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 SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS UNOPPOSED MOTION TO STAY THE PROCEEDINGS BELOW AND TO EXPEDITE THE APPEAL

The Securities and Exchange Commission submits this supplemental memorandum in further support of its motion for a stay pending appeal (filed Dec. 27, Dkt. No. 20). The Commission seeks to respond to the district court's December 27, 2011 order denying the stay motion (attached as Ex. D) and the district court's supplemental order of December 29, 2011 (attached as Ex. E).

The district court's order denying a stay rests exclusively on the erroneous conclusion that this Court lacks appellate jurisdiction to hear this case. Under 28 U.S.C. 1292(a)(1), and the decision in *Carson v. American Brands*, 450 U.S. 79 (1981), this Court has appellate jurisdiction. Indeed, the circumstances of this case closely resemble those in *Carson*, where the Supreme Court held that the

denial of a consent decree including injunctive relief is immediately appealable under Section 1292(a)(1). The district court's decision did not address the merits, and as the Commission demonstrated in its motion to this Court, a stay should be issued because the Commission is likely to succeed on the merits, or at a minimum has "some possibility of success," and because "the balance of hardships tips decidedly in [its] favor." *Thapa v. Gonzalez*, 460 F.3d 323, 336 (2d Cir. 2006).

The district court's supplemental order states that the Commission "seem[s]" or "appears to have" misled the district court and this Court, but the Commission acted in good faith. Ex. E, at 3. The Commission acted in good faith with regard to the date by which the Commission sought a ruling. The Commission also acted in good faith when it sought emergency relief from this Court in order to preserve the status quo while the Court considered the Commission's stay motion in advance of the January 3 deadline set by the district court for Citigroup to respond to the complaint. The Commission properly explained in its filing to this Court that a dismissal motion would undercut a fundamental provision of the proposed consent judgment in which Citigroup agreed not to deny the allegations in the complaint. By moving to dismiss, Citigroup would deny the allegations that Citigroup violated the law. And the Commission did not disregard any professional responsibilities to cite the *Digital Equipment* decision because that

decision is irrelevant to the jurisdictional bases asserted by the Commission here: *Digital Equipment* did not involve injunctive relief, it did not involve an appeal arising under Section 1292(a)(1), it did not involve a consent judgment proposed by a federal agency, and it did not involve a mandamus petition.

BACKGROUND

The Commission filed an unopposed motion for a stay in the district court on December 16, the day after it filed its notice of appeal (Citigroup separately appealed on December 19). Pursuant to Local Rule of Civil Procedure 6.1(b), the Commission's notice of motion stated that Citigroup's response brief, if any, was due on December 30. Notice of Motion (attached as Ex. F). The notice of motion contained no return date, instead stating that "the return date [was] to be specified by the Court." *Id.* On December 19, the district court contacted the parties to expedite Citigroup's response, which was filed the next day, December 20. The district court did not specify when it would rule on the motion.

Because the district court had not yet ruled upon the Commission's stay motion and because of the impending January 3 deadline for the defendant to answer the complaint or seek dismissal, the Commission filed an emergency unopposed motion for a stay, or alternatively a temporary stay, on December 27. The Commission's filing appeared on this Court's electronic docket, and was available

to the public, by approximately 11:45am that day. Late in the afternoon on December 27, the Court temporarily stayed the district court proceedings and stated that it would rule on the Commission's stay motion on January 17, 2012.

Shortly thereafter, the district court issued its order denying the stay motion based solely on its conclusion that *this* Court would lack jurisdiction over the Commission's appeal. Whereas the Commission previously moved this Court for a stay because the district court had "failed to afford the relief requested," the Commission now seeks a stay from this Court because, "a [stay] motion having been made, the district court denied the motion." FED. R. APP. P. 8(a)(2)(A)(ii).

ARGUMENT

I. The Commission is likely to succeed on the jurisdictional issue.

The district court denied the Commission's stay motion solely because it concluded that this Court lacked jurisdiction over the Commission's appeal. The district court did not "consider[] the merits" of the Commission's motion, such as the Commission's likelihood of success on the merits or the balance of the equities. Ex. D at 2, 7.

The district court's ruling on appellate jurisdiction was in error because the Commission is likely to succeed—or at least has "some possibility" of success," *Thapa*, 460 F.3d at 336—on its assertion that this Court may exercise jurisdiction

under 28 U.S.C. 1292(a)(1). The Commission is appealing the district court's rejection of a proposed consent judgment, which: (1) enjoined Citigroup from further violations of the law; (2) required Citigroup to implement a series of business reforms; and (3) ordered Citigroup to pay $285 million, including $160 million in disgorgement. The refusal to enter the consent judgment thus denied, or had the effect of denying, the prohibitory injunctive relief (restricting Citigroup from further violations) and the mandatory injunctive relief (requiring Citigroup to implement reforms) that the Commission requested. This Court has jurisdiction over the Commission's appeal of that decision under Section 1292(a)(1), as well as jurisdiction over the Commission's petition for a writ of mandamus.

A. This Court has jurisdiction over the Commission's appeal pursuant to 28 U.S.C. 1292(a)(1).

Under Section 1292(a)(1)—the statutory exception to the "final judgment rule" for interlocutory orders denying injunctions—the district court's order rejecting the proposed consent judgment is appealable because, at the very least, it "had the practical effect" of denying an injunction. *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 (1981). As the Supreme Court explained in *Carson*, if a district court order rejecting a consent judgment containing injunctive relief is not "immediately appealable," the parties seeking its entry "will lose their opportunity to 'effectually challenge' an interlocutory order that denies them injunctive relief

and that plainly has a 'serious, perhaps irreparable, consequence,'" namely the parties' "right to compromise their dispute on mutually agreeable terms." *Id*. at 86. Consent judgments, like the one in *Carson* and the one here, 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. A court's denial of a proposed consent judgment "radically affect[s]" that condition. *Id*.[1]

In *Carson*, the district court rejected a proposed consent judgment that required the defendants to undertake certain hiring reforms so as to avoid future racial discrimination. *Id.* at 81. In "refusing to enter the proposed consent decree," the district court had explained "that it would not 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) (stating that there is "no factual basis upon which relief may be granted" because the defendants "'expressly deny * * * any unlawful or discriminatory conduct'" (alteration in original)).

[1] The Commission does not contend that this Court has jurisdiction under the *Cohen* collateral order doctrine, which is distinct from the statutory right granted under Section 1292(a)(1). Cases discussing appealability under the *Cohen* doctrine are inapposite here. *See* Ex. D, at 6–7; Ex. E, at 3, citing *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994).

Because the district court had "made clear that nothing short of an admission of discrimination" would have induced the court to approve the consent decree, the Supreme Court held that the district court's 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. The district court order thus "effectively foreclosed" voluntary resolution of the charges, thus negating the parties' "opportunity to settle their case on the negotiated terms." *Id*. at 86, 87 n.12. Under these circumstances, the Supreme Court held that an appeal was available under Section 1292(a)(1). *Id.* at 90.[2]

Under *Carson*, this Court has jurisdiction over the district court's order refusing to approve the proposed consent judgment. That order, which directed the parties to proceed to trial in July 2012, denied the parties the right to end the litigation on "mutually agreeable terms." *Id*. at 86. The district court did not afford the parties any opportunity to submit a revised proposal, and, like the district

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2 Applying *Carson*, numerous courts have reviewed, under Section 1292(a)(1), orders refusing to approve proposed consent judgments containing injunctive relief. *United States v. North Carolina*, 180 F.3d 574 (4th Cir. 1999); *United States v. Hialeah*, 140 F.3d 968, 973–75 (11th Cir. 1998); *United States v. Microsoft*, 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 1172, 1176 (7th Cir. 1985).

court in *Carson*, the district court "made clear" that any revised proposal would be rejected unless it contained "proven or acknowledged facts" about Citigroup's conduct. Ex. C, at 14. Based on this bright-line rule, the district court denied the Commission's request for "wide-ranging injunctive remedies," enforced by "the formidable power of contempt." *Id*. at 8. Consequently, the Commission's appeal has everything "to do with the denial of injunctive relief." Ex. D, at 4. Indeed, it was precisely the Commission's request for injunctive relief that animated the district court's erroneous decision to reject the proposed consent judgment because, in its view, "the injunctive power of the judiciary" cannot be invoked unless supported by "facts, established either by admissions or by trial." Ex. C, at 14–15.

The district court's rejection of the proposed consent judgment will cause the Commission irreparable harm by forcing it to incur the costs and risks of a trial that it had sought to avoid by negotiating a settlement that obtained most of the relief the Commission could have obtained at trial. This is precisely the type of irreparable harm identified in *Carson*, and this harm is not, as the district court's stay order suggests, "minimal." Ex. D at 5–6.

Moreover, while this case and the *Stoker* case are based on the same operative facts, the evidence that will be presented in the Citigroup matter is not identical to the evidence that will be presented in *Stoker*, and the Commission will have to

expend additional resources to prepare for trial against Citigroup.[3] Given the Commission's finite budget, the expenditure of resources on one case is the deprivation of resources from another. *Board of Trade v. SEC*, 883 F.2d 525, 531 (7th Cir. 1989). By forcing the Commission to litigate a case it chose to settle (and to litigate while an appeal is pending in the absence of a stay), the court's order forces a diversion of resources and intrudes upon executive powers regarding resource allocation, which causes irreparable harm not only to the Commission, but also to the investors it protects.

The district court cited two Second Circuit cases addressing *Carson* and Section 1292(a)(1) in its order denying the Commission's stay motion. Ex. D, at 3–4, citing *State of New York v. Dairylea Cooperative Inc.*, 698 F.2d 567 (2d Cir. 1983); *Grant v. Local 638*, 373 F.3d 104, 108 (2d Cir. 2004). Neither of those cases applies here.

In *Dairylea*, the State of New York reached a settlement with Dairylea, one of thirty-three defendants charged violating the antitrust laws. Another defendant, a

[3] For example, in its initial disclosures, Citigroup identified about 20 potential witnesses that were not identified either in the Commission's or Stoker's initial disclosures. Proceeding to trial against Citigroup will require the Commission to interview or depose these additional witnesses. Moreover, Citigroup will have an opportunity to identify purported experts independent of Stoker's identified experts. Deposing any such experts, and presenting rebuttal experts, will require the expenditure of additional resources. And the Commission will be required to respond to dispositive motions filed by Citigroup, which will differ from Stoker's.

Dairylea competitor, objected to the settlement, which the district court rejected. *Id.* at 569. The Second Circuit, in concluding that it lacked jurisdiction to review this decision, distinguished *Carson* on several grounds. First, the Court held that the parties did not show "serious, irreparable harm" because the district court opinion "explicitly expressed a willingness to consider further proposals," such that the parties were "free to return to the bargaining table" to devise a settlement responding to the judge's objections. *Id*. at 570. Second, the Court noted that the proposed consent judgment merely enjoined "one party from violating the law." *Id.* Finally, the Court noted that the agreement would not terminate the litigation because it did not resolve New York's charges against the other thirty or so defendants. *Id*. at 571.

These distinguishing characteristics do not exist here. This district court did not express any willingness to consider further proposals; it unequivocally directed the parties to prepare for trial, and like the district court in *Carson*, it "made clear that nothing short of an admission" would "induce it to approve" a proposed consent agreement. *Compare* Ex. C, at 14 *with Carson*, 450 U.S. at 88 n.12; *see also Grant*, 373 at 108 (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"). Further, the proposed consent judgment here not only enjoined the

defendant from further violations of the law, but also affirmatively required, as in *Carson*, that the defendant undertake certain business reforms to prevent future violations, including: expanding the approval processes for initial offerings of residential mortgage-related securities; requiring in-house and outside counsel to review marketing materials more intensively; and conducting annual audits and certifications to ensure compliance with these actions. Moreover, whereas the settlement in *Dairylea* would not have ended the litigation if approved, the consent decree here—like that in *Carson*—would have ended the litigation if approved, dissipating the concerns about piecemeal appellate litigation that motivated the *Dairylea* decision. *See* 698 F.2d at 570–71.

The decision in *Grant* is similarly distinguishable. In *Grant*, the district court rejected a proposed modification of a decades-old injunction. 373 F.3d at 106. As with *Dairylea*, the 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" because the 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*. at 109. By contrast, the district court here

clearly indicated that it will not approve a proposed injunctive consent judgment in the absence of facts "established either by admissions or by trials." Ex. C, at 15.

For purposes of the pending stay motion, the Commission has demonstrated a likelihood of success on the appellate jurisdictional issue, which is sufficient for the grant of a stay, particularly where the balance of harms considered for purposes of a stay motion tips decidedly in the Commission's favor. *Thapa*, 460 F.3d at 336. There are thus no grounds for the district court's assertion that the Commission's appeal is "patently defective." Ex. D, at 8. For that reason, the Commission's notice of appeal should divest the district court of jurisdiction over continuing trial proceedings regardless of a stay. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam) (the filing of a notice of appeal "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").

B. This Court has jurisdiction over the Commission's mandamus petition.

The Commission has also filed a petition for a writ of mandamus in the event that this Court disagrees about appealability under Section 1292(a)(1), in which case this Court may exercise jurisdiction under 28 U.S.C 1651. *In re Securities and Exchange Commission*, No. 11-5375 (2d Cir., filed Dec. 29, 2011). In that scenario, "no adequate alternative remedies" will be available, and mandamus will

be proper because "the issue involved is novel and significant and its resolution will aid the administration of justice," and because the Commission has "'clear and indisputable right' to the writ" as the district court erred by creating a bright-line rule under which it rejected a proposed consent judgment solely because it did not contain facts established either by admissions or by trial. *SEC v. Rajaratnam*, 622 F.3d 159, 169 (2d Cir. 2010).

This precise situation arose in *Rajaratnam*, where the appellants filed a notice of appeal from a discovery order, and then alternatively sought a writ of mandamus in the event the Court concluded it lacked appellate jurisdiction. *Id*. at 164. The Court ultimately held that it lacked appellate jurisdiction, but issued a writ of mandamus, vacating the district court's discovery order. *Id*. at 169. Notably, the Court in *Rajaratnam* granted the appellants' motion to stay the order pending appeal even as they sought review by this Court through two different avenues, just as the Commission has done here. *Id*. at 166.

II. The Commission did not mislead this Court or the district court.

The district court states that the SEC "seems" or "appears" to have misled both the district court and this Court with regard to the respective stay motions. Ex. E, at 3. The record shows that the Commission acted at all times in good faith and consistent with its obligations to both the district court and this court.

The Commission did not, as the district court writes, make "the [stay] motion returnable December 30, 2011," Ex E, at 1, the implication being that this led the district court to believe that a decision by that date was acceptable to the Commission. The Commission's notice of motion instead expressly stated that the "return date [was] to be specified by the Court." Ex. F. The only date identified in the notice of motion was a December 30 date for Citigroup's response to the stay motion. *Id.* This date was expressly mandated by the Local Civil Rules and Judge Rakoff's Individual Practice Rules. Local Civ. R. 6.1(b) (providing for 14 days for response papers); Rakoff Individual Practice Rule 2(d) (requiring that notice of motion identify filing dates). Thus, the selection of the December 30 date was not intended to suggest that a ruling by that date was acceptable, but rather was an effort to comply with the applicable procedural rules. In any event, the district court asked for a more rapid response from Citigroup, which did not oppose the motion and which filed a response supporting the motion on December 20.

The district court also states that it was not alerted to the importance of the January 3, 2012 deadline to answer or seek dismissal. Ex. E, at 3. During a call on December 19, the district court expressed an intent to expedite consideration of the stay motion. *Id*. at 1. Counsel reasonably understood this to reflect the district court's awareness of the January 3 deadline that it had set. In a case where a

proposed consent judgment containing a no admit/no deny clause had been rejected because it lacked admissions, the date to respond is a crucial moment.

Uncertain about when the district court would rule, and with January 3 looming, the Commission filed its emergency motion for a stay with this Court on December 27 so as to afford this Court an adequate amount of time to decide the Commission's motion before Citigroup had to answer or seek dismissal. Had the district court denied the Commission's motion before December 27, the Commission would have sought the same relief in nearly the same manner because of the exigency created by the district court's decision to shorten Citigroup's response time allowed under Federal Rule of Procedure 4(d)(3) by nearly a month.[4]

The district court incorrectly states that the Commission "seem[s]" to have misled the Court regarding the need for a stay (or the temporary stay that it granted). Ex. E, at 2-3. The Commission properly explained that if Citigroup moved to dismiss, it would deny the legal sufficiency of the complaint, disrupting a key provision of the settlement in which Citigroup agreed not to deny the allegations in the complaint. Complaints filed by the Commission naturally must contain legal allegations as well as factual allegations—they must allege some violation of the

[4] The district court was still able to issue its order denying the stay without the Commission's Second Circuit filing. That decision, as well as the district court's supplemental order, is now available for this Court's review as it considers the Commission's stay motion.

law. While moving to dismiss does not deny the facts of the complaint, it does deny that those facts constitute a violation of the relevant laws. Such a denial would be squarely inconsistent with the consent judgment negotiated by the parties.

The Commission did not violate its "professional obligations" by failing to cite *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 884 (1994) in its filings with this Court. Ex E, at 3. The Commission did not cite *Digital Equipment* because it is not relevant here. In *Digital Equipment*, the Supreme Court determined only that a denial of a non-injunctive settlement between private parties is not reviewable under the *Cohen* collateral order doctrine. But the Commission bases its appellate jurisdictional claim on Section 1292(a)(1), as it relates to injunctions, not the *Cohen* collateral order doctrine. Regardless of whether the rejection of a non-injunctive settlement between private parties provides a basis for an appeal, the Commission is challenging the denial of a consent judgment containing injunctive relief that has been proposed by a federal agency exercising Article II executive powers. *Digital Equipment* discusses neither appeals under Section 1292(a)(1) nor the rejection of consent judgments ordering injunctive relief proposed by government agencies. The controlling Supreme Court case is *Carson*, which the Commission cited in its motion.

CONCLUSION

For the reasons above, and those explained in the Commission's motion filed on December 27 (Dkt. No. 20), the Court should issue an order staying the proceedings below pending appeal and expediting the appeal.

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December 30, 2011

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2011, I electronically filed the Securities and Exchange Commission's supplemental memorandum in support of its motion for a stay, with additional 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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