a settlement to which it freely consents. We doubt that a court's discretion extends to refusing to allow such a litigant to reach a voluntary settlement in which it gives up things of value without admitting liability." (*CGMI II* at 10, JA-310.) *See Wal-Mart Stores*, 396 F.3d at 116 (upholding class action settlement and observing that a "presumption of fairness, adequacy, and reasonableness may attach to a . . . settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery").

For all these reasons, the district court exceeded its limited authority in rejecting the proposed Consent Judgment on the ground that the parties failed to provide "proven or acknowledged facts."

C. The District Court's Standard, If Affirmed, Would Undermine the Ability of Private Parties to Resolve Disputes with Regulators.

The district court's proposed standard not only is unprecedented, but it also is unwarranted, unwise and would undermine the strong federal policy favoring the resolution of litigation through settlement. As the Second Circuit panel observed, requiring proven or admitted facts as a condition to judicial approval of a consent judgment "would in most cases undermine any chance for compromise." (*CGMI II* at 10, JA-310.)

The reasons for this are obvious: private parties can ill afford the risks of agreeing to a consent judgment predicated on an admission of wrongdoing given the potentially devastating collateral consequences posed by private litigation premised on such admissions. Specifically in this case, Citigroup's management and Board of Directors appropriately considered these potential adverse collateral consequences in determining to consent to the entry of the proposed Consent Judgment. CGMI and its affiliates are defending numerous class action lawsuits and related litigations asserting claims arising out of the subprime and credit crisis, which include allegations specifically related to CGMI's CDO-related business practices.[10] These private civil litigations rest on

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[10] *See In re Citigroup Inc. Sec. Litig.*, No. 07 Civ. 9901 (SHS) (S.D.N.Y. filed Nov. 8, 2007); *In re Citigroup Inc. Bond Litig.*, No. 08 Civ. 9522 (SHS) (S.D.N.Y. filed Nov. 5, 2008); *see also Brecher* v. *Citigroup Inc.*, No. 09 Civ. 7359 (SHS) (S.D.N.Y. filed Aug. 21, 2009); *Int'l Fund Mgmt. S.A.* v. *Citigroup*

allegations that CGMI misled investors by making false statements concerning its subprime exposure and concealing its involvement in the CDO market. In electing to settle this matter pursuant to the SEC's longstanding "no admit, no deny" policy, Citigroup's management and Board appropriately prioritized its current

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Inc., No. 09 Civ. 8755 (SHS) (S.D.N.Y. filed Oct. 14, 2009); *Norges Bank* v. *Citigroup Inc.*, No. 10 Civ. 7202 (SHS) (S.D.N.Y. filed Sept. 17, 2010); *Swiss & Global Asset Mgmt.* v. *Citigroup Inc.* No. 10 Civ. 9325 (SHS) (S.D.N.Y. filed Dec. 13, 2010); *AHW Inv. P'ship* v. *Citigroup Inc.*, No. 10 Civ. 9646 (DLC) (S.D.N.Y. filed Dec. 29, 2010); *Universal-Investment-Gesellschaft MBH* v. *Citigroup Inc.*, No. 11 Civ. 314 (SHS) (S.D.N.Y. filed Jan. 14, 2011); *Odom* v. *Morgan Stanley Smith Barney, LLC*, No. 11 Civ. 3827 (SHS) (S.D.N.Y. filed June 6, 2011); *Melgen* v. *Citigroup Inc.*, No. 11 Civ. 4788 (SHS) (S.D.N.Y. filed July 12, 2011); *British Coal Staff Superannuation Scheme* v. *Citigroup Inc.*, No. 11 Civ. 7138 (SHS) (S.D.N.Y. filed Oct. 11, 2011); *Highland CDO Opportunity Master Fund, L.P.*, v. *Citibank, N.A.*, No. 12 Civ. 2827 (NRB) (S.D.N.Y. filed Apr. 5, 2012); *MoneyGram Payment Sys., Inc.* v. *Citigroup Inc.*, No. 27-CV-11-21348 (WRH) (Minn. Dist. Ct. filed Oct. 26, 2011); *Loreley Fin. (Jersey) No. 3 Ltd.* v. *Citigroup Global Markets Inc.*, No. 650212/2012 (N.Y. Sup. Ct., N.Y. Cnty. filed Jan. 24, 2012).

CGMI also faces additional litigation exposure arising out of the subprime and credit crisis unrelated to its CDO structuring activities—for instance, litigation concerning residential mortgage-backed securities in which similar issues have been alleged. *See Union Central Life Ins. Co.* v. *Credit Suisse First Boston Mortgage Sec. Corp.*, No. 11 Civ. 2890 (GBD) (S.D.N.Y. filed Apr. 28, 2011); *Fed. Home Loan Bank of Boston* v. *Ally Fin., Inc.*, No. 11 Civ. 10952 (GAO) (D. Mass. filed May 26, 2011); *Fed. Hous. Fin. Agency* v. *Citigroup Inc.*, No. 11 Civ. 6196 (DLC) (S.D.N.Y. filed Sept. 2, 2011); *Cambridge Place Inv. Mgmt., Inc.* v. *Morgan Stanley & Co.*, No. 10-2741-BLS2 (Mass. Super. Ct. filed July 9, 2010); *Charles Schwab Corp.* v. *BNP Paribas Sec. Corp.*, No. CGC-10-501610 (Cal. Super. Ct. filed July 15, 2010); *Fed. Home Loan Bank of Chicago* v. *Banc of Am. Sec., LLC*, No. LC091499 (Cal. Super. Ct. filed Oct. 15, 2010); *Fed. Home Loan Bank of Chicago* v. *Banc of Am. Funding Corp.*, No. 10 CH 45033 (Ill. Cir. Ct. filed Oct. 15, 2010); *Cambridge Place Inv. Mgmt., Inc.* v. *Morgan Stanley & Co.*, No. 11-0555-BLS2 (Mass. Super. Ct. filed Feb. 11, 2011); *Allstate Ins. Co.* v. *CitiMortgage Inc.*, No. 650432/2011 (N.Y. Sup. Ct. filed Feb. 17, 2011); *The Western & Southern Life Ins. Co.* v. *Residential Funding Co., LLC*, No. A1105042 (Ohio Ct. Com. Pl. filed June 29, 2011).

shareholders' interests in minimizing the adverse collateral consequences associated with being adjudicated at fault in this matter, including the enhanced risk of an adverse outcome in these numerous pending private civil litigations.

The district court not only expressly ignored the strong federal policy encouraging settlements, but it also advocated in favor of its own policy preference that CGMI either admit the facts at issue—so that private civil litigants (in this case, a handful of ultra-sophisticated institutional investors) could "derive . . . collateral estoppel assistance" from such admitted facts (*CGMI I* at 12, SPA-12; *see also id.* at 10, SPA-10 (noting that "'a consent judgment between a federal agency and a private corporation which is not the result of an actual adjudication of any of the issues . . . can not be used as evidence in subsequent litigation'" (quoting *Lipsky* v. *Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976))))—or try the case, so that "the public is [not] deprived of ever knowing the truth" (*CGMI I* at 8–9, SPA-8–9). In adopting this approach, the district court undertook to advance its preferred policy agenda—one in which few, if any, cases are resolved consensually, and most cases instead are resolved through resource-intensive and risky trials.

The district court's preferred policy agenda is expressly at odds with the "strong federal policy favoring the approval and enforcement of consent decrees." *Wang*, 944 F.2d at 85; *see also United States* v. *Glens Falls Newspapers,* *Inc.*, 160 F.3d 853, 856 (2d Cir. 1998) (noting that "fostering settlement is an important Article III function of the federal district courts").[11] This policy has "particular force where . . . a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement." *Cannons*, 899 F.2d at 84. This policy also allows sophisticated litigants to resolve complicated matters with government agencies on fair and reasonable terms, and in a manner that avoids wasteful litigation that exposes both parties to extreme results. As the Ninth Circuit observed in *Randolph*, "[t]he use of consent decrees encourages informal resolution of disputes, thereby lessening the risks and costs of litigation." 736 F.2d at 528. "Not only the parties, but the general public as well, benefit from the saving of time and money that results from the voluntary settlement of litigation." *Gorsuch*, 718 F.2d at 1126; *see also Glens Falls Newspapers, Inc.*, 160 F.3d at 856 (same). The district court's refusal to follow this strong federal policy in favor of its preferred "quest for truth" should be rejected.

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[11] *See also Little Rock Sch. Dist.* v. *Pulaski Cnty Special Sch. Dist. No. 1*, 921 F.2d 1371, 1388 (8th Cir. 1990) ("A strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor."); *cf. Ehrheart* v. *Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010) ("The strong judicial policy in favor of class action settlement contemplates a circumscribed role for the district courts in settlement review and approval proceedings.").

For all these reasons, this Court should reject the district court's imposition of a condition precedent to approving the proposed Consent Judgment—specifically, that the settling parties must provide "proven or acknowledged facts"—as unprecedented, unwarranted and unwise.

II.

THE DISTRICT COURT ERRED IN FINDING THAT THE PROPOSED CONSENT JUDGMENT WAS NOT FAIR, REASONABLE, ADEQUATE OR IN THE PUBLIC INTEREST BECAUSE IT WAS NOT BASED ON "PROVEN OR ACKNOWLEDGED FACTS"

The district court determined that the proposed Consent Judgment was "neither reasonable, nor fair, nor adequate, nor in the public interest," because it was not based on "proven or acknowledged facts." (*CGMI I* at 14, SPA-14.) This determination, which is based on an erroneous legal standard, constitutes an abuse of the district court's discretion. When evaluated under the appropriate standard, endorsed by this Court and every other federal court of which we are aware, the Consent Judgment is fair, reasonable and adequate. For these reasons, this Court should reverse the November 28 Order and remand this matter to the district court with instructions to approve the Consent Judgment.

A. The Consent Judgment Is Fair.

The district court determined that the Consent Judgment "is not fair, because, despite Citigroup's nominal consent, the potential for abuse in imposing penalties on the basis of facts that are neither proven nor acknowledged is patent."

(*Id.*) In its March 15 Opinion, the Second Circuit rejected this determination, observing that "there is no suggestion . . . that Citigroup's settlement was anything other than voluntarily given, and, as the district court acknowledged, in the interests of Citigroup," and further reasoning that, absent some evidence of abuse or unfairness, a district court should not reject such settlements based on the purported need to "protect a private, sophisticated, counseled litigant from a settlement to which it freely consents." (*CGMI II* at 10–11, JA-310–11.)

The Second Circuit panel, we submit, is correct: the record is devoid of any evidence to suggest that the Consent Judgment resulted from an unfair or abusive exercise of the SEC's authority, or any "abuse" by or against CGMI.[12] Absent any such evidence, a settlement "reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery" should not be rejected due to the danger of a nonspecific *potential* for abuse, but instead should be afforded a "*presumption* of fairness, adequacy and reasonableness." *Wal-Mart Stores*, 396 F.3d at 116 (approving settlement in a class action context) (emphasis added); *New York* v. *Nintendo of Am. Inc.*, 775 F. Supp. 676, 680–81 (S.D.N.Y. 1991) (settlement held to be "fair" where it "grew out of investigations conducted

[12] As the Second Circuit observed, there is a serious "difficulty reconciling the [district] court's concern for the substantiality of the relief being imposed on Citigroup with the court's earlier observation that the penalties imposed on Citigroup amounted to no more than 'pocket change' or a 'mild and modest cost of doing business.'" (*CGMI II* at 10, JA-310.)

by [regulators with] . . . extensive experience in complex antitrust cases" and "after spirited arms-length negotiations" with defendant's "counsel . . . also experienced in antitrust matters").

The record before the district court demonstrates the fairness of this settlement: the Consent Judgment was reached after the SEC concluded its multi-year investigation, involving the production by CGMI of tens of millions of pages of documents and testimony taken from numerous current and former CGMI employees and third parties. (JA-178; JA-221; JA-224.) The SEC—not the district court—was best positioned to determine the strengths and weaknesses of its case and the most appropriate resolution of this matter, particularly given the context of its investigation of similar alleged conduct across the financial services industry. (*See CGMI II* at 8, JA-308 (listing "[t]he numerous factors that affect a litigant's decision whether to compromise a case or litigate it to the end" and noting that "the scope of a court's authority to second-guess an agency's discretionary and policy-based decision to settle is at best minimal"); *see also* JA-87–88.) CGMI, and Citigroup's Board and management, appropriately and, after consulting with counsel about the risks of further litigation, freely elected to resolve this matter through settlement. (JA-180–82.) For all these reasons, the proposed Consent Judgment satisfies the fairness requirement under this Court's established standard, and the district court abused its discretion in concluding otherwise.

B. The Consent Judgment Is Reasonable and Adequate.

The district court determined that the Consent Judgment "is not reasonable, because how can it ever be reasonable to impose substantial relief on the basis of mere allegations," and "not adequate, because, in the absence of any facts, the Court lacks a framework for determining adequacy." (*CGMI I* at 14, SPA-14.) In other words, the district court rejected the proposed Consent Judgment on the ground that, absent proven or acknowledged facts, a consent judgment is unreasonable and inadequate because the court would have no "assurance that the substantial injunctive relief it is being asked to impose has any basis in fact." (*Id.* at 9, SPA-9.)

The district court erred in reaching this conclusion. As the Second Circuit panel observed, "it is not correct that the court had no basis available to assess the underlying facts." (*CGMI II* at 11, JA-311.) The district court had a basis, even without proven or admitted facts, to determine the adequacy of the proposed Consent Judgment—specifically, as this Court noted, it had access to "[t]he substantial evidentiary record amassed by the S.E.C. over its lengthy investigation," and "guidance as to how the evidence supported the proposed consent judgment"—guidance that was provided at the district court's request through the parties' extensive written submissions and at a hearing. (*Id.* (citing SEC Mem. in Resp. to Questions Posed by the Court Regarding Proposed Settlement, JA-94–100).)

The Second Circuit's March 15 Opinion is fully consistent with prior precedent. As discussed *supra* Part I.B, the role of a district court in deciding whether to approve a settlement is not to "substitute its judgment for that of the parties, nor is it to turn consideration of the adequacy of the settlement 'into a trial or a rehearsal of the trial.'" *In re Sony*, 448 F. App'x at 87 (quoting *Grinnell*, 495 F.2d at 462); *accord Microsoft*, 56 F.3d at 1461–62. Instead, a district court should determine the reasonableness and adequacy of a proposed settlement in light of the nature of the case and the litigation risks posed. *See Wal-Mart Stores, Inc.*, 396 F.3d at 119 (describing a "range of reasonableness" that "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." (quotation omitted)); *Nintendo*, 775 F. Supp. at 681 (settlement was "reasonable and adequate" because regulators faced significant litigation risks at trial in light of acknowledged "doubts as to the evidentiary standard they would have to meet" and settlement delay of "years before consumers received any meaningful restitution" even if regulators prevailed).[13]

The Second Circuit panel observed that the district court here "appears to overlook the possibilities . . . that . . . the S.E.C. might fail to win a judgment at trial" or that "Citigroup perhaps did not mislead investors," and "does not appear to have given deference to the S.E.C.'s judgment on wholly discretionary matters of policy," such as evaluating litigation risk and allocating its limited resources. (*CGMI II* at 7, JA-307.) This is particularly surprising because the parties specifically informed the district court of the significant litigation risks and potential adverse collateral consequences that informed their decisions to settle. (JA-98–100; JA-180–85.)

The parties also specifically informed the district court of the basis for the proposed Consent Judgment's monetary penalties and injunctive remedies. (*CGMI I* at 3–4, SPA-3–4; *see also* JA-94–100; JA-185–90.) The parties

[13] The district court's reliance on the publicly reported facts concerning the SEC's settlement with Goldman Sachs arising out of the same industry-wide investigation as a basis to inform its determination of whether the SEC's settlement with CGMI in this matter was reasonable and adequate was particularly misplaced. (*See CGMI I* at 13 n.7, SPA-13 (referencing *SEC* v. *Goldman Sachs & Co.*, No. 10 Civ. 3229 (BSJ) (July 20, 2010).) Even assuming that the allegations in the *Goldman* matter and the instant case are similar in certain respects, each matter has unique strengths and weaknesses, creating a level of litigation risk as to which only the SEC, as a party to both cases, is privy. *See Microsoft*, 56 F.3d at 1461 (noting that the extent of specific remedies in a settlement "may well reflect an underlying weakness in the government's case" or "a concession the government made in bargaining").

explained that the disgorgement amount set forth in the proposed Consent Judgment reflected CGMI's alleged profits, which was a reasonable estimate of the amount the SEC could have recovered if it succeeded at trial in proving that CGMI violated the federal securities laws. *See SEC* v. *Cavanagh*, 445 F.3d 105, 116–17 & n.25 (2d Cir. 2006) (disgorgement recovery is limited to profits); 15 U.S.C. § 77t(d)(2) (civil penalties should be lower in negligence actions, as alleged here, than in fraud actions). (*See also* JA-87–88; JA-185–87.) Moreover, the proposed Consent Judgment contains significant and meaningful remedial measures, enforced by injunction, including, among other provisions, heightened oversight for internal CGMI committees in approving certain securities offerings, enhanced accountability of internal and legal compliance personnel and outside counsel in reviewing marketing and offering materials, and expanded audit and certification requirements. (*CGMI I* at 3, SPA-3; JA-44–47.)

A consent judgment containing such comprehensive monetary and injunctive relief, especially in light of the significant litigation risk—as determined by sophisticated and counseled parties, following a lengthy investigation—is both "adequate" and "reasonable." *See, e.g.*, *Dist. of Columbia* v. *Potomac Elec. Power Co.*, No. 11 Civ. 282 (BAH), 2011 WL 6000851, at *7 (D.D.C. Dec. 1, 2011) (settlement approved where consent decree provided for "remediation requirements," and regulator retained right to sue to "enforce any liability for future remedial actions"); *United States* v. *McGraw-Edison Co.*, 718 F. Supp. 154, 158 (W.D.N.Y. 1989) (accepting hazardous waste CERCLA settlement where "the proposed judgment adequately and fairly addresses the problems which Congress meant to correct when it enacted the statutes upon which this lawsuit is based").

For all these reasons, the proposed Consent Judgment satisfies the reasonableness and adequacy requirements under this Court's established standard, and the district court abused its discretion in concluding otherwise.

C. The Consent Judgment Is in the Public Interest.

The district court determined that the Consent Judgment "does not serve the public interest, because it asks the Court to employ its power and assert its authority when it does not know the facts." (*CGMI I* at 14, SPA-14.) As discussed, *supra* Part I, the district court abused its discretion in so concluding. As the Second Circuit panel stated, "it is not the proper function of federal courts to dictate to executive administrative agencies what policies will best serve the public interest." (*CGMI II* at 9 n.3, JA-309.) *See also Randolph*, 736 F.2d at 530 ("The initial determination whether the consent decree is in the public interest is best left to the SEC and its decision deserves our deference."); *Bear, Stearns*, 2003 WL 22466156, at *1 ("This review is particularly deferential when the SEC, in its role as *parens patriae*, is one of the settling parties."); *SEC* v. *Bear, Stearns & Co.*, No. 03 Civ. 2937 (WHP), 2003 WL 22000340, at *3 (S.D.N.Y. Aug. 25, 2003) (holding that the SEC "is presumed to represent the interests of the investing public aggressively and adequately"); *WorldCom*, 273 F. Supp. 2d at 436 (Rakoff, J.) (holding that public agency's "determinations as to why and to what degree the settlement advances the public interest are entitled to substantial deference").

To support its finding that the public interest had not been served, the district court pointed to the public's purported right to know the "truth in a matter of obvious public importance" and future litigants' purported right to obtain the benefits of the "collateral estoppel effect" of the Consent Judgment. (*CGMI I* at 8–10, SPA-8–10.) As this Court recognized however, "[t]he S.E.C.'s decision to settle with Citigroup was driven by considerations of governmental policy as to the public interest." (*CGMI II* at 7, JA-307; *see also* JA-82 ("[T]he SEC strongly believes that the proposed consent judgment here is in the public interest[.]"); JA-87–88.) By overriding and disregarding the SEC's assessment of these considerations, among others, the district court impermissibly "imposed what it considered to be the best policy to enforce the securities laws." (*CGMI II* at 9–10, JA-309–10.) As this Court held, "[i]t is not [] the proper function of federal courts to dictate policy to executive administrative agencies." (*Id.* at 7–8, JA-307–08.)

This Court repeatedly has cautioned, consistent with Supreme Court precedent, that a district court's authority to consider the "public interest" in the context of evaluating a consent judgment is highly circumscribed: this Circuit permits district courts to consider the public interest in evaluating proposed injunctions only to "ensure that [*the*] *injunction does not cause harm* to the public interest." (*Id.* at 7 n.1, JA-307 (emphasis added).) *Accord Winter* v. *NRDC, Inc.*, 555 U.S. 7, 24 (2008); *eBay, Inc.* v. *MercExchange*, 547 U.S. 388, 391 (2006); *Salinger* v. *Colting*, 607 F.3d 68, 80 (2d Cir. 2010).

In this case, as the Second Circuit panel observed, "[t]he district court did not suggest that any aspect *of the injunctive provisions* of the settlement would harm the public interest in any way." (*CGMI II* at 7 n.1, JA-307; *see id.* ("What the [district] court found contrary to the public interest was not the terms of the injunction, but rather the fact that the parties had settled on terms that did not establish Citigroup's liability for the benefit of civil claimants against it.").) Nor could the required "anti-public interest" finding be made. The injunction itself—which prohibits CGMI from violating the federal securities laws and requires CGMI to undertake a series of remedial measures designed to prevent violations of the federal securities laws—serves only to *benefit* the public, by strengthening CGMI's practices with respect to the marketing and sale of residential mortgage-backed securities. *See Bear, Stearns*, 2003 WL 22466156, at *2 (noting the public benefits of injunctive relief contained in consent judgments). The SEC appropriately exercised its discretion in determining that the public interest was served in securing these injunctive benefits and the monetary relief associated with the proposed Consent Judgment.

For all these reasons, the proposed Consent Judgment satisfies the public interest standard under this Court's established standard, and the district court abused its discretion in concluding otherwise.

III. THIS COURT HAS JURISDICTION OVER THE PARTIES' APPEALS AND THE SEC'S MANDAMUS PETITION

A. This Court Has Jurisdiction Over the Parties' Appeals from the November 28 Order Refusing to Grant an Injunction.

This Court has jurisdiction over the parties' interlocutory appeals from the November 28 Order because the district court's order refused to grant an injunction. "[T]he courts of appeals *shall* have jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts of the United States . . . or of the judges thereof . . . *refusing* . . . injunctions." 28 U.S.C. § 1292(a)(1) (emphases added).

The November 28 Order, by its express terms, refuses to grant the injunction sought by the SEC:

> A *large part* of what the S.E.C. requests, in this . . . consent judgment[], is *injunctive relief* . . . . But when a public agency asks a court to become its partner in enforcement by imposing *wide-ranging injunctive remedies* on a defendant . . . the court, and the public, need some knowledge of what the underlying facts are . . . . [T]he Court is forced to conclude that a proposed Consent Judgment that asks the Court to impose *substantial injunctive relief* . . . 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. . . . *The injunctive power* of the judiciary is not a free-roving remedy to be invoked at the whim of a regulatory agency, even with the consent of the regulated. . . . ***Accordingly, the Court refuses to approve the proposed Consent Judgment***.

(*CGMI I* at 5, 8, 14, 15, SPA-5, SPA-8, SPA-14, SPA-15 (emphases added).)

Accordingly, under the plain language of section 1292(a)(1), this Court has jurisdiction over the parties' appeals. *See CFTC* v. *Walsh*, 618 F.3d 218, 224 (2d Cir. 2010) (appellate jurisdiction under section 1292(a)(1) exists with respect to "orders that explicitly . . . refuse . . . injunctions").

B. Appellate Jurisdiction Is Proper Because the Parties Will Suffer Irreparable Harm If Forced to Proceed to Trial.

Because the November 28 Order expressly refused to grant an injunction, it is immediately appealable under section 1292(a)(1). To the extent this Court determines, however, that the November 28 Order does not "explicitly" refuse to grant an injunction, but rather refuses to approve a consent judgment and thereby "effectively denie[s] a party injunctive relief,"[14] it nevertheless is

[14] Even if this Court were to find that the November 28 Order does not expressly refuse to grant an injunction, there is no question that the November 28 Order "effectively denie[s] a party injunctive relief." *See supra* at Part III.A; *see also Carson*, 450 U.S. at 83–84 (order refusing to approve proposed consent decree that would have permanently enjoined an employer from discriminating against certain employees "ha[d] the practical effect of refusing an injunction" because the injunction was "at the very core of the disapproved settlement"). The proposed Consent Judgment at its core includes a permanent injunction against CGMI that prevents it from violating sections 17(a)(2) and (3) of the Securities Act and also requires it to undertake internal measures designed to prevent violations of the federal securities laws. (JA-54–55, JA-57–59.) Indeed, the

immediately appealable under section 1292(a)(1) because "in the absence of an interlocutory appeal, a party"—indeed, both parties—"will suffer irreparable harm." *Grant* v. *Local 638*, 373 F.3d 104, 108 (2d Cir. 2004) (citing *Carson*, 450 U.S. at 83–84); *see also Walsh*, 618 F.3d at 223–25.

This Court, in its March 15 Opinion, expressly determined that the parties would suffer "irreparable harm" if they were forced to proceed to trial. (*CGMI II* at 12–15, JA-312–15.) Specifically, this Court found that "the [district] court's posture—requiring a binding admission of liability as a condition of approval of the settlement—virtually precludes the possibility of settlement" and its "intimation that it will not approve a settlement that does not involve Citigroup's admission of liability . . . substantially reduces the possibilities of the parties reaching settlement." (*Id.* at 13, 15, JA-313, JA-315.) Based on these findings, this Court held that "'in refusing to approve the parties' negotiated consent decree'"—and instead imposing an unprecedented requirement of proven or acknowledged facts that was unacceptable to the parties—"'the District Court denied petitioners the opportunity to compromise their claim,'" thus causing the

district court agreed that "*[a] large part* of what the S.E.C. requests . . . is *injunctive relief*, both broadly, in the request for an injunction forbidding future violations, and more narrowly, in the request that the Court enforce future prophylactic measures (here, for a three-year period)," and it was these "wide-ranging injunctive remedies" that precluded the district court from approving the proposed Consent Judgment without a showing of proven or acknowledged facts. (*CGMI I* at 5, 8, SPA-5, SPA-8 (emphases added).)

parties "irreparable" harm. (*Id.* at 15, JA-315 (quoting *Carson*, 450 U.S. at 89–90).)[15]

The Second Circuit's ruling follows *Carson* and its progeny. *See, e.g.*, *Microsoft*, 56 F.3d at 1456 (holding that irreparable harm requirement of *Carson* was met and asserting jurisdiction under section 1292(a)(1) where "the judge is refusing to grant the injunction *except under conditions that the parties will not accept*," because such refusal "cannot but have enormous practical consequences for the government's ability to negotiate future settlements" (emphasis added)); *Stovall* v. *City of Cocoa, Fla.*, 117 F.3d 1238, 1241 (11th Cir. 1997) (asserting jurisdiction under section 1292(a)(1) because the "loss of the 'bargain' obtained through negotiation" of a settlement constituted an "irreparabl[e] harm[ ]" that warranted immediate review); *Durrett* v. *Hous. Auth. of City of Providence*, 896 F.2d 600, 602 (1st Cir. 1990) (asserting jurisdiction under section 1292(a)(1) because the parties "are obviously in danger of suffering loss of 'their right to compromise their dispute on mutually agreeable terms'"

[15] Although the Second Circuit made this determination in the context of deciding whether a stay pending appeal is appropriate, the identical "irreparable harm" standard—as set forth in *Carson*—applies when deciding whether irreparable harm exists that is sufficient to give rise to jurisdiction over an interlocutory appeal. Indeed, *Carson* itself is a case where the Court held that an interlocutory appeal under section 1292(a)(1) was appropriate. *See* 450 U.S. at 89–90.

(quoting *Carson*, 450 U.S. at 88)).[16] For these reasons, this Court has appellate jurisdiction over the parties' interlocutory appeals from the November 28 Order under section 1292(a).

C. In All Events, This Court Already Has Asserted Jurisdiction Over the SEC's Mandamus Petition.

In its March 15 Opinion, the Second Circuit held that "there is no question that our court has jurisdiction to rule on the issues raised by the petition for mandamus." (*CGMI II* at 5–6, JA-305–06.) The All Writs Act, 28 U.S.C. § 1651(a), provides that a court of appeals may issue a writ of mandamus when reviewing the interlocutory order of a district court as long as the "Court of Appeals could at some stage of the [ ] proceedings entertain appeals" from those decisions rendered by the district court. *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 255 (1957); *see, e.g.*, *SEC* v. *Rajaratnam*, 622 F.3d 159, 169–72 (2d Cir. 2010); *In re City of New York,* 607 F.3d 923, 932 (2d Cir. 2010).

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[16] The Second Circuit specifically distinguished cases where no irreparable harm was found as "substantially different from this one" because the refusal to accept a settlement in those cases "left the parties free to return to the bargaining table to make reasonable adjustments of terms of settlement or to demonstrate the fairness at a hearing." (*CGMI II* at 12–13, JA-312–13 (distinguishing *Grant*, 373 F.3d 104, and *New York* v. *Dairylea Cooperative Inc.*, 698 F.2d 567 (2d Cir. 1983)).) Here, the parties already have demonstrated that the proposed Consent Judgment is fair, reasonable and adequate, both in their detailed written submissions to the district court and at the November 9 hearing. *See supra* at 9–12 and Part II. The district court rejected the proposed Consent Judgment as unfair, unreasonable and inadequate expressly because it was not supported by "proven or acknowledged facts." (*CGMI I* at 14, SPA-14.)

Accordingly, because this Court already has exercised jurisdiction over the SEC's Mandamus Petition, which raises the same substantive issues as those presented by the parties' appeals, this Court has jurisdiction to review the district court's November 28 Order refusing to approve the proposed Consent Judgment.

CONCLUSION

For the foregoing reasons, Defendant-Appellee-Cross-Appellant CGMI respectfully requests that this Court reverse the district court's November 28 Order and remand the case with instructions that the district court approve the proposed Consent Judgment.

Dated: May 14, 2012
New York, New York

Respectfully submitted,

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

The undersigned counsel for Defendant-Appellee-Cross-Appellant Citigroup Global Markets Inc. certifies that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B)(i). This brief contains 13,623 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/ Susanna M. Buergel
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Dated: May 14, 2012

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

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

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

[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

[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

[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

[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.

[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]

[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

[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

[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]

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[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]

[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

[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

[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

[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

[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

[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

[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.

[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
Patrick P. Garlinger

11-5227

11-5375, 11-5242 (CON)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellant/Cross-Appellee/Petitioner,

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 CONTENTS (CONTINUED)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

Miscellaneous **Page**

11-5227

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REPLY BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION,
APPELLANT/PETITIONER

INTRODUCTION

Similar to the thousands of consent judgments negotiated by government agencies and approved by federal courts, the consent judgment here ordered substantial relief on a no-admit basis—Citigroup did not admit the complaint's allegations. The district court rejected the consent judgment, stating unequivocally that it was not fair, reasonable, adequate, and in the public interest because:

- The court had "not been provided with any proven or admitted facts." SPA 4.

- The consent judgment did not "involve any admissions," which deprived the public "of ever knowing the truth in a matter of obvious public importance" and precluded private litigants from deriving "collateral estoppel assistance" from the consent judgment. SPA 9, 10, 12.

- The consent judgment asked "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." SPA 14.

- "[T]he potential for abuse in imposing penalties on the basis of facts that are neither proven nor acknowledged is patent." SPA 14.

- The deployment of "[t]he injunctive power of the judiciary" must "rest on facts—cold, hard, solid facts, established either by admissions or by trials." SPA 14–15.

The counsel (Counsel) appointed to "argue in support of the district court's position," Dkt. No. 123, abandons this stated holding. Counsel claims that the court rejected the consent judgment not because it required "proven or admitted facts," SPA 4, but rather because the parties refused to provide the court with "some modest evidence," Counsel Br. 38. This re-imagining of the order cannot be reconciled with the language that the court actually used. Had the court asked for "a modest evidentiary basis," *id*. at 35, the Commission would have provided it, as the Commission has done when this and other courts have made comparable requests. But the court never asked and even it had, the Commission's provision of "some evidentiary basis," Counsel Br. 40, would not have supplied the court with what it expressly required: "cold, hard, solid facts, established either by admissions or by trials." SPA 14–15.

That no one defends the order as written reflects its fundamental flaws. The order contravened a century of precedent in which courts have routinely approved consent judgments ordering significant injunctive relief without requiring factual admissions. In doing so, these courts have substantially deferred to an agency's decision to settle on a no-admit basis after assessing the benefits of settling versus trial. Counsel does not dispute that requiring admissions conflicts with this district court's prior practice, Supreme Court precedent, and the rulings of other courts, including dozens of cases cited by the Commission. Nor does Counsel show that it would be consistent with this substantial and well-established body of law to preclude the imposition of injunctive relief to which a defendant voluntarily agrees unless courts engage in the type of fact-finding that occurs at trial.

The court's requirement of "proven or admitted facts," SPA 4, gave no deference to the Commission's decision that resolving this case on a no-admit basis served the public interest in light of the relief obtained—including substantial injunctive relief and monetary relief totaling $285 million—and the costs and risks of proceeding to trial. And the court's order effectively precludes settlement in many cases, intruding upon the Commission's ability to manage its enforcement program. Moreover, while Counsel argues that the court needs evidence to assess the violations alleged in the complaint and the sufficiency of the relief obtained, a court may not reject a consent judgment because it believes that an agency should have alleged other violations or because it believes that relief falling well within a range of reasonable settlement outcomes does not *best serve* the public interest.

Rather than merely postpone entry of the consent judgment, as Counsel claims, the court definitively refused to enter the injunctive relief and ordered the parties to trial. This court accordingly has jurisdiction under 28 U.S.C. 1292(a)(1) and the Supreme Court's ruling in *Carson*. But even if this case were not directly on point with *Carson*, which it is, mandamus is appropriate because the court's stated justification for its ruling creates a novel and unsupported rule of law that constitutes a clear abuse of discretion.

ARGUMENT

I. The district court unequivocally held that injunctive consent judgments must be based on facts established "by admissions or by trials," a ruling that Counsel abandons by arguing that the district court merely requested "some modest evidence," even though the court made no such request, and "some modest evidence" would not have provided "proven or admitted facts."

According to Counsel, the district court requested "an evidentiary or factual submission, however modest," which the Commission refused to provide, prompting the court to reject the consent judgment because it lacked "the evidentiary submission it need[ed] to assess the settlement." Counsel Br. 22, 66; *see also id*. 1, 3, 4, 6, 24–25, 30–31, 34–35, 37–40, 70; Prof. Br. 17; Pitt Br. 23; Better Markets Br. 13–22 (arguing that the parties failed to provide "requested information," "evidentiary support," or an "adequate record"). This inaccurately recounts the order and what occurred below.

The court did not ask for "some modest evidence," and thus the Commission could not have "declined to furnish" it. Counsel Br. 38, 53. The court did not request "documents, deposition transcripts, or other evidence," *id*. 30–31, or indicate that such evidence would satisfy the court's professed need for "proven or acknowledged facts," SPA 14. Rather, the court asked policy questions that the Commission answered at length—the Commission's brief responded to inquiries about settlements where "the defendant neither admits nor denies wrongdoing," the impact of such settlements on private litigants, and the Commission's efforts to bring contempt proceedings against those who violate injunctions. JA68–69, 204–28; *see* JA72–169 (Commission memorandum).

Had the court asked the Commission to provide "some modest evidence" in support of its allegations, Counsel Br. 38, the Commission would have done so. The Commission has previously provided evidence in response to comparable requests made by courts in other cases. *E.g.*, *SEC v. Bank of America*, No. 09-6829 (JSR), Dkt. 97, 99 (S.D.N.Y. Mar. 2, 2010); *SEC v. Citigroup, Inc.*, No. 10-1277, Dkt. 16 (D.D.C. Sept. 8, 2010) (providing exhibits in response to evidentiary questions posed by the court); *SEC v. Koss*, No. 11-991, Dkt. 6 (E.D. Wisc. Jan. 24, 2012) (same). But the court did not ask in this instance, and there is a significant difference between the questions posed by this court in *Bank of America* and the questions that it posed here. In *Bank of America*, the court ordered the parties to submit "underlying discovery materials, such as deposition testimony, documents, and emails[] bearing on" specific evidentiary questions. No. 09-6829, Dkt. No. 82 (Feb. 11, 2010). The court posed different questions here; instead of requesting specific evidence, it asked policy questions such as whether there is "an overriding public interest in determining whether the SEC's charges are true." JA68.

While a request for "a modest evidentiary basis," Counsel Br. 35, may be consistent with the limited scope of judicial review, requiring a substantial evidentiary showing exceeds that limit. Even when courts undertake more searching inquiries of private class action settlements without deference to a government agency, *see infra* p.23, fairness hearings "must not be turned into a trial or a rehearsal of the trial" and a court "must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974). Courts reviewing consent judgments do not make factual findings, SEC Br. 22, 27, and substituting a trial-like procedure for the limited review process applicable to consent judgments would "'emasculate the very purpose for which settlements are made,'" *Detroit*, 495 F.2d at 462.

Moreover, the Commission's provision of "some evidentiary basis" would not have been enough under the court's stated test because evidence is not the same as "proven or admitted facts." *Compare* Counsel Br. 6, 59 *with* SPA 4. Counsel and *amici* cite *Bank of America* and *Goldman Sachs* as "model[s]," but neither outcome would have satisfied the court here. Counsel Br. 29–30; Prof. Br. 19–20; Pitt Br. 27–28; Better Markets Br. 24–25. In *Bank of America*, the defendant acknowledged "'an evidentiary basis'" for the Commission's factual statement, but did not admit "'the truth of any such statements'" or agree that they would be binding "'in any other litigation.'" Br. 29–30 & n.13, quoting No. 09-6829, Dkt. No. 97 (S.D.N.Y. Mar. 2, 2010). Thus, the consent judgment that this district court grudgingly approved in *Bank of America* after labeling it "inadequate and misguided," *SEC v. Bank of America*, 2010 U.S. Dist. Lexis 15460, at *19, (Feb. 22, 2010), would have failed the test created here because that consent judgment did not provide "proven or admitted facts" or give private litigants any "collateral estoppel assistance." SPA 4, 12. The consent judgment in *Goldman Sachs* similarly contained the no-admit language that the court found dispositively objectionable here. Counsel Br. 30, citing *SEC v. Goldman Sachs & Co.*, No. 10-3229, Dkt. No. 25 (S.D.N.Y. Jul. 20, 2010).[1]

The district court here did not suggest that following these "models" or giving the court "some evidentiary basis," Counsel Br. 40, were viable options that would yield "the truth in a matter of obvious public importance," SPA 9. Rather, the court identified only two paths for approval: provide facts "established by admissions"—which Citigroup would not make here—or provide facts "established by trial"—which the Commission, exercising its discretion as a law enforcement agency, chose to forgo because it determined that the benefits of settling outweighed the costs of further litigation. SPA 14–15. Evidence by itself would not have alleviated the court's stated concern about establishing "either through trial or through their admission what the facts are." JA209; *accord* JA212

[1] Counsel attempts to distinguish *United States v. Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995) by asserting that the D.C. Circuit "did not reject a requirement that the district court have some evidentiary basis." Counsel Br. 59. This is beside the point because the district court here required far more than "some evidentiary basis" as a prerequisite to approval.

("[W]hy isn't it * * * much more in the * * * public interest to simply require that they admit the charges?").

In sum, the court did not use the words that Counsel attributes to it in the order under review, nor did the court back away from its holding in the two orders that it issued after the Commission appealed. JA281–89, 296–300.[2] Rather than defend the order, Counsel and *amici* try to rewrite it. Prof. Br. 6–9, Pitt Br. 19–24. But the notion that the court did not require Citigroup "to admit or acknowledge the Complaint's allegations," Pitt Br. 20, cannot be squared with the court's express requirement of "admitted" or "acknowledged facts," SPA 4, 14. That the decision as written has no defenders is a strong justification for reversal.

[2] Given how far Counsel strays from what the court said, it is ironic that Counsel accuses the Commission of "materially misstat[ing] the district court's holding." Counsel Br. 28–29, 31, 54. In fact, the Commission quoted the district court extensively and accurately, emphasizing its requirement of "admitted or judicially established facts." *E.g.*, SEC Br. ii, 10, 21. Nor did the three judges that granted the Commission's stay motion "misinterpret[]" the district court's opinion. Counsel Br. 24, 27–29 & n.12, 31. Those judges reasonably construed the district court's order as requiring an "admission of liability" because if Citigroup admitted the allegations it would, in effect, admit liability. *SEC v. Citigroup Global Markets, Inc.*, 673 F.3d 158, 165 (per curiam) (2d Cir. 2012) (*Stay Order)*.

II. Counsel has not identified any binding legal support for the district court's ruling that the Commission must present "proven or admitted facts" to obtain approval of an injunctive consent decree.

A. The district court's holding establishes a bright-line rule that has no support in the law.

The Commission, aided by dozens of examples, demonstrated that courts, including the district court here, have consistently approved consent judgments proposed by government agencies that impose significant injunctive relief in matters of public importance and that contain provisions in which defendants do not admit or outright deny factual allegations. SEC Br. 21–41. Counsel almost completely ignores these examples and does not dispute that a rule conditioning approval of a consent decree on a defendant's admissions conflicts with the prior practice of the district court here, as well as the practice of other courts in the Second Circuit. Rather, Counsel downplays the court's ruling as nothing more than a "routine" application of the standard of review, which, in Counsel's view, permits a court to reject a consent judgment based "on the specific factual particulars" of this case, Counsel Br. 33, 73, including the absence of "proven or admitted facts," SPA 4.

There is nothing "routine" about the court's order, and the cases that Counsel cites do not support the court's extraordinary departure from well-established precedent in which courts rarely reject consent judgments proposed by government agencies and never reject them for the reason offered here without being reversed. Counsel Br. 35–37. Counsel derives no assistance from cases in which courts reviewed consent judgments containing the same type of no-admit provisions at issue here without any suggestion that the absence of "proven or admitted facts," SPA 4, provided a basis for disapproval. *United States v. Miami*, 664 F.2d 435 (5th Cir. 1981) (per curiam) (en banc), citing *United States v. Miami*, 614 F.2d 1322, 1343 (5th Cir. 1980) (vacating consent judgment on other grounds); *United States v. North Carolina*, 180 F.3d 574 (4th Cir. 1999) (affirming approval of consent judgment).[3] And Counsel errantly relies on inapposite decisions involving *private* class action settlements, which courts review with a much higher degree of scrutiny because they have a "fiduciary responsibility" to protect absent class members. *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 22 (2d Cir. 1987); *accord* Rule 23(e)(2), Adv. Comm. Notes, 2003 amend. ("[C]ourt review and approval are essential to ensure adequate representation of class members who have not participated in shaping the settlement.").

These cases do not demonstrate that courts "routinely require" a "factual basis" before they evaluate consent judgments. Counsel Br. 37. They do not

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[3] *See* http://www.justice.gov/crt/about/emp/documents/ncagree.htm.

support variance from the well-established practice of approving injunctive consent judgments in which a defendant does not admit or denies the factual allegations. And they do not counterbalance cases like *Microsoft* in which the D.C. Circuit reversed a district court that had rejected a consent judgment, which, like the consent judgment here, stated that it did "not constitute 'any evidence or admission by any party with respect to any issue of fact or law.'" *United States v. Microsoft*, 159 F.R.D. 318, 324 (D.D.C. 1995). The D.C. Circuit held that "the district judge's criticism of Microsoft for declining to admit that the practices charged in the complaint actually violated the antitrust laws" was "unjustified." *United States* v. *Microsoft*, 56 F.3d 1448, 1454, 1461 (D.C. Cir. 1995).

B. To obtain approval of an injunctive consent judgment, the Commission does not need to make the type of showing necessary to obtain injunctive relief at trial.

This Court does not require "proven or admitted facts," SPA 4, as a prerequisite to the imposition of injunctive relief when a defendant, such as Citigroup, voluntarily accepts "'the grave consequences'" of an injunction, such as being subject "'to contempt sanctions.'" Counsel Br. 40, quoting *SEC v. Unifund Sal*, 910 F.2d 1028, 1040 (2d Cir. 1990). Counsel cites Second Circuit cases addressing the Commission's burden in *contested cases*, *id.* at 38–44, but does not cite any binding precedent imposing the same burden when a defendant consents.

Aaron v. SEC, 446 U.S. 680 (1980) is not such a case, and the Court did not address a situation "where a defendant nominally consents or acquiesces in the requested injunctive relief," as Counsel incorrectly states. Counsel Br. 39.

The failure to distinguish between contested and settled cases is precisely the error made by two Florida cases upon which Counsel relies. Counsel Br. 40–42, citing *SEC v. Globus Group, Inc.*, 117 F. Supp. 2d 1345 (S.D. Fla. 2000); *SEC v. Lane*, 2009 U.S. Dist. Lexis 75556 (M.D. Fla. Jul. 10, 2009) (magistrate report), *overruled by district court*, 2009 U.S. Dist. Lexis 75535 (M.D. Fla. Aug. 24, 2009). While a court presiding over a contested case must ensure that a defendant is not unfairly enjoined, *Unifund*, 910 F.2d at 1040, no similar concern exists when a defendant like Citigroup agrees to the relief because there is no need to "protect a private, sophisticated, counseled litigant from a settlement to which it freely consents," particularly when there is no suggestion "that Citigroup's settlement was anything other than voluntarily given." *Stay Order*, 673 F.3d at 165.[4]

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[4] Counsel argues that the consent judgment violates Federal Rule of Civil Procedure 65(d) because it does not give Citigroup "sufficient notice of the prohibited conduct." Counsel Br. 43–44 & n.23. Rule 65(d) was designed "to protect those who are enjoined." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974); 11A Wright & Miller, FED. PRAC. & PROC. § 2955, at 308 (2002). While the proposed injunctive relief satisfies Rule 65(d), Citigroup has agreed not to challenge the injunction on Rule 65(d) grounds and has made clear that it does not seek protection from an injunction to which it consented. Citigroup Br. 40–42; JA47 (¶ 11).

Globus and *Lane* apply the wrong standard of judicial review. A court reviews a consent judgment to determine whether it is fair, reasonable, adequate, and in the public interest, but it does not make the sort of factual determinations about past violations and future misconduct that it must make at trial. *Globus*, 117 F. Supp. 2d at 1346–49, quoting 15 U.S.C. 77t(b). Neither the cases cited in *Globus* nor the decision in *Aaron* commit the parties and the court to a review process for consent judgments that resembles the trial that the parties sought to avoid by settling. *Globus*'s holding effectively precludes injunctive consent judgments based on allegations in contravention of the well-established precedent discussed previously. SEC Br. 28–40.

III. By requiring "proven or admitted facts," the district court did not defer to the Commission's determination that a no-admit settlement serves the public interest given the relief obtained and the risks of proceeding to trial, and the court's holding limits the Commission's ability to settle, affecting its enforcement program.

The district court erred because it did not defer to the Commission's policy regarding no-admit settlements or its determination that this particular settlement served the public interest given the relief it obtained and the risks of proceeding to trial. SEC Br. 41–46. There is no "indication in the record that the [district] court in fact gave deference to the SEC's judgment"; rather, it "imposed what it considered to be the best policy to enforce the securities laws," *Stay Order*, 673

F.3d at 164–65. The court's ruling, if left standing and adopted by other courts, would limit the Commission's litigation options because effectively prohibiting the use of no admit/no deny provisions "would in most cases undermine any chance for compromise." *Id*. at 165; *see* SEC Br. 46–50.

Like the district court, which "verbally acknowledged" the deference owed to the Commission, *Stay Order*, 673 F.3d at 164, Counsel concedes that "substantial deference" is "plainly due" to the Commission but argues that if courts actually defer to the Commission's policy determinations about no-admit settlements, courts will be reduced to "potted plants" and forced to "rubber-stamp" consent judgments, threatening "the constitutional independence of the federal judiciary." Counsel Br. 31, 46, 54–56. Lost in this hyperbole is the fact that judicial review is, and always has been, limited in this context. *Microsoft*, 56 F.3d at 1462; SEC Br. 22–23 (describing the historically limited judicial review of consent judgments). It is limited precisely because one of the settling parties is a "government actor committed to the protection of the public interest," *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990), and entrusted with making "an assessment of how the public interest is best served," *Stay Order*, 673 F.3d at 164.

Deference is not the antithesis of robust judicial review. SEC Br. 44–45. A court may review a consent judgment to determine if it is "ambiguous," there will be "difficulties in implementation," or implementation "would create a drain on judicial resources." *Microsoft*, 56 F.3d at 1462; *In re United States*, 503 F.3d 638, 641 (7th Cir. 2007). If a consent judgment will "diminish the legal rights of a party who objects to the decree" or if a consent judgment "imposes obligations on a party that did not consent to the decree," a court may conclude that the consent judgment is not fair or in the public interest. *United States v. Hialeah*, 140 F.3d 968, 984 (11th Cir. 1998); *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986). Moreover, no amount of deference can overcome the extremely rare instance in which there is proof that a consent judgment was the product of collusion, "bad faith[,] or malfeasance." *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 689 (1961). But courts have approved no-admit consent judgments proposed by government agencies for many years without any suggestion that this practice would somehow "undermine the independence of the federal judiciary." Counsel Br. 55–56.

Courts defer to agencies not only because they act in the public interest when negotiating a consent judgment, but also because agencies are best positioned to evaluate the "prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt." *Stay Order*, 673 F.3d at 164; *see* Pitt Br. 9–15 (describing the Commission's thorough process for assessing these factors). The Commission's experience and expertise give it the best perspective to make the "discretionary assessment of its prospects of doing better or worse" at trial and "the optimal allocation of its limited resources." *Stay Order*, 673 F.3d at 165. Even the Commission's high 75% winning percentage means that it will lose some cases, as it did in *Stoker*, Counsel Br. 44 & n.24, and only the Commission can properly decide whether obtaining substantial relief without admissions outweighs the risks of proceeding to trial given the resources a trial will consume and the Commission's overall allocation of resources across its enforcement program. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *New York Law Dep't v. FCC*, 984 F.2d 1209, 1213–15 (D.C. Cir. 1993) ("We can no sooner question the soundness of this bargain than we could a unilateral agency decision not to prosecute."); *Board of Trade v. SEC*, 883 F.2d 525, 531 (7th Cir. 1989).

The district court, as well as Counsel and *amici*, may disagree with the policy of entering into consent judgments on a no admit/no deny basis, but it is a legitimate policy choice based on the Commission's conclusion that, in any given case, obtaining immediate and substantial relief may outweigh the benefits of an adjudicatory fact-finding that offers no guarantee of success. Many other agencies make the same choice, and it is a decision to which courts should defer. *Stay Order*, 673 F.3d at 163–64.

The district court's order, if affirmed, affects the Commission's enforcement program because requiring "proven or admitted facts," SPA 4, is "tantamount to ruling" that a court "will not approve a settlement that represents a compromise." *Citigroup*, 673 F.3d at 166. The court's rule thus effectively "undermine[s] any chance for compromise," *id.*, because efforts to force admissions in negotiations will often face strong resistance from defendants concerned about the implications for parallel private actions. Citigroup Br. 34–37; SIFMA Br. 9–13. Requiring admissions will, in most instances, commit the Commission to proceed to trial no matter how much settlement benefits the public. SEC Br. 46–50.

Counsel contends that "all options remain available" for settlement, but the district court, which ordered the parties to prepare for trial, offered no such options. Counsel Br. 53. And while Counsel suggests that the parties can make a "renewed request for approval," nothing in the order suggests that such a request would be granted if the Commission just makes some minor adjustments to the relief or presents "some modest evidence." *Id.* at 38, 53. Only one modification would suffice: the addition of "cold, hard, solid facts, established either by admissions or by trials." SPA 14–15.

Amici miss the point when they suggest that the Commission can avoid this "dilemma" by declining to request injunctive relief or by bringing administrative actions. Prof. Br. 21–22. Congress has given the Commission the ability to obtain injunctions in federal court, which has the advantages of increased visibility, the threat of contempt, and more efficient mechanisms for enforcing judgments. The Commission, entrusted with the decision of how to proceed in each case, *see Heckler*, 470 U.S. at 831–32, should not find its options limited based on a rule that has no foundation in the law.

IV. Acting in the public interest, the Commission exercised its discretion to charge Citigroup with negligence and to negotiate a consent judgment that was fair, reasonable, adequate, and in the public interest because it ordered substantial injunctive relief and monetary relief totaling $285 million.

The district court abused its discretion by rejecting a consent judgment that ordered substantial injunctive relief and $285 million in disgorgement, interest, and penalties—a large portion of the relief that the Commission could have reasonably expected to obtain at trial—while eliminating all litigation risk. SEC Br. 50–52. The court rejected the consent judgment because it was not supported by "proven or admitted facts," SPA 4, but it also criticized (1) the Commission's decision to charge Citigroup with negligence and (2) the relief that the Commission obtained.

SEC Br. 52–55. Like the court's primary justification, these ancillary criticisms do not justify the district court's order.

A. A district court may not premise the rejection of a consent judgment on the Commission's discretionary decision not to charge a defendant with scienter-based fraud.

Counsel asserts that the district court's order should be affirmed because there is a "puzzling discrepancy" between the Commission's allegations against Citigroup and those against Stoker. Br. 2, 25, 33–34, 58, 72. No "discrepancy" exists; the Commission charged both Citigroup and Stoker with negligence.[5] Counsel claims that the Commission "clearly alleged intentional misconduct" *by Citigroup*, but he relies solely on snippets from the *complaint against Stoker* that are taken out of context and that do not allege scienter—they do not allege that Citigroup intentionally or recklessly made materially misleading statements. Counsel Br. 12–13, 33. The Commission, having analyzed the evidence amassed during a multi-year investigation, as well as the probability of prevailing on that evidence, decided that "there was not sufficient evidence to support a finding of scienter." JA221; *see also* JA99, 105–06.

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[5] The *Stoker* complaint did not fail "to specify whether it was charging negligence or intentional misconduct." Counsel Br. 34. It plainly alleged "that defendant Brian Stoker negligently violated Sections 17(a)(2) &(3)." *SEC v. Stoker*, 2012 U.S. Dist. Lexis 78658, at *1 (S.D.N.Y. Jun. 6, 2012); *see* SA 24–25 (¶¶ 81–82).

Counsel also cites a supposed "inconsistency" between the allegations here and the allegations in *Goldman Sachs*. Counsel Br. 2, 19, 25–26, 33, 51. The Commission, however, reviewed a different body of evidence regarding a different defendant that made a different materially misleading disclosure under different circumstances. Based on that evidence, the Commission charged Goldman Sachs with intentional fraud. Again, there is no "inconsistency."

Counsel's comparison of these cases wrongly assumes that a court may reject a consent judgment because it concludes that the relief is not sufficient in light of charges that the court believes the agency *should have* brought. Counsel Br. 24–25, 33–34, 72. But the Commission's decision "whether or not to prosecute" and "what charge to file" is committed to its "absolute discretion." *Heckler*, 470 U.S. at 831; *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). Courts reviewing consent judgments may not "reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made." *Microsoft*, 56 F.3d at 1459 (a judge cannot "construct his own hypothetical case and then evaluate the decree against that case").

B. The district court's limited role in reviewing consent judgments does not include an unrestricted examination of what monetary and injunctive relief best serves the public interest.

Counsel asserts that the court properly questioned whether the quantity and quality of relief "adequately or fairly addresses the need for deterrence or the degree of harm to investors." Counsel Br. 43, 47–52. Courts, however, may not decide at what level proposed relief will "further the goals of the statute," *id*. at 47, because "it is not the proper function of federal courts to dictate to executive administrative agencies what policies will best serve the public interest," *Stay Order*, 673 F.3d at 164 n.3, or to conduct an "unrestricted evaluation of what relief would best serve the public," *United States v. BNS Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (internal quotation marks omitted). A consent judgment "embodies a compromise," *United States v. Armour & Co.,* 402 U.S. 673, 681 (1971), and the Commission has the best vantage point to assess the "advantages and disadvantages" of such a compromise, *SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983), including "the value of the particular proposed compromise," *Stay Order*, 673 F.3d at 164. When it settles, the Commission always attempts to negotiate the best possible outcome given the misconduct alleged, the evidence, the likelihood of success at trial, the stage of the proceeding, and the relief available by law.

Nevertheless, Counsel argues that the $95 million penalty, which would be added to a Fair Fund for distribution to investors along with $190 million in disgorgement and prejudgment interest, was insufficient. In comparing this penalty to Citigroup's "gross gain," Counsel Br. 48–49, Counsel assumes, as the district court apparently did, that the Commission would obtain the maximum at trial and chose "for no good reason to settle for less." *Stay Order*, 673 F.3d at 163. But there are a range of possible outcomes at trial—no penalty, a penalty less than $95 million, or the maximum penalty under law—and there are a range of reasonable settlements that reflect those trial outcomes, as well as the parties' negotiation positions. When a government agency proposes a consent judgment ordering relief that fits within this range, a court should not condition approval "on what it considered to be the public's *best* interest." *SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984). Even courts conducting more searching evaluations of class action settlements do not apply such a stringent analysis; rather, they assess "the range of reasonableness of the settlement fund in light of the best possible recovery" and "all the attendant risks of litigation." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 804 (2d Cir. 2009) (internal quotation marks omitted).[6]

Thus, even if there were truth to a single commentator's "speculat[ions]" that Citigroup's gross revenue was $600 million, Counsel Br. 48 n.26, and even if current law authorized a court to impose a penalty equal to investors' losses (which it does not), Counsel does not cite a single case holding that a court may reject a proposed consent judgment because it concludes that the proposed penalty was only a certain percentage of the maximum available. Counsel simply assumes that a district court has the authority to reject a consent judgment negotiated by a government agency because it believes that the penalty ordered is not enough to deter wrongdoers or compensate investors. But a court may not reject a consent judgment because it believes that the settlement was not "the best possible settlement that could have been obtained." *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409 1436 (6th Cir. 1991).

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[6] The Commission's "reasonable calculation of the maximum penalty available" was $190 million and its estimate of what it "could have reasonably obtained if successful at trial" was $160 million. *Compare* JA97 *with* SEC Br. 53. The $30 million difference equals the prejudgment interest amount, which may be added to the ill-gotten gains upon which the maximum penalty is based. *SEC v. Koenig*, 557 F.3d 736, 744–45 (7th Cir. 2009). Even using the $190 million figure, the $95 million penalty was well within the range of reasonable settlement outcomes.

Moreover, the comparisons that Counsel uses to critique the penalty are inapt. Counsel claims that the Commission did not give the court "any information" regarding "Citigroup's gross gain," Counsel Br. 49, but the court did not ask for such information or mention "gross gain" in its opinion. While a defendant's wealth and investors' estimated losses may factor into settlement negotiations, *id*. 50–52, the penalty maximums set by Congress effectively establish an upper boundary—few defendants will settle for more than what they could lose at trial—and those maximums do not account for a defendant's wealth or investor harm. SEC Br. 53–54. Finally, Counsel defends the court's comparison of the $95 million penalty here with the penalty in *Goldman Sachs*, where the defendant paid total monetary relief of $550 million as opposed to $285 million proposed here. Counsel Br. 50–51. But Counsel elides the differences between the two cases—Goldman Sachs was charged with scienter-based fraud and it did not settle prior to the filing of the complaint, distinctions that the Commission identified in response to the district court's inquiry about the difference between the penalties. JA96–97; *see* SEC Br. 54 n.23 (Second Circuit opinions refusing to compare sanctions across cases).

Whereas Counsel assails the monetary relief as too insubstantial, it questions the "need for injunctive relief." Counsel Br. 43, 51, 66–67. Counsel asserts that a negligence claim "would normally weigh against imposing injunctive relief," *id*. at 43, but *Aaron* implicitly rejected this argument. 446 U.S. at 700–01. Counsel questions the need for the prohibitory injunctive relief in particular because Citigroup discontinued its illegal conduct. Counsel Br. 43. But while a lack of "ongoing conduct" eliminates the "proper basis" to seek "a civil contempt remedy," it does not make this type of injunctive relief unnecessary. JA220. Counsel points to the relatively few contempt proceedings brought by the Commission to imply that this injunctive relief serves no purpose, but Counsel disregards both the high evidentiary hurdles for contempt and the possibility that the Commission brings few contempt proceedings precisely because these injunctions generally deter misconduct. Finally, Counsel doubts the need for the mandatory relief ordering Citigroup to undertake various reforms, claiming that Citigroup "had already implemented" these reforms. Counsel Br. 43. Counsel, however, ignores the auditing, accountability, and certification reforms imposed by the consent judgment, which Citigroup had not implemented and which were modeled after the reforms approved by courts in *Goldman Sachs* and other cases. JA104–05, 225–27.

V. This Court has jurisdiction under Section 1292(a)(1) or its mandamus authority.

A. The district court's order is appealable under Section 1292(a)(1) because, *as written*, the order refused an injunction and precluded the parties from settling on a no-admit basis.

The district court's order refused the Commission's request for "wide-ranging injunctive remedies," SPA 8, which by itself authorizes this appeal under 28 U.S.C. 1292(a)(1). *See* SEC Br. 4. Alternatively, this Court has jurisdiction because the court's order "had the practical effect" of refusing an injunction, which had a "serious, perhaps irreparable, consequence" because it precluded the parties from settling "on mutually agreeable terms." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83, 86 (1981); *see* SEC Br. 5. *Carson* is controlling: the Supreme Court held that a district court order refusing a decree "that did not rest solidly on evidence" of wrongdoing was appealable because the ruling "effectively ordered the parties to proceed to trial" and "effectively foreclosed" settlement. *Id*. at 86–87 & n.12, 90; *see* SEC Br. 5–7. By precluding settlement without "proven or admitted facts," SPA 4, the district court's order here had a similar effect, and is "far more similar to [the order] in *Carson*" than to the orders held to be non-appealable "in *Grant* and in *Dairylea*," *Stay Order*, 673 F.3d at 166, 168. The "principal difference" is that the orders in *Grant* and *Dairylea* "left the parties free to return to the bargaining table to make reasonable adjustments of terms of settlement," whereas this order "virtually precludes the possibility of settlement." *Id*. at 166; *see also* SEC Br. 7–10.

The district court's order is no "[m]ere postponement" or "delay" of injunctive relief, as Counsel claims, and Counsel wrongly assumes that the court will approve the consent judgment if the parties return "with the evidentiary submission it needs to assess the settlement." Counsel Br. 66–67. What the court requested was not an "evidentiary submission," but rather "facts, established either by admissions or by trials," and the court made clear that it that would not approve a consent judgment with a no admit/no deny provision. SPA 4, 9, 14–15. Thus, unlike in *Grant* and *Daiylea*, "the district court's rejection of the settlement cannot be cured by the parties returning to the bargaining table to make relatively minor adjustments to the terms of the settlement to address the district court's concern." *Stay Order*, 673 F.3d at 168.[7] The only adjustment that would satisfy the requirements of the court's order is the inclusion of admissions, which would

[7] When a court rejects a private class action settlement because the relief does not adequately compensate the class, the parties remain "free to negotiate" more relief, and jurisdiction may be lacking. *In re Touch Am. Holdings ERISA Litig.*, 563 F.3d 903, 907 (9th Cir. 2009) (per curiam). Here, no similar adjustment would resolve this court's fundamental objection to a lack of "proven or admitted facts." SPA 4.

"substantially reduc[e]" if not eliminate "the possibilities of the parties reaching settlement." *Id*.

Counsel further argues that the order is not appealable because the injunctive relief is not "at the core of the decree" in the way *Carson* requires. Counsel Br. 64–65. The Court in *Carson* explained that while the "order declining to enter the proposed consent decree" did not expressly refuse an injunction, it had "the practical effect of doing so" because the decree would have enjoined the defendants from engaging in illegal discrimination and would have ordered a change in their employment practices. "Indeed," the Court stated, "prospective relief was at the very core of the disapproved settlement." 450 U.S. at 83–84. The Court did not, as Counsel argues (at 64), use the phrase "very core" to establish a new "criterion" for determining when orders having the practical effect of refusing an injunction create "serious, perhaps irreparable, consequences." *Carson*, 450 U.S. at 84.

The district court's order here more clearly and expressly refused injunctive relief than the order in *Carson*, and therefore is appealable irrespective of the order's practical effect. But at the very least, the order here had a similar practical effect of denying the substantial prospective relief proposed, as in *Carson*. And these injunctive provisions—like the systemic changes in *Carson*—included significant mandatory changes to Citigroup's business practices designed to prevent a recurrence of the charged violations. JA44–47, 224–26. The court's order, like the order in *Carson*, is thus appealable under Section 1292(a)(1).

B. A writ of mandamus is appropriate if the Court determines that it lacks jurisdiction under Section 1292(a)(1).

In response to the Commission's showing that mandamus is proper, SEC Br. 58–61, Counsel makes one last attempt to rewrite the order it was appointed to defend. Counsel contends that the Commission can still obtain the relief it sought by "the simple expedient of submitting evidence to the district court" or of "successful adjudication at trial." Counsel Br. 70–71. Again, the court never held out such a "simple expedient" as an option, and its order requiring "proven or admitted facts," SPA 4, offers no hope that merely "submitting evidence" will satisfy the court. "Adjudication at trial" hardly provides the Commission with the relief it seeks through mandamus; the Commission requests entry of the consent judgment precisely because it concluded, in an exercise of its prosecutorial discretion, that settling the matter, immediately obtaining substantial relief, and avoiding trial serves the public interest.

Mandamus is appropriate because the court clearly abused its discretion when it expressly created a novel rule of law that detrimentally affects the

Commission and, if adopted by additional courts, other government agencies. SEC Br. 59–61. It may be "routine," as Counsel claims, for courts to evaluate consent judgments proposed by government agencies, and it may not be "extraordinary" for courts to reject *private* class action settlements out of concern for absent class members. Counsel Br. 73–74, *citing In re Traffic Executive Ass'n-Eastern Railroads*, 627 F.2d 631 (2d Cir. 1980). But, for a century, courts have approved consent judgments proposed by government agencies that contain no admissions, or outright denials. SEC Br. 25–40. The court's ruling that such a consent judgment is not fair, adequate, reasonable, and in the public interest precisely because it contains no admissions was extraordinary, without legal support, inconsistent with the practice of this court and other district courts in the Second Circuit, and intrusive upon the powers constitutionally vested in the executive branch. The unwillingness of either Counsel or *amici* to defend the decision as written only confirms that it was an abuse of discretion, and that issuance of a writ of mandamus is appropriate.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Commission's opening brief, the order of the district court should be reversed.

Respectfully submitted,

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September 2012

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,978 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by the word-count function on Word Perfect Office X5.

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§/ *Jeffrey A. Berger*

September 13, 2012 Jeffrey A. Berger

CERTIFICATE OF SERVICE

I hereby certify that, on September 13, 2012, I electronically filed the Reply Brief of the Securities and Exchange Commission, Appellant/Petitioner using the CM/ECF system. In addition, on the same day, I sent the original and six copies of the brief to the following address: U.S. Court of Appeals for the Second Circuit, Thurgood Marshall U.S. Court House, 40 Foley Square, New York, NY 10007.

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To be argued by Brad S. Karp

11-5227-cv(L),

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

United States Court of Appeals
for the
Second Circuit

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

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Pro Bono Counsel asserts that the district court properly rejected the proposed Consent Judgment[1] because the parties failed to provide the district court 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" (PBC Br.[2] 1 (emphasis in original))—and Pro Bono Counsel repeats this mantra throughout his brief. Through this careful formulation, Pro Bono Counsel suggests that the district court would have been satisfied with "any" modest factual information upon which to evaluate the reasonableness, adequacy, and fairness of the proposed Consent Judgment. However, by suggesting to this Court that a modest factual showing would have satisfied the district court, Pro Bono Counsel fundamentally mischaracterizes and rewrites the actual district court ruling.

As this Court fully appreciated in its opinion granting a stay of further proceedings below, the factual showing demanded by the district court as a condition of approving the parties' settlement was anything but modest; it was

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[1] All capitalized terms and abbreviations have the definitions set forth in CGMI's opening brief.

[2] References to "PBC Br." are to the Brief of Appointed Pro Bono Counsel for the United States District Court, D.E. # 220-1 (filed Aug. 13, 2012). References to "CGMI Br." and "SEC Br." are to CGMI's and the SEC's opening briefs, respectively.

extreme and unprecedented. This Court concluded that the district court "requir[ed] a binding admission of liability as a condition of approval of the settlement." (*CGMI II* at 13, JA-313.) And the motivation behind the district court's extreme and unprecedented condition was readily apparent to this Court: the "most important justification for [the district court's] ruling was that a consent judgment without Citigroup's admission of liability is bad policy and fails to serve the public interest because defrauded investors cannot use the judgment to establish Citigroup's liability in civil suits to recover the investors' losses." (*CGMI II* at 6–7, JA-306–07.) [3]

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[3] In finding "that the S.E.C. and Citigroup have made a strong showing of likelihood of success in setting aside the district court's rejection of their settlement" (*id.* at 17, 12, JA-317, JA-312), this Court made a number of other pointed observations, including the following:

- "We know of no precedent that supports the proposition that a settlement will not be found to be fair, adequate, reasonable, or in the public interest unless liability has been conceded or proved and is embodied in the judgment." (*id.* at 12, JA-312);

- "[T]here is no indication in the record that the court in fact gave deference to the S.E.C.'s judgment." (*id.* at 9, JA-309);

- "[W]e question the district court's apparent view that the public interest is disserved by an agency settlement that does not require the defendant's admission of liability." (*id.* at 10, JA-310);

- "[I]t is not the proper function of federal courts to dictate to executive administrative agencies what policies will best serve the public interest." (*id.* at 9 n.3, JA-309);

This Court's observation follows directly from the emphatic and unequivocal language of the district court's ruling. The district court made clear—three separate times in its 15-page opinion—that it rejected the proposed Consent Judgment expressly because CGMI refused to acknowledge or admit the SEC's allegations sufficiently to provide *collateral estoppel* benefits in private civil litigation for the ten ultra-sophisticated investors, the "defrauded investors," allegedly injured in the underlying CDO transaction.

- "[T]he court does not appear to have given deference to the S.E.C.'s judgment on wholly discretionary matters of policy." (*id.* at 7, JA-307);
- "We doubt that a court's discretion extends to refusing to allow . . . a litigant to reach a voluntary settlement in which it gives up things of value without admitting liability." (*id.* at 10, JA-310);
- "The district court's intimation that it will not approve a settlement that does not involve Citigroup's admission of liability, a condition that Citigroup is unlikely to satisfy, substantially reduces the possibilities of the parties reaching settlement." (*id.* at 15, JA-315);
- The district court, on the one hand, "prejudges the fact that Citigroup had in fact misled investors, [repeatedly calling them "defrauded investors,"] and assumes that the S.E.C. would succeed at trial in proving Citigroup's liability" while, on the other hand, "state[s] that it could not conclude that the settlement was fair because it had no knowledge of the underlying facts." (*id.* at 7 & n.2, 12, JA-307, JA-312); and
- "[W]e have difficulty reconciling the court's concern for the substantiality of the relief being imposed on Citigroup with the court's earlier observation that the penalties imposed on Citigroup amounted to no more than 'pocket change' or a 'mild and modest cost of doing business.'" (*id.* at 10, JA-310).

Curiously, Pro Bono Counsel does not so much as mention "collateral estoppel"—the "most important justification for [the district court's] ruling"—even once in his 76-page brief. Yet, as this Court recognized, the district court could not have been more unapologetic or overt about its goal here: the district court repeatedly emphasized that the "collateral estoppel" effect of the proposed Consent Judgment was the key, missing ingredient necessary for the parties to obtain the court's approval. Specifically, the district court observed that "[a]s a matter of law, an allegation that is neither admitted nor denied is simply that, an allegation. It has no evidentiary value and *no collateral estoppel effect*." (*CGMI I* at 10, SPA-10 (emphasis added).) The district court further stressed that, in "exchange" for consenting to the settlement, "Citigroup not only settles what it states was a broad-ranging four-year investigation by the S.E.C. of Citigroup's mortgage-backed securities offerings, but also *avoids any investors' [sic] relying in any respect on the S.E.C. Consent Judgment in seeking return of their losses*." (*Id.* at 11, SPA-11 (emphasis added) (internal citation omitted).) Finally, as if its goal was not abundantly clear, the district court underscored its objective:

> [I]n actuality, the combination of charging Citigroup only with negligence and then permitting Citigroup to settle without either admitting or denying the allegations *deals a double blow to any assistance the defrauded investors might seek to derive from the S.E.C. litigation in attempting to recoup their losses through private litigation, since private investors not only cannot bring securities claims based on negligence, but also cannot derive any collateral*

> *estoppel assistance from Citigroup's non-admission/non-denial of the S.E.C.'s allegations*.

(*Id*. at 12, SPA-12 (emphasis added).)

Thus, as this Court properly observed and contrary to Pro Bono Counsel's revisionist pitch, this is *not* at its core a dispute about the quantity or quality of evidentiary facts a district court properly may demand in order to evaluate a proposed consent judgment. Instead, this appeal concerns the district court's ability to "requir[e] a binding admission of liability" (*CGMI II* at 13, JA-313), or otherwise to impose "collateral estoppel" effects, as a condition of approving a settlement freely entered into by sophisticated, represented parties that understood, and expressly bargained, that the settlement would have no such effects. This Court put it precisely right when it held that the district court rejected the Consent Judgment because it believed that it "disserved the public interest . . . to allow Citigroup to settle on terms that did not establish its liability." (*Id.* at 7, JA 307.)

Pro Bono Counsel devotes a substantial portion of his brief to chiding CGMI for purportedly putting words in the district court's mouth or mischaracterizing the district court's ruling; but it was *this* Court—not CGMI—that (accurately) described the level of acknowledged or admitted facts required by the district court as "tantamount to proof of **liability**." (PBC Br. 1–2 (emphasis in original).)[4] Pro Bono Counsel repeatedly takes issue with this (Court's) description of the district court's ruling—noting that the district court easily "could have . . . employed [the term liability] had the court so intended." (PBC Br. 29.) But contrary to Pro Bono Counsel's position, the district court's decision is unmistakably clear. The actual district court ruling—not the ruling described in Pro Bono Counsel's brief—left CGMI with a stark choice: either (i) admit or acknowledge the facts asserted by the SEC sufficiently to provide collateral estoppel benefits for "defrauded" investors in private civil litigations (in effect, concede liability in this action and any related future matters), or (ii) proceed to trial. These two options, expressly mandated by the district court's decision, rule out the possibility well understood and appreciated not just by this Court, but by hundreds of federal district and appellate courts before it: that CGMI, in a rational exercise of business judgment, might actually dispute the facts and allegations asserted by the SEC, but nevertheless determine to settle for any number of legitimate reasons, including to avoid both the costs and reputational risks inherent

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4 Pro Bono Counsel employs this puzzling "transference" tactic throughout his brief, repeatedly accusing CGMI of "mischaracteriz[ing]," "distort[ing]," "misinterpret[ing]," "materially misstat[ing]," "misconce[iving]," being "alarmist," "ignor[ing]" facts, and making "patently untrue" statements about the district court's ruling, when all CGMI did, in each and every instance, was to quote this Court's opinion. (PBC Br. 1, 4, 24, 28, 28 n.12, 31, 31 n.14, 45, 52, 53, 57, 67.)

in contesting litigation brought by the SEC, and the potential collateral estoppel effects arising from an adverse outcome at trial.

And lest there be any doubt about the district court's zeal to ascertain the "truth" (as opposed merely to glimpse some modest factual showing) prior to approving the proposed Consent Judgment, consider the following passages from the decision below:

> "[T]he court, and the public, need some knowledge of what the underlying facts are: for otherwise, . . . the public is deprived of ever knowing the truth in a matter of obvious public importance." (*CGMI I* at 8–9, SPA-8–9.)
>
> "[A] consent judgment that does not involve any admissions and that results in only very modest penalties is just as frequently viewed . . . as a cost of doing business . . . rather than as any indication of where the real truth lies." (*Id.* at 10, SPA-10.)
>
> "[Absent] cold, hard, solid facts, established either by admissions or by trials, [the injunctive power of the judiciary] serves no lawful or moral purpose and is simply an engine of oppression." (*Id.* at 14–15, SPA-14–15.)
>
> "Finally, in any case like this that touches on the transparency of financial markets whose gyrations have so depressed our economy and debilitated our lives, there is an overriding public interest in knowing the truth. . . . [T]he S.E.C., of all agencies, has a duty, inherent in its statutory mission, to see that the truth emerges . . . ." (*Id.* at 15, SPA-15.)

As this Court observed, in the district court's absolutist regime, a "settlement must be deemed to be either insufficiently onerous or excessively onerous unless the liability of Citigroup ha[s] been either proved or disproved at trial or one side or the other had conceded the issue." (*CGMI II* at 11–12, JA-311–12.)

CGMI respectfully submits that the district court exceeded its authority and committed a clear error of law, as unprecedented as it is unwise, by requiring a settling defendant—as a condition of the court approving a consent judgment—either to admit the allegations against it sufficient to provide collateral estoppel effect or proceed to trial. For these reasons, those set forth below and in CGMI's opening brief, and for the reasons set forth by this Court in its opinion staying further proceedings below, CGMI respectfully requests that this Court reverse the district court's order, and remand with instructions that the district court approve the proposed Consent Judgment.

STANDARD OF REVIEW

Pro Bono Counsel does not dispute that the district court's legal conclusions are reviewed *de novo* (*see* PBC Br. 23 & n.11), but asserts that the issue on appeal is "at worst" a mixed question of law and fact, "entitled to be reviewed under a clearly erroneous standard." (*Id.* at 24 n.11.) Pro Bono Counsel is mistaken. The issue on appeal is whether the district court erred in holding that, *as a matter of law*, "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." (*CGMI I* at 14, SPA-14; *see also id.* ("[H]ow can it *ever* be reasonable to impose substantial relief on the basis of mere allegations?" (emphasis added)).) Indeed, the district court expressly did not evaluate the factual record in connection with its refusal to approve the proposed Consent Judgment. The district court's legal conclusion rejecting the proposed Consent Judgment—concededly in the absence of acknowledged or admitted facts—should be reviewed by this Court *de novo*. (CGMI Br. 1, 5.)[5]

ARGUMENT

I.

THE DISTRICT COURT COMMITTED A CLEAR ERROR OF LAW BY REQUIRING PROVEN OR ACKNOWLEDGED FACTS AS A CONDITION OF APPROVING THE PROPOSED CONSENT JUDGMENT

The district court erred in holding, as a matter of law, that "proven or acknowledged facts" are a necessary condition to approving the proposed Consent Judgment.

[5] *Lynch* v. *City of New York*, cited by Pro Bono Counsel, is inapposite. 589 F.3d 94 (2d Cir. 2009) (applying abuse of discretion standard to *fact-bound* review of police department policy); *see also Garcia* v. *Yonkers Sch. Dist.*, 561 F.3d 97, 103 (2d Cir. 2009) (conclusions of law reviewed *de novo* even when abuse of discretion standard applies). Pro Bono Counsel suggests, elsewhere in his brief, that *Patterson* v. *Newspaper & Mail Deliverers' Union of New York & Vicinity*, 514 F.2d 767 (2d Cir. 1975), limits this Court's review of a decision refusing to approve a consent judgment. (PBC Br. 32.) *Patterson*, however, stands for a very different proposition, holding that an appellate court's review of a district court's decision *approving* a settlement is "limited" due to "the clear policy in favor of encouraging settlements." 514 F.2d at 771.

A. Pro Bono Counsel Misstates the District Court's Holding and Mischaracterizes the Proceedings Below.

In holding that the parties have "a strong likelihood of success in their joint effort to overturn the district court's ruling," this Court emphasized that there is "no precedent" supporting the district court's ruling requiring proven or acknowledged facts as a condition for approving a consent judgment. (*CGMI II* at 12, JA-312.) There is, however, overwhelming authority to the contrary. Indeed, CGMI's opening brief identified over 800 decisions where district courts approved such consent judgments *without* requiring proven or acknowledged facts, and two circuit court decisions that *specifically reversed* district court orders, like the November 28 Order below, that sought to condition approval of consent judgments on proven or acknowledged facts. (CGMI Br. 21–26.)

Pro Bono Counsel's primary response to this unbroken line of authority is to defend an opinion that the district court *did not write*. Even though the November 28 Order, by its express terms, mandates that CGMI provide "proven or acknowledged" facts sufficient to give rise to collateral estoppel, Pro Bono Counsel now tells this Court that the district court in fact required only some "modest evidentiary basis" to evaluate the propriety of the proposed Consent Judgment. (PBC Br. 35.) The requisite evidentiary basis, according to Pro Bono Counsel, could have been a "factual showing" in "any form," including a nonbinding statement of facts submitted *ex parte* and only "for purposes of the revised consent judgment." (*Id.* at 3, 6, 30, 31 n.14.)

Pro Bono Counsel's position is manifestly different from what the district court actually held, and mischaracterizes the unambiguous terms of the November 28 Order. *See United States* v. *Spallone*, 399 F.3d 415, 420 (2d Cir. 2005) ("[I]f a judgment is clear and unambiguous, a court must adopt, and give effect to, the plain meaning of the judgment." (internal quotation marks omitted)).[6] Consider the actual language of the ruling below: the district court held that it could not approve the proposed Consent Judgment in the absence of "proven or acknowledged facts"—adding, for the avoidance of doubt, that these must be "cold, hard, solid facts, *established either by admissions or by trials*." (*CGMI I* at 14–15, SPA-14–15 (emphasis added).) The district court further required that this factual proof be binding so that it will have "collateral estoppel" effect and may be "rel[ied]" on in subsequent private litigation by "investors[] . . . seeking return of their losses." (*Id.* at 10–12, 15, SPA-10–12, SPA-15.) Contrary to Pro Bono

[6] Several of the *amici* mimic this (mis)reading of the ruling, including former SEC Chairman Harvey Pitt and various securities law scholars who join with Pro Bono Counsel in asserting, contrary to the plain language of the November 28 Order, that the district court did not lay down a new rule of law requiring proven or acknowledged facts as a condition precedent to entry of a consent judgment. (*See, e.g.*, Brief of Amicus Curiae Former Securities and Exchange Commission General Counsel and Chairman, Harvey Pitt in Support of Affirmance of District Court's Ruling 20–22; Brief of *Amici Curiae* Securities Law Scholars for Affirmance in Support of the District Court's Order and Against Appellant and Appellee 17–18.)

Counsel's position (PBC Br. 3–4, 30), the district court ruled that such a factual submission could not be made *ex parte* because the "public[] need[s] some knowledge of what the underlying facts are" and there is an "overriding public interest in knowing the truth." (*CGMI I* at 8, 15, SPA-8, SPA-15.)

Notably, the district court never requested that the parties submit the modest evidentiary basis Pro Bono Counsel now suggests was all the district court required. In fact, the district court *never* conducted an evidentiary hearing; nor did it solicit "evidentiary" or "factual" submissions from the parties, electing in its October 27 Order convening the November 9 hearing to pose nine largely theoretical questions. (*See, e.g.*, JA-68–69 ("How can a securities fraud of this nature and magnitude be the result simply of negligence?").) Indeed, the district court did not once use the word "evidence" during the November 9 hearing, or solicit any further evidentiary or factual submissions, instead focusing on the merits of the SEC's policy of permitting defendants to settle on a no-admit/no-deny basis. (*See generally* JA-198–232.)[7]

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[7] Pro Bono Counsel's suggestion that it "should have been evident to both parties" that the district court here was asking for the submission of evidence because of the parties' "familiarity" with the decision by the same district court in *SEC* v. *Bank of America Corp.*, No. 09 Civ. 6829 (JSR), 2010 WL 624581 (S.D.N.Y. Feb. 22, 2010), is misplaced. (PBC Br. 24.) In contrast to the district court's October 27 Order posing largely theoretical questions, and which did not request the parties to submit any "evidence" for the court's review, this district court in *Bank of America* expressly "direct[ed] the parties . . . to submit to the Court . . . underlying discovery materials, such as

Because the district court did not then—or ever—ask the parties to present an evidentiary basis for the proposed Consent Judgment, the suggestion by Pro Bono Counsel that the parties "declined" and "total[ly] fail[ed] to present any evidence," thus "virtually forc[ing]" the district court to reject the settlement, rings particularly hollow. (PBC Br. 4, 24, 35, 53.)

B. The District Court's Requirement of Proven or Acknowledged Facts Is Unprecedented.

Pro Bono Counsel fails to identify even *a single* authority supporting the district court's requirement that the parties provide proven or acknowledged facts as a condition of approving the Consent Judgment.[8]

Particularly probative is Pro Bono Counsel's inability to distinguish the two circuit decisions most directly on point: *Carson* v. *American Brands, Inc.*,

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deposition testimony, documents, and emails, bearing on [a list of enumerated] matters." Order, No. 09 Civ. 6829 (JSR), D.E. # 82 at 1–2.

[8] Pro Bono Counsel does cite a handful of cases in which courts requested factual information in connection with reviewing proposed consent judgments. (*See* PBC Br. 37 n.18.) But far from supporting precedent, these cases either are precursors to this decision, built on the groundwork laid by the district court itself in *Bank of America*, 2010 WL 624581, or *followed* the erroneous and unprecedented ruling of the district court here. (*See* CGMI Br. 24 n.5 (discussing the *Koss* and *Circa Direct* decisions' reliance on the district court's holding); *see also generally* Transcript of Proceedings, *SEC* v. *Citigroup Inc.*, No. 10 Civ. 1277 (ESH), D.E. # 13 (D.D.C. 2010) (citing *Bank of America* decision and requesting factual background prior to entry of the consent judgment). Moreover, the *Circa Direct* court has since *recanted* its initial ruling that it "lacked the factual predicate necessary" to approve a proposed consent judgment "without any admission by the defendant," holding in a recent decision that it would not require any admission by the defendant as a condition of approving the proposed consent judgment. *See FTC* v. *Circa Direct LLC*, No. 11-2172, 2012 WL 3987610 (D.N.J. Sept. 11, 2012).

654 F.2d 300 (4th Cir. 1981) and *United States* v. *Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995). First, Pro Bono Counsel does not address the merits of *Carson*—an omission that is particularly puzzling given the close similarity between the November 28 Order and the order reversed in *Carson*, in which the district court refused to approve a consent decree because it did not require admissions of fact, reasoning that such an order "does not create any factual basis upon which relief may be granted." *Carson* v. *Am. Brands, Inc.*, 446 F. Supp. 780, 788–89 (E.D. Va. 1977), *rev'd*, 654 F.2d 300. For all the reasons set forth in CGMI's opening brief, this Court should follow the Fourth Circuit and reverse the November 28 Order. (*See* CGMI Br. 20–24.)

Second, Pro Bono Counsel's attempt to distinguish *Microsoft* is entirely unpersuasive. In *Microsoft*, the D.C. Circuit reversed a district court order refusing to approve a consent decree on the ground that it did not require the admission of "any issue of fact or law." *United States* v. *Microsoft Corp.*, 159 F.R.D. 318, 324, 332 (D.D.C. 1995), *rev'd*, 56 F.3d 1448. Pro Bono Counsel speculates that the D.C. Circuit's "primary objection," and the real reason for its reversal, was that the district court reached beyond the four corners of the complaint to question why certain charges were not brought (PBC Br. 58–59)—a criticism that applies equally here in any event. *See infra* 26–27. It is unclear how Pro Bono Counsel draws such an inference since the D.C. Circuit emphatically rejected as "unjustified" the district court's "criticism of Microsoft for declining to admit" certain facts alleged against it, reasoning that "[o]rdinarily, defendants do not admit to having violated the antitrust or other laws alleged as violated in complaints that are settled." 56 F.3d at 1461 (internal quotation marks and citation omitted).

Finally, Pro Bono Counsel simply fails to address the more than 800 district court decisions identified by CGMI approving federal regulatory consent judgments, *none* of which required proven or acknowledged facts as a condition of approval. (*See* CGMI Br. 24–26 & n.6.) Pro Bono Counsel's failure to engage on this overwhelming body of controlling authority corroborates this Court's determination that the district court's requirement of proven or acknowledged facts as a condition of approving the Consent Judgment is unprecedented.

C. The "Authority" Relied on by Pro Bono Counsel Is Entirely Inapposite.

In defense of the November 28 Order, Pro Bono Counsel relies on private class actions and regulatory matters involving *contested* injunctions—not, as here, an injunction presented on consent. (*See* PBC Br. 35–45.) Although a court approving a *contested* injunction may sometimes require a "sufficient evidentiary or factual basis" to protect the rights of an *unwilling* party (PBC Br. 37), this standard has no relevance here, where all parties have consented to the proposed injunction. In all events, several of the cited decisions actually affirm district court approvals of contested consent decrees *without* requiring any admissions. (*See, e.g.*, PBC Br. 35 (citing *Metro. Hous. Dev. Corp.* v. *Vill. of Arlington Heights*, 616 F.2d 1006, 1015 (7th Cir. 1980) (refusing to require "finding of a . . . violation [as] a necessary predicate to the entry of a consent decree" and indicating that a contested decree may be entered "without the support of facts")).)[9]

1. Decisions Concerning Contested Injunctions in the Private Class Action Context Do Not Apply to Regulatory Consent Judgments Like This One Where There Are No Absent Class Members to Protect.

As purported support for the November 28 Order, Pro Bono Counsel cites numerous cases approving contested injunctions in private class actions (*see* PBC Br. 32, 35–37), none of which is relevant to the district court's refusal to approve the *agreed-upon* regulatory injunction here. (*CGMI II* at 12 n.5, JA-312 ("These rulings . . . were justified by the adverse impact of the injunctions on non-parties . . . . They appear to us to have no relevance to this case, where the terms of the settlement do not have adverse impact on anyone.").) *See also United States*

[9] *See also City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 454, 459 (2d Cir. 1974) (rejecting argument that district court committed reversible error by "refus[ing] to permit an evidentiary hearing to investigate the propriety of the [contested] settlement" and stating that a defendant need not admit liability for purposes of settlement); *United States* v. *Charles George Trucking*, 34 F.3d 1081, 1083, 1086–89 (1st Cir. 1994) (affirming approval of contested consent decree that "roughly correlated with[] some acceptable measure of comparative fault" and refusing to "police" the "fairness" of the decree further because "[s]ophisticated actors know how to protect their own interests, and they are well equipped to evaluate risks and rewards").

v. *City of Miami*, 664 F.2d 435, 436, 440 (Former 5th Cir. 1981) (en banc) (Rubin, J., concurring) (where certain parties had not consented, a consent decree's "validity must be tested by the same standards that are applicable in any other adversary proceeding," but where all parties have consented, the decree "carries with it a presumption of validity" (citation omitted)); *United States* v. *City of Alexandria*, 614 F.2d 1358, 1364 (5th Cir. 1980) (companion case to *City of Miami*, holding that, where no parties objected to proposed consent decree, the "reasonableness and appropriateness of the consent decree must be measured against the allegations of the complaint and the relief which might have been granted if the case had gone to trial").[10]

These private class action decisions are distinguishable for the additional reason that Rule 23(e) of the Federal Rules of Civil Procedure requires a district court to employ heightened scrutiny in reviewing contested class action settlements "to guard against settlements that may benefit the class representatives

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[10] This Court has cited *City of Alexandria* for this very proposition. *See Kirkland* v. *N.Y. State Dep't of Corr. Servs.*, 711 F.2d 1117, 1132 (2d Cir. 1983). In addition, Pro Bono Counsel cites *City of Miami* for the proposition that an injunction must be based on "facts of record, whether established by evidence, affidavit or stipulation" (PBC Br. 35), but neglects to mention that the former Fifth Circuit only applied a heightened degree of scrutiny to the claims of the objecting parties and affirmed—without requiring any defendant to admit the allegations in the complaint—those portions of the consent decree that were not objected to by any party. 664 F.2d at 444 (Rubin, J., concurring); *see also United States* v. *City of Miami*, 614 F.2d 1322, 1343 (Former 5th Cir. 1980) (consent decree did not require admissions of fact).

or their attorneys at the expense of absent class members or shareholders." *City of Miami*, 614 F.2d at 1331 (stating that "court's role" as "guardian" of "unrepresented class members . . . stem[s] directly from the language of [Rule 23(e)]"). Given this heightened scrutiny, it understandably is "desirable" that the district court make "findings of fact . . . whenever the propriety of the settlement is seriously in dispute." *Malchman* v. *Davis*, 706 F.2d 426, 433 (2d Cir. 1983). Pro Bono Counsel's attempt to stretch this principle to cover the circumstances here is unavailing: there are no absent class members in need of the district court's protection. *See City of Miami*, 614 F.2d at 1332 (concerns warranting heightened scrutiny do not exist where plaintiff is a "government department charged with seeing that the laws are enforced").[11]

2. Decisions Concerning the "Proper Showing" Requirement Are Not Applicable to This Agreed-Upon Injunction.

Pro Bono Counsel cites several decisions concerning the requirement that the SEC make a "proper showing" of a reasonable likelihood that a violation will recur to obtain an injunction under 15 U.S.C. § 77t(b). (*See* PBC Br. 38–45.) This statutory provision is not mentioned *once* in the November 28 Order, or

[11] *United States* v. *IBM Corp.*, 163 F.3d 737 (2d Cir. 1998), too, is inapplicable. (*See* PBC Br. 37.) In *IBM*, this Court observed that while the scope of a district court's review in approving a consent decree ordinarily is "minimal," the mandatory provisions of the Tunney Act, 15 U.S.C. § 16(e)(1) require a more searching inquiry into the "public interest" in the context of antitrust consent decrees. *See IBM*, 163 F.3d at 740.

otherwise referenced by the district court in the record below. Nor has Pro Bono Counsel identified any controlling authority that requires such a showing in the context of consent judgments.[12] The authority on which he relies suggests precisely the opposite. *See SEC* v. *Mgmt. Dynamics, Inc.*, 515 F.2d 801, 803, 806–07 (2d Cir. 1975) (where certain defendants had not consented to a proposed injunction, requiring district court to make an "independent judicial determination" that "a violation occurred" only as to the objecting defendants).

Moreover, the requirement Pro Bono Counsel seeks to impose makes no sense: the hallmark of a consent judgment is that no party concedes wrongdoing. *See Swift & Co.* v. *United States*, 276 U.S. 311, 327, 329 (1928). Indeed, CGMI has identified more than 150 decisions approving SEC consent judgments providing for injunctive relief, *all* of which were approved by a district court based on the allegations alone—and *none* of which required a "proper showing." (*See* CGMI Br. 24–26 & n.6.) Against this weight of authority, Pro Bono Counsel relies on three district court decisions from outside this Circuit that purport to require a proper showing in connection with a consent judgment. (PBC Br. 41–42 (citing *SEC* v. *Lane*, No. 6:07-cv-1920-Orl-22DAB, 2009 WL 2634484 (M.D. Fla. 2009); *SEC* v. *Globus*, 117 F. Supp. 2d 1345 (S.D. Fla. 2000); *SEC* v.

[12] Pro Bono Counsel relies on a handful of decisions concerning *contested* injunctions, which are inapposite here. *See, e.g.*, *SEC* v. *Bausch & Lomb Inc.*, 565 F.2d 8 (2d Cir. 1977) (contested injunction); *SEC* v. *Unifund Sal*, 910 F.2d 1028 (2d Cir. 1990) (same).

Nashwinter, 559 F. Supp. 33 (E.D. Va. 1983).)[13] These three decisions not only are contrary to the overwhelming weight of authority, but they also do not stand for the proposition that § 77t(b) requires the SEC to supply "proven or acknowledged" facts. In fact, in *Lane*, the ruling relied on most extensively by Pro Bono Counsel (PBC Br. 43–44), the district court for the Middle District of Florida *overruled* a magistrate judge's opinion refusing to approve a consent decree that permitted defendants to settle without admitting the facts alleged. *Lane*, 2009 WL 2634484, at *2; *see also* Consent Judgment, *Lane*, No. 6:07-cv-1920, D.E. # 179.

II.

THIS COURT SHOULD NOT ADOPT PRO BONO COUNSEL'S SUGGESTED "MODEL" FOR APPROVAL OF A CONSENT JUDGMENT

Pro Bono Counsel urges this Court to adopt, and to impose on the parties here, his suggested "model for the type of 'proven or acknowledged facts'" a court should require for approving consent judgments. (PBC Br. 30; *see also id.* at 3, 19, 24–25.) This model purportedly is based on the *Bank of America* and

[13] Pro Bono Counsel also suggests that *Dopp* v. *Franklin National Bank*, 461 F.2d 873 (2d Cir. 1972), and *Aaron* v. *SEC*, 446 U.S. 680 (1980), require a "proper showing" even where "a defendant nominally consents or acquiesces in the requested injunctive relief." (PBC Br. 38, 39.) But these cases say no such thing. *Dopp* did not discuss the proper showing requirement and did not involve a consent judgment. *See* 461 F.2d at 879. *Aaron* involved a contested injunction. *See* 446 U.S. at 684; *see also Circa Direct*, 2012 WL 3987610 (ruling that the FTC analog to § 77t(b) "does not apply . . . in the consent decree context" because "the source of the court's authority to award relief is the agreement of the parties, not the complaint upon which the action was originally based").

Goldman Sachs matters,[14] and Pro Bono Counsel asserts that it allows a defendant to provide proven or acknowledged facts sufficient to permit district courts to evaluate the propriety of a proposed consent judgment, without admitting "liability." (PBC Br. 27–29.) What Pro Bono Counsel fails to disclose is the significant collateral estoppel risk posed by this "model"—a risk that, indeed, materialized in both the *Bank of America* and *Goldman Sachs* matters. With all respect, this Court should decline Pro Bono Counsel's invitation to depart from established precedent and to adopt a "model" that would impose on CGMI (and all future settling defendants) a substantial collateral estoppel risk and thereby, as this Court appropriately observed, "virtually preclude[] the possibility of settlement." (*CGMI II* at 13, JA-313.)

As CGMI explained in its opening brief, serious adverse consequences would result if it were required to admit or acknowledge facts alleged by the SEC in connection with the Consent Judgment. (*See* CGMI Br. 35–38 & n.10 (discussing numerous class and individual actions seeking billions of dollars in damages).) These consequences would be substantial even if CGMI were required to provide a "limited" acknowledgment of facts, as illustrated by the

[14] *See generally Bank of America*, 2010 WL 624581; *SEC* v. *Goldman Sachs & Co.*, No. 10 Civ. 3229 (BSJ), D.E. # 25 (S.D.N.Y. Jul. 20, 2010).

very precedents Pro Bono Counsel commends to this Court as illustrative of the wisdom of his "model."

Specifically, in *Bank of America*, the same district court assigned to this matter required, as a condition to approving the proposed consent judgment, the submission of a 35-page "Statement of Facts" that the settling defendant "*agree[] to* for the purposes of evaluating the settlement." 2010 WL 624581, at *1 n.2 (emphasis added). Pro Bono Counsel states that Bank of America submitted these facts "without conceding their truth or admitting liability." (PBC Br. 29.) What Pro Bono Counsel *does not* mention is that the district court then *made a finding*—purportedly based in substantial part on its review of these "agreed to" facts—that it was "clear" that the bank "failed adequately to disclose" "obvious[ly]" material information. *Bank of Am.*, 2010 WL 624581 at *1. Not surprisingly, a few months later, private plaintiffs in a related class action filed an amended complaint against the bank asserting that the district court had made a "finding that it was 'clear' that [Bank of America] had made material misrepresentations and omissions to shareholders."[15] Pro Bono Counsel's suggestion that this matter is best resolved by requiring CGMI to "agree to" certain

[15] *See* Compl. ¶¶ 23, 211–14, *In re Bank of America Corp. Secs., Deriv., & ERISA Litig.*, 09 MDL 2058 (PKC), D.E. # 363 (S.D.N.Y. filed Oct. 22, 2010); *see also* Pl.'s Mem. of Law in Support of Mot. for Class Cert. at 19, 09 MDL 2058, D.E. # 479 (S.D.N.Y. filed Oct. 17, 2011) (citing the district court's decision to support its contention that "there can be no serious question that the misstatements and omissions . . . were material").

facts, à la *Bank of America*, entirely ignores the real-world consequences that would follow—consequences that CGMI expressly bargained to avoid by agreeing to the Consent Judgment.

Similarly, Pro Bono Counsel suggests that CGMI "acknowledge," as Goldman Sachs ("Goldman") did in connection with an SEC enforcement action arising from the same industry-wide review of CDO-related business activities, certain "key facts," including a "mistake" in its disclosures to investors. (PBC Br. 30.) Critically, however, Goldman expressly agreed to make its "acknowledgement" as a condition of its settlement with the SEC; in other words, the "acknowledgement" was part of the bargain struck by Goldman—not a requirement imposed by the district court against the parties' wishes. Here, by contrast, CGMI did not agree to provide such an "acknowledgement" in connection with agreeing to the terms of the proposed Consent Judgment.

Moreover, as in *Bank of America*, plaintiffs in a subsequent private action argued that their claims should survive a motion to dismiss based on Goldman's "acknowledgement." While Goldman argued that its acknowledgment should have no weight because Goldman expressly disclaimed having "admitted [or] denied" the SEC's allegations when it entered into its SEC consent judgment, the district court supervising that private litigation held that Goldman's disclaimer was "eviscerated by its concession" that it had made a "mistake" in its marketing materials. *Richman* v. *Goldman Sachs Grp., Inc.*, No. 10 Civ. 3461, 2012 WL 2362539, at *10, 12 (S.D.N.Y. Jun. 21, 2012).[16]

For these reasons, this Court should decline to adopt Pro Bono Counsel's suggestion that CGMI be required to "acknowledge" facts as a condition of approving the Consent Judgment. This Court also should decline to adopt Pro Bono Counsel's suggestion that, "[a]rmed with the record" of the completed trial in the parallel action against former CGMI employee Brian Stoker, the district court should now "assess whether the proposed injunctive relief [against CGMI] is reasonable, adequate, and fair." (PBC Br. 44.) If the district court were to make findings of fact against CGMI based on the *Stoker* trial record—putting aside the substantial question of whether this would be proper given that the *Stoker* action proceeded as a distinct matter, to which CGMI was *not* a party—then CGMI would be subject to the same sorts of adverse collateral consequences that civil plaintiffs are seeking to exploit in the *Bank of America* and *Goldman Sachs* matters.

[16] *See also ACA Fin. Guar. Corp.* v. *Goldman, Sachs & Co.*, No. 650027/11, 2012 WL 1450022, at *13 (N.Y. Sup. Apr. 23, 2012) (relying in part on Goldman's acknowledgment of a "mistake" in denying Goldman's motion to dismiss a fraud claim concerning the same CDO transaction that was the subject of Goldman's consent judgment).

III.

THE CONSENT JUDGMENT IS FAIR, REASONABLE, ADEQUATE, AND IN THE PUBLIC INTEREST

Pro Bono Counsel does *not* dispute that the district court has limited discretion in reviewing the proposed SEC Consent Judgment. (*See* PBC Br. 18, 46 (acknowledging that "substantial deference" to the SEC's determinations "is plainly due").) Instead, Pro Bono Counsel argues that the district court properly refused to approve the Consent Judgment as "fair, reasonable and adequate" because the parties failed to provide facts that would have enabled the district court to resolve three "puzzlements and inconsistencies" inherent in the Consent Judgment: (i) the SEC's failure to charge CGMI with intentional wrongdoing, (ii) the purportedly inadequate amount of the civil penalty, and (iii) the nature of the injunction. (PBC Br. 24–26, 33–34, 45.)

Pro Bono Counsel's argument, again, mischaracterizes the November 28 Order, which refused to approve the proposed Consent Judgment on the ground that it was unfair, unreasonable, inadequate, and not in the public interest expressly because the parties refused to provide "proven or acknowledged" facts sufficient to give rise to collateral estoppel effects—not as a result of any alleged "puzzlements." *See supra* at 1–7, 9–13. Pro Bono Counsel also ignores the fact that the parties submitted written memoranda and answered the district court's questions at a hearing concerning the same topics that purportedly puzzled the district court. (*See* CGMI Br. 9–12.) In any event, none of the three concerns identified by Pro Bono Counsel justifies the district court's refusal to approve the Consent Judgment.

A. The SEC's Determination of the Claims Charged Is a Wholly Discretionary Policy Matter to Which the District Court Should Have Deferred.

Pro Bono Counsel argues that the district court's refusal to approve the Consent Judgment was proper because the allegations in a complaint filed simultaneously against former CGMI employee Brian Stoker "effectively alleged intentional conduct," creating an "inconsistency" with the negligence-based complaint against CGMI. (PBC Br. 2, 25–26.) Even if this were a proper reading of the allegations in the Stoker complaint—and it is not[17]—the district court's refusal to approve the Consent Judgment because of its dissatisfaction with the claims asserted by the SEC is beyond the scope of the district court's authority: the district court is not permitted to "reach beyond the complaint to evaluate claims that the government did *not* make and [] inquire as to why they were not made." *Microsoft*, 56 F.3d at 1459 (criticizing district court for "construct[ing] his own

[17] The *SEC* v. *Stoker* complaint did not allege intentional fraud, but rather negligence-based violations of Sections 17(a)(2) and (a)(3) of the Securities Act. (No. 11-7388, D.E. # 1, at 1); *see also Aaron*, 446 U.S. at 696 (violation of Section 17(a)(2)-(3) does not require scienter). Similarly, the complaint here concerns "alleged negligent failures of controls relating to the crafting of [CGMI's] disclosures" and does not allege that "CGMI intentionally misled investors." (JA-99 (SEC Mem. on Consent Judgment).)

hypothetical case and then evaluat[ing] the [judgment] against that case"). (*See also CGMI II* at 9, 7, JA-309, JA-307 ("[T]here is no indication in the record that the court in fact gave deference to the S.E.C.'s judgment"; "[T]he court does not appear to have given deference to the S.E.C.'s judgment on a wholly discretionary matter of policy.").)

B. The SEC's Determination of the Civil Penalty Amount Is a Wholly Discretionary Policy Matter to Which the District Court Should Have Deferred.

Pro Bono Counsel suggests that the proposed $95 million civil penalty is inconsistent with the penalty imposed in the purportedly similar *Goldman Sachs* case and, in all events, is too small to provide effective deterrence—thereby justifying the district court's refusal of the Consent Judgment. (PBC Br. 48–53.) The SEC, however, specifically determined that this penalty is an effective deterrent (*see* JA-96–99 (SEC Mem. on Consent Judgment)); the district court cannot refuse to approve the Consent Judgment because it disagrees with the SEC's determination of what best serves the public's interest. (*See CGMI II* at 9, JA-309 (stating that the district court should have deferred to the SEC's "belie[f] . . . that the public interest was served by . . . disgorgement of $285 million")); *see also SEC* v. *Randolph*, 736 F.2d 525, 529 (9th Cir. 1984) (reversing district court's refusal to approve consent decree because it applied "too strict a standard" in challenging the SEC's determination regarding the deterrent effect of the penalty).[18]

Likewise, Pro Bono Counsel's assertion that the penalty here should be similar to the penalty imposed in the "virtually identical" *SEC* v. *Goldman Sachs & Co.* case is misplaced. *See* No 10 Civ. 3229 (BSJ) (S.D.N.Y. filed Apr. 16, 2010).[19] It is the province of the SEC—not the district court—to analyze, evaluate and differentiate conduct of various market participants, in carrying out its mandate to enforce the federal securities laws. The SEC is uniquely situated in this case, based on its review of a mammoth factual record developed over several years, to evaluate the relative conduct of market participants in connection with its industry-wide review of CDO-related business activities. It is precisely for this reason that the district court should defer to the SEC's determination of the

[18] Pro Bono Counsel's suggestion that the "parties . . . effectively prevent[ed] the court from having any ability to calculate" the civil penalty is disingenuous. (PBC Br. 49.) The parties provided written and oral responses to the district court's questions concerning the calculation of the civil penalty. (*See* JA-96–100, JA-187–90, JA-215–16.) Although the district court had the opportunity to solicit additional information from the parties, it did not do so; nor did it find that the civil penalty was improperly calculated or contrary to law.

[19] Pro Bono Counsel's assertion that the claims in this case are "identical" to those asserted against Goldman cannot be reconciled with his assertion that the district court lacked an "evidentiary basis" to engage in even the most rudimentary analysis of the facts of this case. If the district court lacked an evidentiary basis to assess the propriety of the proposed Consent Judgment, then clearly it—and Pro Bono Counsel—are not equipped to compare the facts at issue here with those in an entirely separate matter not pending before the district court. (*Compare* PBC BR. 24, 50, *with* PBC Br. 1–5.)

appropriate relief to seek in each individual matter, and that deference should be greatest where, as here, the federal regulatory agency's evaluation is made in the context of an industry-wide investigation.[20]

C. Pro Bono Counsel's Objections to the Injunctive Relief Proposed Are Without Merit.

Finally, Pro Bono Counsel objects to the "request for broad injunctive relief." (PBC Br. 26.) However, Pro Bono Counsel cites no authority to support his assertion that "the limited claim of negligence . . . would normally weigh against imposing injunctive relief" (*id.* at 26, 43)—an assertion belied by the fact that the injunctive provisions of the Consent Judgment "relate to control weaknesses that contributed to" the alleged violations (JA-41), and by the fact that courts regularly have approved similar injunctions as part of consent judgments resolving negligence-based claims.[21] Pro Bono Counsel also suggests, without support, that the injunctive measures are unnecessary; even if CGMI voluntarily has adopted certain of the measures set forth in the proposed affirmative

[20] In all events, as the parties explained to the district court in detail, there are fundamental differences in the conduct alleged in each case. (*See* JA-187–89 (CGMI Mem. on Consent Judgment).)

[21] *See, e.g.*, *SEC* v. *J.P. Morgan Secs. LLC*, No. 11-CV-4206, D.E. # 4 (S.D.N.Y. filed Jun. 29, 2011) (approving broad injunctive relief granted by consent judgment based on negligence charge); *SEC* v. *Option One Mortg. Corp.*, No. 12-CV-633, D.E. # 2 (C.D. Cal. filed Apr. 24, 2012) (same). (*See generally* CGMI Br. 24–26 & n.6 (referring to chart collecting similar orders).)

injunction, it is squarely within the SEC's discretion to require compliance through injunctive relief, rather than rely on voluntary compliance.

For these reasons, the proposed Consent Decree is fair, reasonable, adequate, and in the public interest. It should be approved.[22]

IV.

THIS COURT HAS JURISDICTION OVER THE PARTIES' APPEALS

A. The District Court Refused to Grant an Injunction.

This Court has jurisdiction over the parties' appeals from the November 28 Order under 28 U.S.C. § 1292(a)(1). As this Court recently held in *CFTC* v. *Walsh*—controlling Second Circuit precedent Pro Bono Counsel fails to cite—"orders that explicitly . . . refuse . . . injunctions . . . meet the plain terms of [§ 1292(a)(1)]." 618 F.3d 218, 224 (2d Cir. 2010). In an apparent effort to escape this authority and the plain language of § 1292(a)(1), Pro Bono Counsel asserts, without support, that the district court did not "refuse an injunction *per se*," but instead merely "declined to approve the proposed consent judgment in the absence of any facts." (PBC Br. 5, 63.) This assertion, again, mischaracterizes the

[22] Pro Bono Counsel asserts that a consent decree must serve the "public interest." (PBC Br. 45.) He ignores, however, this Court's ruling that that the public interest inquiry does not concern the consent judgment as whole, but only whether "*the injunctive provisions* of the settlement would *harm* the public interest." (*CGMI II* at 7, JA-307 (second emphasis added).) Pro Bono Counsel does not contend that the proposed injunction here harms the public interest. (*See* CGMI Br. 21 n.3.)

November 28 Order: the district court expressly stated that it "*refuse[d]* to approve the proposed Consent Judgment" *precisely because* "[the] proposed Consent Judgment . . . asks the Court to impose substantial *injunctive relief* . . . on the basis of allegations unsupported by any proven or acknowledged facts . . . ." (*CGMI I* at 14–15, SPA-14–15 (emphases added).)[23] Because the district court's November 28 Order expressly and unambiguously refused to grant an injunction, this Court has jurisdiction under 28 U.S.C. § 1292(a)(1) to hear the parties' appeals.[24]

B. The November 28 Order Has the Practical Effect of Refusing an Injunction.

Even if this Court concludes that the November 28 Order is not one that expressly refuses to grant injunctive relief, this Court nevertheless properly should exercise jurisdiction under § 1292(a)(1) and the standard set forth in *Carson* v. *Am. Brands, Inc.*, 450 U.S. 79 (1981). (*See* CGMI Br. 50–53 & n.14.)

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[23] Pro Bono Counsel concedes this point earlier in his brief, asserting that the district court properly refused to approve the Consent Judgment because "the district court had no basis" to "assess whether *the proposed injunctive relief* is reasonable, adequate, and fair." (PBC Br. 44–45 (emphasis added).)

[24] Pro Bono Counsel's reliance on *New York* v. *Dairylea Co-op, Inc.*, 698 F.2d 567 (2d Cir. 1983), is misplaced. In that case, the district court declined to approve a consent decree, but did not address, let alone explicitly refuse, its injunctive provisions. *See id.* at 570; *New York* v. *Dairylea Co-op, Inc.*, 547 F. Supp. 306 (S.D.N.Y. 1982) (not analyzing injunctive provisions).

1. Prospective Injunctive Relief Lies at the Core of the Consent Judgment Denied by the November 28 Order.

The first of *Carson*'s two requirements is met because the proposed injunctive relief lies "at the very core of" the November 28 Order. *Carson*, 450 U.S. at 83–84. Indeed, in the second sentence of his brief, Pro Bono Counsel describes the relief sought here as "a problematic consent judgment that included a request for *substantial injunctive relief enforced by the court's own contempt power*." (PBC Br. 1 (emphasis added); *see also id.* at 5 ("the consent judgment includes substantial injunctive relief"); *id.* at 26 (describing the relief sought, including "prophylactic measures," as "broad injunctive relief").)[25]

Carson is directly on point. In *Carson*, the district court in an employment discrimination action refused to approve a proposed EEOC consent decree that provided for (i) money damages, and (ii) an injunction forbidding the defendant from discriminating against employees and requiring the defendant to adopt procedural changes in its hiring practices. 450 U.S. at 81, 84; *Carson* v. *Am. Brands, Inc.*, 606 F.2d 420, 427 (4th Cir. 1979). The Supreme Court held that the proposed injunction was at the "very core" of the disapproved consent decree, thus

25 Notably, Pro Bono Counsel describes the injunctive relief sought as "broad" and "substantial" when asserting that the district court properly exercised its authority to refuse the settlement, given the parties' efforts to invoke the power of the court (PBC Br. 64), but denies that injunctive relief is at the "'core'" of the Consent Judgment for purposes of an immediate interlocutory appeal, *id.*

warranting immediate interlocutory review under § 1292(a)(1). 450 U.S. at 84. Similarly here, the proposed Consent Judgment provided for (i) monetary payments, and (ii) an injunction forbidding CGMI from violating the Securities Act and requiring CGMI to make significant changes to its procedures for the review and issuance of mortgage-related securities—procedures specifically designed to remediate the conduct alleged by the SEC. (*See* CGMI Br. 9.) As the Supreme Court held in *Carson*, such injunctive relief plainly lies at the "very core" of the Consent Judgment.[26] 450 U.S. at 84.

Pro Bono Counsel seeks to evade *Carson* by arguing that "the district court . . . sa[id] nothing about whether any given part of the proposed consent decree is core or peripheral in the sense that pertains to interlocutory appeals." (PBC Br. 65 n.41.) This argument is both irrelevant and inaccurate: the district court expressly emphasized that "*a large part* of what the S.E.C. requests . . . is injunctive relief" that is "wide-ranging" in nature. (*CGMI I* at 5, 8, SPA-5, SPA-

[26] *See also United States* v. *Colorado*, 937 F.2d 505, 508 (10th Cir. 1991) (first *Carson* prong satisfied where agreement "contained many conditions which [defendant] must fulfill"); *Durrett* v. *Hous. Auth.*, 896 F.2d 600, 602 (1st Cir. 1990) (first *Carson* prong "clearly fulfilled" where defendant agreed to extensive undertakings as part of consent decree); *Sierra Club, Inc.* v. *Elec. Controls Design, Inc.*, 909 F.2d 1350, 1352–53 (9th Cir. 1990) (first *Carson* prong satisfied where consent judgment provided for both monetary and injunctive relief and court "refused to enter the entire consent judgment").

8.)[27] This argument also mischaracterizes the *Carson* standard as requiring that an injunction be "at the 'core' of [a] concern that implicates the need for immediate, interlocutory appeal." (PBC Br. 64.) That is not the test set forth by the Supreme Court—or, for that matter, in any other case cited by Pro Bono Counsel. *Carson* requires only that the injunction be at the "core of the disapproved settlement," 450 U.S. at 84, a fact here that the district court and Pro Bono Counsel both have acknowledged.

Given the concededly wide-ranging nature of the proposed injunctive relief and its centrality to the Consent Judgment, the cases cited by Pro Bono Counsel finding an injunction not to be at the "very core" of a consent judgment are inapposite. (*See* PBC Br. 64.) For instance, in *Dairylea*, this Court contrasted the limited injunction before it, which "primar[il]y . . . order[ed] [the defendant] not to violate the law," with the broad injunction in *Carson*. 698 F.2d at 570. As in *Carson*, the injunctive provisions in this case go far beyond the "obey the law" injunction at issue in *Dairylea* and, as acknowledged by Pro Bono Counsel, "also [require] a variety of mandatory injunctions in the form of prophylactic measures

[27] Pro Bono Counsel concedes that the injunction was "important" to the district court's ruling. (PBC Br. 64; *see also CGMI I* at 8, SPA-8 (stating that proven or acknowledged facts are required "when a public agency asks a court to become its partner in enforcement by imposing wide-ranging injunctive remedies").) Moreover, contrary to Pro Bono Counsel's assertion (PBC Br. 64–65), the fact that some of these injunctive measures already have been voluntarily implemented by CGMI has no bearing on their centrality to the settlement.

Citigroup was ordered to implement" (PBC Br. 40). In *Grant* v. *Local 638*, 373 F.3d 104 (2d Cir. 2004), although the consent decree broadly resolved entitlements stemming from a long-running discrimination lawsuit, the narrow injunctive provisions did not implement the consent decree's wide-ranging prophylactic measures, unlike here, and only gave effect to certain equitable relief awarded as a result of prior proceedings. *Id.* at 108.

Because injunctive relief lies at the core of the parties' proposed Consent Judgment here, the first *Carson* requirement is met.

2. The November 28 Order Causes Irreparable Harm by Forcing CGMI Either to Make Binding Admissions or Proceed to Trial.

The second *Carson* requirement—irreparable harm to the parties—also is satisfied because the district court "is refusing to grant the injunction *except under conditions that the parties will not accept*." *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1456 (D.C. Cir. 1995) (emphasis added); *see also Carson*, 450 U.S. at 87–88.[28] As this Court held in staying further proceedings below, "the district court's rejection of the settlement cannot be cured by the parties returning to the bargaining table to make relatively minor adjustments to the terms of the

[28] The clear holdings of these decisions squarely foreclose Pro Bono Counsel's assertion—unsupported by any authority—that irreparable harm must be caused *solely* by the denial of injunctive relief, rather than by the denial of the consent judgment as whole. (*See* PBC Br. 64–67; *see also* CGMI Br. 50–53 (discussing case law).)

settlement to address the district court's concern." (*CGMI II* at 13, 15, JA-313, JA-315.) Instead, the November 28 Order, by requiring proven or acknowledged facts as a condition of settlement, "virtually precludes the possibility of settlement." (*Id.*)

Pro Bono Counsel suggests that the "harm to the parties occasioned by the [November 28 Order]" can be cured if the parties simply "come back to the district court with the evidentiary submission it needs to assess the settlement." (PBC Br. 66 (internal quotation marks omitted).)[29] But, as discussed *supra* at 1–7, 9–13, Pro Bono Counsel's assurance is disingenuous because the November 28 Order *unequivocally* states that the district court will accept nothing less than public and binding "proven or acknowledged facts."

The November 28 Order presents the parties with a Hobson's choice: either settle under "conditions that the parties will not accept" or proceed directly

[29] In support of this argument, Pro Bono Counsel relies on a number of inapposite decisions. (*See* PBC Br. 66–67.) *Dairylea* and *Grant*, as this Court already has determined, "are substantially different from this [case] . . . [because the orders in those cases] left the parties free to return to the bargaining table to make reasonable adjustments of terms of settlement or to demonstrate fairness at a hearing." (*CGMI II* at 13, JA-313; *see also* CGMI Br. 53 n.16.) *See also In re Touch Am. Holdings, Inc. ERISA Litig.*, 563 F.3d 903, 906–07 (9th Cir. 2009) (no irreparable harm where the district court rejected a private class action settlement "primarily [because of] the inadequacy of the monetary settlement," but "did not indicate that . . . it absolutely disapproved of any term of the proposed settlement" and "might have been willing to approve those provisions if the monetary settlement had been larger"); *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 884 (1994) (not discussing *Carson*'s irreparable harm requirement or otherwise limiting *Carson* or its progeny).

to trial. This is precisely the sort of "choice" described by *Carson* as inflicting irreparable harm. (*See* CGMI Br. 52–53 (discussing case law).) [30] For these reasons, this Court has jurisdiction over these appeals under *Carson*.

C. CGMI Has Standing to Appeal.

Because the November 28 Order rejected the parties' settlement, which CGMI sought, CGMI indisputably is "aggrieved" and has standing to appeal. *See United States* v. *Vazquez*, 145 F.3d 74, 79 (2d Cir. 1998). The fact that CGMI is the party against which equitable relief was sought is irrelevant. *Microsoft*, 56 F.3d at 1455–57 (holding that in the "rare situation" where a district court refuses to approve a consent decree providing for injunctive relief, "*both parties* [to the decree] must be entitled to appeal" (emphasis added)); *see also Grant*, 373 F.3d at 105, 108 & n.4 (considering on its merits an appeal from a district court's refusal to approve a settlement brought by the party against which

[30] Pro Bono Counsel fails to address *Durrett*, 896 F.2d at 602, and the ruling with regard to irreparable harm in *Microsoft*, 56 F.3d at 1456, and makes an unavailing attempt to distinguish *Stovall* v. *City of Cocoa, Fla.*, 117 F.3d 1238, 1241 (11th Cir. 1997), on the ground that it involves different "factual scenarios and legal claims." (PBC Br. 67.) Putting aside that this could be said of *any* case, the mere fact that *Stovall* involved an order refusing to approve an election plan is a distinction without a difference because both here and in *Stovall*, the relevant orders resulted in "the loss of the 'bargain' obtained through negotiation"—a loss that, as here, the *Stovall* court found could not be cured, precluding the parties from returning to the bargaining table. 117 F.3d at 1241.

equitable relief was sought); *Dairylea*, 698 F.2d at 567 (considering on merits similar appeal brought on behalf of both parties).[31]

The decision in *Great Am. Audio Corp.* v. *Metacom, Inc.*, 938 F.2d 16 (2d Cir. 1991), relied on by Pro Bono Counsel, is inapposite. While the district court in *Great American* denied plaintiff's request for an injunction, that injunction was not part of a consent judgment, but rather was resisted by the defendant, which challenged the injunction and prevailed after trial. 938 F.2d at 18. Both parties appealed, and this Court held that it had jurisdiction to hear plaintiff's appeal, but not defendant's, finding that the defendant, having resisted the injunction and prevailed at trial, was not "aggrieved" by the order denying the injunction. *Id.* at 19. Here, by contrast, CGMI expressly agreed to the injunction, and thus is as equally aggrieved as the SEC by the November 28 Order.[32]

[31] Pro Bono Counsel argues that *Grant* and *Dairylea* hold that the only party with standing to appeal the denial of an injunction is "'the party to whom injunctive relief is denied.'" (PBC Br. 69 (quoting *Dairylea*, 698 F.2d at 570).) In fact, neither case stands for that proposition—indeed, neither case even addressed the issue of standing; in both, this Court elected to consider and resolve the appeals on their merits. *See Grant*, 373 F.3d at 108 & n.4; *Dairylea*, 698 F.2d at 570.

[32] *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737 (1976), cited by Pro Bono Counsel, similarly is inapposite. *Wetzel* concerned an appeal from a summary judgment order refusing an injunction that was sought by plaintiff and vigorously resisted by defendant. *See id.* at 740–41.

CONCLUSION

For these reasons, and the reasons set forth in its opening brief, Defendant-Appellee-Cross-Appellant CGMI respectfully requests that this Court reverse the district court's November 28 Order and remand the case with instructions that the district court approve the proposed Consent Judgment.

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New York, New York

Respectfully submitted,

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

The undersigned counsel for Defendant-Appellee-Cross-Appellant Citigroup Global Markets Inc. certifies that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B)(i). This brief contains 10,262 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.

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