UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 11-5227 Caption [use short title] SEC v. Citigroup Global Markets Inc.

Motion for: Emergency motion for stay; Expedited review

Set forth below precise, complete statement of relief sought:

The SEC moves (1) for an emergency stay of the proceedings below, or alternatively, for a temporary stay in light of the defendant's January 3 deadline to answer the complaint; and (2) expedited review of its appeal

MOVING PARTY: Securities and Exchange Commission
☑ Plaintiff ☐ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Citigroup Global Markets Inc. (Apellant)

MOVING ATTORNEY: Jeffrey A. Berger

OPPOSING ATTORNEY: Brad S. Karp

[name of attorney, with firm, address, phone number and e-mail]

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Court-Judge/Agency appealed from: U.S. District Court for the Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☑ No
Has this relief been previously sought in this Court? ☐ Yes ☑ No
Requested return date and explanation of emergency: December 30; District court has not ruled on stay motion, and defendant's answer date is January 3, 2012

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/S Jeffrey A. Berger **Date:** 12/27/2011

Has service been effected? ☑ Yes ☐ No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

Form T-1080

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION, Plaintiff-Appellant, v. CITIGROUP GLOBAL MARKETS INC., Defendant-Appellant	)	No. 11-5227

SECURITIES AND EXCHANGE COMMISSION'S (1) UNOPPOSED EMERGENCY MOTION TO STAY THE PROCEEDINGS BELOW PENDING APPEAL, OR, IN THE ALTERNATIVE, FOR A TEMPORARY STAY, AND (2) UNOPPOSED MOTION TO EXPEDITE THE APPEAL

The Securities and Exchange Commission (Commission) moves on an emergency basis to stay the proceedings below pending appeal, and, if needed, to stay those proceedings temporarily until the Court can rule on this motion in light of an exigency created by a January 3, 2012 deadline for Citigroup to answer the complaint. The Commission also moves to expedite the appeal. Defendant Citigroup Global Markets Inc. (also an appellant) consents to these requests.

INTRODUCTION

On October 19, 2011, the Commission filed a complaint against Citigroup alleging violations of the antifraud provisions of Sections 17(a)(2) and (3) of the Securities Act of 1933 ("Securities Act"). The same day, the Commission

submitted a proposed consent judgment to the district court, which provided for injunctive relief and required that Citigroup make a payment of $285 million, as well as implement certain business reforms. Under the judgment's terms, Citigroup neither admitted nor denied the allegations in the complaint. The Commission explained to the district court that the proposed consent judgment reasonably reflected the scope of relief likely to be obtained by the Commission if successful at trial, taking into account the litigation risk; the benefit of avoiding that risk; the unwillingness of Citigroup to settle while admitting liability; the opportunity to detail publicly the Commission's factual conclusions, as described in its complaint; and the Commission's allocation of resources among its many investigations and enforcement actions designed to protect investors.

The district court rejected the proposed consent judgment, ruling on November 28, 2011 that it was not fair, adequate, reasonable, or in the public interest because it did not rest on "cold, hard, solid facts, established either by admissions or by trials." Or. 15. The district court directed the parties to prepare for trial, and orally ordered Citigroup to answer the complaint by January 3, 2012, even though the Federal Rules of Civil Procedure give Citigroup 60 days from the Commission's request for waiver of service (or until January 30, 2012) to answer. The Commission appealed, and moved in the district court for a stay pending appeal (to

the extent that its notice of appeal did not divest the district court of jurisdiction). Citigroup filed a brief in support of the Commission's stay motion.

The Commission explained that a stay should issue because the Commission has "some possibility of success" on appeal and "the balance of hardships tips decidedly in [its] favor." *Thapa v. Gonzalez*, 460 F.3d 323, 336 (2d Cir. 2006). In particular, the Commission argued that it was likely to prevail on appeal, and at least had shown "some possibility" of success, because the district court's unprecedented bright-line rule conflicted with a well-established practice in which courts, including the Supreme Court, have approved consent judgments containing injunctive relief without requiring the adjudication or admission of facts as a precondition.

Moreover, the Commission argued that a stay was appropriate because "the balance of hardships" tipped decidedly in the Commission's favor. Absent a stay, investors would suffer harm as the Commission expended resources on a litigation that may ultimately be resolved by consent judgment if this Court reverses the district court's order—resources that could instead be allocated to other investigations and enforcement activities. And without a stay, the Commission would lose permanently the benefits of the proposed settlement and be forced to incur the litigation risks and costs avoided by the proposed consent judgment.

Because the district court has "failed to afford the relief requested," the Commission moves this Court for a stay on the same grounds that it asserted in the district court. Fed. R. App. P. 8(a)(2)(A)(ii). The Commission seeks a stay on an emergency basis because the January 3 deadline for Citigroup to answer creates an exigency that threatens the Commission with additional irreparable harm. Requiring Citigroup to answer or move to dismiss the Commission's complaint by January 3 threatens a central provision of the proposed consent judgment, namely that Citigroup would not deny the Commission's allegations. The Commission therefore requests that the Court stay the proceedings below pending appeal, or, in the alternative, temporarily stay those proceedings, including the January 3 deadline for Citigroup to answer, until this Court can rule on the Commission's stay motion.

BACKGROUND

The Commission filed a detailed complaint against Citigroup on October 19, 2011, alleging that Citigroup violated Sections 17(a)(2) and (3) of the Securities Act by making material misrepresentations in connection with a collateralized debt obligation (CDO) transaction that it structured and marketed. In particular, the complaint alleged that Citigroup represented that the portfolio of assets in the CDO would be selected by an independent manager, but did not disclose to investors that Citigroup actually exerted significant influence over the selection of approximately

half the assets and that Citigroup had taken a short position in those assets. Compl. ¶¶ 1–3 (attached as Ex. A). The Commission further alleged that Citigroup realized net profits of $160 million. *Id.* ¶¶ 4–5.

On the same day it filed the complaint, the Commission presented its proposed consent judgment to the district court for its approval. Under the terms of the consent judgment (attached as Exhibit B), Citigroup agreed: (1) to entry of an order enjoining it from violating Sections 17(a)(2) and (3) of the Securities Act; (2) to pay $285 million ($160 million in disgorgement, $30 million in prejudgment interest, and a $95 million civil penalty) into a Fair Fund that the Commission would seek to distribute to injured investors; and (3) to undertake various steps enhancing Citigroup's processes for reviewing and approving mortgage-related securities offerings, including CDO offerings. Citigroup consented to the entry of judgment "[w]ithout admitting or denying the allegations of the complaint (except as to personal and subject matter jurisdiction)." Ex. B, at 1.

The district court rejected the proposed consent judgment in an order entered on November 28, 2011. It ruled that the consent judgment was "neither fair, nor reasonable, nor adequate, nor in the public interest" 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." Or. 8 (attached as Exhibit C). The district

court held that a proposed consent judgment that asks a court to impose injunctive relief "on the basis of allegations unsupported by any proven or acknowledged facts whatsoever," Or. 14, cannot be approved because it does not rest on "cold, hard, solid facts, established either by admissions or by trials," Or. 15.

Having rejected the proposed consent judgment because it lacked such "proven or acknowledged facts," the district court directed the parties to prepare for trial. Or. 15. The Commission sent its request for a waiver of service of process to Citigroup on December 1, 2011, and Citigroup returned the executed waiver the following day, which should have given it 60 days (or until January 30, 2012) to file its answer under Federal Rule of Civil Procedure 4(d)(3). The district court, however, orally ordered Citigroup to answer by January 3, 2012 during a status conference call that took place early in the week of December 5, 2011.

The Commission filed a notice of appeal on December 15, 2011. Citigroup also filed a notice of appeal challenging the district court's order. On December 16, the Commission moved for a stay in the district court. Citigroup filed a response on December 20 in which it supported the Commission's request. As of 11:00am on December 27, the district court has not ruled on the Commission's motion.

ARGUMENT

I. The district court has "failed to afford the relief requested," and the January 3 deadline to answer necessitates this emergency stay request.

The Commission requests that the Court stay the proceedings below pursuant to Federal Rule of Appellate Procedure 8(a)(2)(A)(ii), which authorizes stay motions to be filed with the Court of Appeals when a motion to the district court has been made, but the district court has "failed to afford the relief requested." In this instance, the Commission filed its stay motion on December 16, and Citigroup file a response in support of the Commission's motion on December 20.[1] The district court, however, has not yet ruled.

In light of the shortened deadline for Citigroup to answer imposed by the district court, as well as the federal holiday on January 2, the Commission moves for an emergency stay from this Court. Even though Citigroup, having returned a

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1 As the Commission argued in its motion to the district court, it believes that the filing of its Notice of Appeal divested the district court of jurisdiction over the proceedings because the "filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control *over those aspects of the case involved in the appeal*." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam) (emphasis added). In this instance, the issue on appeal is whether the parties' request to resolve the case through a consent judgment—and avoid the cost and uncertainties of litigation, including the process of trial preparation—should have been approved. Thus, the parties' wish to resolve the dispute on mutually agreeable terms, precluding a proceeding that would otherwise continue, is the central issue on appeal. The Commission sought a stay in the district court—and requests a stay here—to the extent that the district court has not been divested of jurisdiction.

waiver of service, "need not serve an answer to the complaint until 60 days after the request was sent," FED. R. CIV. P. 4(d)(3), the district court orally ordered Citigroup to answer by January 3, 2012 during a status teleconference. If Citigroup files its answer, denying some or all of the allegations in the complaint, or if Citigroup moves to dismiss, challenging the complaint's legal sufficiency, it will disrupt a central negotiated provision of the consent judgment pursuant to which Citigroup agreed not to deny the allegations in the complaint. If either event occurs, the parties will not be able to return to their initial bargaining positions should this Court ultimately reverse the district court.

Because only 4 business days remain until the January 3 deadline (January 2 is a federal holiday), the Commission requests emergency relief from the Court, which the Commission believes should be granted for the reasons explained below. The Commission believes that the Court must act by midday on January 3.

II. A stay of the proceedings pending resolution of this appeal, including the requirement that Citigroup answer by January 3, is warranted.

The decision whether to stay a proceeding pending an interlocutory appeal requires consideration of three factors: (1) the likelihood of success on appeal; (2) whether irreparable injury will be sustained absent a stay; and (3) whether a stay will injure other parties or the public. *In re World Trade Center Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007); *Thapa*, 460 F.3d at 334–35; *Mohammed v. Reno*, 309

F.3d 95, 101 (2d Cir. 2002). These interrelated factors are assessed on a sliding scale, and "more of one excuses less of the other." *Mohammed*, 309 F.3d at 101 (internal quotation marks omitted). Thus, "the necessary level or degree of possibility of success will vary according to the court's assessment" of the other factors. *Thapa*, 460 F.3d at 334 (internal quotation marks omitted). "[S]ome possibility" of success on appeal is sufficient to justify a stay where "the balance of hardships tips decidedly in favor" of the party seeking the stay. *Id.* at 336.

The application of these factors supports a stay here. We are unaware of any court that has ever before required that "proven or acknowledged facts" be established as a condition to the approval of a proposed consent judgment submitted by a federal agency. The consistent practice of other courts approving consent judgments that provide for injunctive relief and do not rest on "proven or acknowledged facts" suggests "some possibility," if not a likelihood, that the Commission will prevail on appeal. At the same time, the Commission and the investors it protects will be irreparably injured in the absence of a stay in that the Commission will be forced to commit resources to the litigation of this matter, which may ultimately be resolved by settlement if this Court reverses, rather than to other enforcement matters benefitting additional investors. Citigroup will not be injured by a stay, as it has affirmatively supported the Commission's request.

A. The Commission's appeal has a sufficient possibility of success.

The first factor—likelihood of success on appeal—weighs in favor of a stay pending appeal. This Court has avoided "setting too high a standard" for the "likelihood of success" factor, and only requires a showing that there is "some possibility" of success where the other factors support a stay, as is the case here. *Mohammed*, 309 F.3d at 101; *Thapa*, 460 F.3d at 334.

The Commission's mission is to protect investors, and the proposed settlement accomplished that mission because Citigroup disgorged all its ill-gotten gains and agreed to a penalty that was more than half of the maximum that the Commission could have obtained at trial under the controlling statute ($95 million, as compared with $160 million). Thus, the proposed resolution here—including the injunctive relief—reflects the relief that the Commission would likely recover were it to prevail at trial. The Commission made the reasonable judgment that expending additional resources to attempt to obtain an adjudication of the facts is not justified in light of the adequacy of the relief obtained, the litigation risks associated with trial, and the need to devote those resources to other matters.

At the same time, the public was adequately informed about Citigroup's misconduct. The Commission, after a thorough investigation, authorized the filing of a detailed complaint describing Citigroup's misconduct. Citigroup has not

contested those allegations in this proceeding. Furthermore, the Commission submitted two memoranda to the district court explaining the Commission's reasons for entering the settlement.

Given this record, the Commission is likely to prevail on appeal because the district court's ruling conflicts with three long-standing principles and practices concerning consent judgments entered into by federal agencies: (1) the well-established and oft-approved practice of federal agencies entering into consent judgments providing for injunctive relief in which defendants do not admit to the allegations in the complaint; (2) the federal policy favoring settlements by consent judgment; and (3) the strong deference afforded to federal agencies presenting proposed consent judgments for approval.[2]

[2] The district court order is reviewable pursuant to 28 U.S.C. 1292(a)(1). *Carson v. American Brands, Inc.*, 450 U.S. 79, 89 (1981). The Commission alternatively will seek a writ of mandamus so that in the event that this Court concludes that it lacks jurisdiction under Section 1292(a)(1), the order nevertheless will be reviewable. *SEC v. Rajaratnam*, 622 F.3d 159, 169–72 (2d Cir. 2010), citing *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380–81 (2004) (issuing a writ of mandamus because "no adequate alternative remedies are available," because "the issue involved is novel and significant and its resolution will aid the administration of justice," and because the appellants "have shown a 'clear and indisputable right' to the writ" as the district court clearly abused its discretion by basing its ruling on an erroneous view of the law).

1. The district court's decision contravenes a well-established practice that courts have approved for a century.

Courts have long approved consent judgments providing for injunctive relief in government enforcement actions notwithstanding the absence of an adjudication or admission of the material factual allegations of the complaint. *See Swift & Co. v. United States*, 276 U.S. 311, 327 (1928); *United States v. Microsoft*, 56 F.3d 1448, 1461 (D.C. Cir. 1995). The entry of consent judgments providing for injunctive relief without admissions is a frequent occurrence across the public law spectrum. *E.g.*, *United States v. Lexington-Fayette Urban County Gov't*, 591 F.3d 484, 486 (6th Cir. 2010) (Clean Water Act); *Rodrigues v. Herman*, 121 F.3d 1352, 1354 (9th Cir. 1997) (ERISA); *Microsoft*, 56 F.3d at 1461 (Sherman Act); *United States v. AT&T*, 552 F. Supp. 131, 143, 211 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (Sherman Act; breakup of AT&T). They are no less common in this circuit.[3]

They are so much the norm that *Black's Law Dictionary* has defined a "consent decree" as a judgment "whereby the defendant agrees to stop alleged

[3] *E.g.*, *FTC v. Diet Coffee, Inc.*, No. 1:08-cv-00094-JSR (S.D.N.Y. Jan. 10, 2008) (providing that defendant agrees to entry of order "without admitting the allegations of the Commission's Complaint"); *EEOC v. Morgan Stanley & Co.*, 256 F.R.D. 124 (S.D.N.Y. 2004) (resolving gender discrimination claims through consent judgment in which Morgan Stanley affirmatively denied any wrongdoing or liability); *CFTC v. Kelly*, No. 1:98-cv-05270-JSR (S.D.N.Y. Nov. 5, 1998) (consent order providing that defendant "neither admit[s] or den[ies] any of the allegations").

illegal activity without admitting guilt or wrongdoing," BLACK'S LAW DICTIONARY 410 (6th ed. 1990), and the 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 Wright and Miller, *Federal Practice and Procedure* § 4443, at 256–57 (2d ed. 2002). Indeed, federal courts, including those in this circuit, have approved consent judgments in which defendants expressly *deny* liability without any suggestion that such a practice contravenes the public interest. *E.g.*, *United States v. New Puck, LP*, No. 1:04-cv-05449-JSR, at 2 (S.D.N.Y. Jul. 14, 2004) (Americans with Disabilities Act); *United States v. Delta Dental Plan of Arizona, Inc.*, 1995 U.S. Dist. Lexis 9752, at *1 (D. Ariz. May 19, 1995) (Sherman Act). Likewise, the Commission should not be required to forgo a settlement that otherwise provides substantial relief—including the return of funds to investors and a requirement that important business reforms be implemented and maintained—based on the absence of an admission by the defendant.

2. The district court's decision contravenes the strong federal policy favoring consent judgments.

Rejecting settlements in the absence of adjudicated or admitted facts cuts against the "strong federal policy favoring the approval and enforcement of consent decrees." *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991). The Supreme Court has long endorsed the use and entry of consent judgments, which, like all settlements,

embody a compromise that preserves the resources of the courts and the parties, who "save themselves the time, expense, and inevitable risk of litigation." *E.g.*, *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971); *Swift*, 276 U.S. at 324–27. The preservation of resources is particularly important when federal agencies like the Commission are involved: consent judgments permit the Commission to "conserve its own and judicial resources" while still obtaining disgorgement, penalties, and other remedies that ultimately benefit investors. *SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983). Indeed, this Court has recognized that "[t]he SEC 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. 1973).

3. The district court's decision does not give appropriate deference to the government agency proposing the consent judgment.

The rule announced in the district court's order does not afford the Commission the strong deference owed "to the government agency that has negotiated and submitted the proposed judgment." *SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984). Judicial review of proposed consent judgments is to be limited, and "[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 district court's role is not to decide "whether the settlement is one which the

court itself might have fashioned, or considers as ideal," *United States v. Cannons Eng'g* Corp., 899 F.2d 79, 84 (1st Cir. 1990), or to withhold approval unless it determines that "this 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).

Review is limited, in significant part, because the deference owed to agencies has a constitutional dimension. As with all federal agencies, the Commission's decision to investigate, to prosecute, and to settle is solely an executive function. *Heckler v. Chaney*, 460 U.S. 821, 831 (1985). Agencies, such as the Commission, "must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if its acts," and whether the certain benefits for investors obtained through settlement outweigh the costs and risks posed by trial. *Id.* at 831–32. The district court's order usurps the Commission's ability to allocate its resources, to mitigate litigation risk, and to obtain substantial benefits for investors in the exercise of its best and reasonable judgment. *See Microsoft*, 56 F.3d at 1457 (in denying a proposed consent decree, a district judge "impermissibly arrogated to himself the President's role 'to take care that the laws be faithfully executed'"); *Board of Trade v. SEC*, 883 F.2d 525, 531 (7th Cir. 1989) ("Judges can 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.").

Judicial review, of course, is not a mere rubber stamp. A court may reject a proposed consent judgment if, for instance, it disregards applicable federal or state law or if the decree would impose an unreasonable burden on judicial resources. *E.g.*, *St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 268 (8th Cir. 2011) (rejecting a proposed consent judgment because the parties, in essence, agreed to violate local zoning laws); *In re United States*, 503 F.3d 638, 641 (7th Cir. 2007) (noting that a judge may reject a proposed consent decree "if implementing the decree would create a drain on judicial resources"). But a settlement should not be rejected merely because it does not include "proven or acknowledged facts," Or. 14, especially where, as here, the settlement obtains a substantial portion of what the Commission could have obtained at trial while eliminating all litigation risk.

In sum, the Court should grant the stay because the Commission has demonstrated some possibility of success on a substantial issue of importance. *Thapa*, 460 F.3d at 336.

B. The Commission and the investors it protects will suffer irreparable harm absent a stay.

Though the district court rejected the proposed consent judgment based on its evaluation of investor interests, in the Commission's view, a failure to stay the

proceeding would irreparably injure not only the Commission, but also the investors that it protects. The administration of an enforcement program by a federal regulatory agency requires the prioritization and allocation of resources. *Board of Trade*, 883 F.2d at 531 ("Agencies must compare the value of pursuing one case against the value of pursuing another; declining a particular case hardly means that the SEC's lawyers and economists will go twiddle their thumbs; case-versus- case is the daily tradeoff."). Here, in the absence of a stay, the Commission must allocate substantial resources to the litigation of this matter while the appeal is pending, even though the Court may ultimately reverse the district court. The Commission cannot then use these resources for other investigations and enforcement actions intended to protect yet more investors.

Even with an expedited appeal process, which the Commission requests below, the Commission must immediately begin preparing for trial; it must coordinate discovery, take depositions, draft pretrial motions, and respond to dispositive motions, all of which consume resources. Moreover, if Citigroup seeks to dismiss the case, such a motion must be filed—and may be ruled upon—before this Court will be able to decide the Commission's appeal. Particularly in light of the looming January 3 deadline to answer, a decision reversing the November 28 order will not return the Commission to the position it previously occupied because,

absent a stay Citigroup could be required as a practical matter to take positions that would foreclose the agreement the parties had negotiated. *Brenntag Int'l Chems., Inc. v. Bank of India*, 175 F.3d 245, 249–50 (2d Cir. 1999). A stay pending appeal is needed to prevent that irreparable injury to the Commission's enforcement program and the investors it protects.

C. The balance of the equities favors a stay.

Finally, a balancing of the equities here counsels in favor of a stay. Citigroup has not asserted that it will be prejudiced by a stay pending appeal, and it has affirmatively supported the Commission's request for relief in the district court. Similarly, it does not oppose and consents to the relief requested here.

At the same time, staying the case pending appeal will affirmatively benefit the public. As noted above, a stay pending appeal will permit the Commission to utilize its resources on other matters for the benefit of investors. "Resource allocation" is "governed by budgets and opportunities," and, as a result, "case-versus-case is the daily tradeoff" that the Commission must contemplate. *Board of Trade*, 883 F.2d at 531 (further discussing how the Commission best understands "the opportunity costs of reallocations within the agency"). The time and energy spent preparing for this trial, in a matter where the Commission, accounting for litigation risk, has already obtained most of the relief it reasonably

could expect to obtain at trial, is better directed towards other investor-protection efforts while this Court determines whether a trial will occur. While the public undoubtedly has a general interest in speedy resolution of litigation, delaying this matter by a few months will not harm the public interest, particularly given that this Court's decision may result in the approval of a consent judgment that would promptly create a $285 million fund to benefit injured investors.

III. Alternatively, the Court should issue a temporary stay pending resolution of this motion in light of the January 3 deadline to answer.

To the extent this Court cannot rule on the Commission's emergency motion to stay the proceedings below by January 3, it should at least order a temporary stay of the proceedings, including the January 3 deadline to answer, pending resolution of this motion. Absent a temporary stay, the Commission's interest in the proposed consent judgment will be irreparably harmed because any answer or dispositive motion filed by Citigroup will likely interfere with a key provision in the proposed consent judgment pursuant to which Citigroup neither admitted *nor denied* the allegations in the complaint.

IV. The Commission moves for an order expediting the appeal

In conjunction with its request for a stay, the Commission requests that the Court expedite its appeal. In particular, the Commission requests that the Court establish a briefing schedule under which the Commission's opening brief is due 35

days after the issuance of an order granting the motion for expedition, with oral argument to follow as soon as practicable thereafter.

CONCLUSION

For the reasons described above, (1) the Court should issue an order staying the proceedings below pending appeal; (2) if necessary, the Court should temporarily stay the proceedings below pending resolution of this motion; and (3) the Court should expedite this appeal.

Respectfully submitted,

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December 27, 2011

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2011, I electronically filed the Securities and Exchange Commission's emergency motion for a stay, with exhibits, using the Court's CM/ECF system, which served a copy of the document on the following counsel of record:

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