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.	Nos. 11-5227 11-5242 11-5375

CITIGROUP GLOBAL MARKETS INC.'S MEMORANDUM IN SUPPORT OF SECURITIES AND EXCHANGE COMMISSION'S UNOPPOSED EMERGENCY MOTION TO STAY THE PROCEEDINGS BELOW PENDING APPEAL OR, IN THE ALTERNATIVE, FOR A TEMPORARY STAY, AND UNOPPOSED MOTION TO EXPEDITE THE APPEAL

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Defendant-Appellee Cross-Appellant Citigroup Global Markets Inc. ("CGMI") submits this memorandum in support of the December 27, 2011 Unopposed Emergency Motion to Stay the Proceedings Below Pending Appeal or, in the Alternative, for a Temporary Stay, and Unopposed Motion to Expedite the Appeal ("Motion for Stay and to Expedite") filed by Plaintiff-Appellant Cross-Appellee Securities and Exchange Commission ("SEC").

RELEVANT FACTUAL BACKGROUND

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 of 1933 ("Complaint") in connection with a single, highly complex synthetic collateralized debt obligation ("CDO") transaction called Class V Funding III ("Class V"). CGMI structured Class V five years ago and marketed the Class V securities to a handful of ultra-sophisticated institutional investors. The Complaint alleges that certain of the extensive disclosures CGMI made in the offering documents and marketing materials for Class V were inaccurate and misleading.

At the same time it filed the Complaint, and with the consent of CGMI, the SEC submitted for the district court's approval a proposed final judgment and permanent injunction ("Consent Judgment") agreed to by the SEC and CGMI for purposes of resolving the claims asserted in the Complaint. (*See*

Ex. 1.[1]) 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 with respect to its review and issuance of mortgage-related securities offerings. 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. The Consent Judgment provides that the $285 million to be paid by CGMI be distributed through a Fair Fund to the fewer than a dozen ultra-sophisticated institutional investors in Class V, subject to the district court's approval. Consistent with longstanding practice in enforcement action settlements, the Consent Judgment provides that CGMI neither admits nor denies the allegations in the Complaint. A similar SEC settlement with Goldman, Sachs and another with J.P. Morgan, both arising out of the same SEC CDO sales practices inquiry and involving the same material terms as CGMI's proposed settlement with the SEC, were recently approved by District Judges Jones and Berman.[2]

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[1] Citations in the form of "Ex. __" refer to exhibits attached to the Declaration of Brad S. Karp in Support of Citigroup Global Markets Inc.'s Memorandum in Support of Securities and Exchange Commission's Unopposed Emergency Motion to Stay the Proceedings Below Pending Appeal or, in the Alternative, for a Temporary Stay, and Unopposed Motion to Expedite the Appeal, dated January 9, 2012.

[2] *SEC* v. *Goldman, Sachs & Co.*, No. 10 Civ. 3229 (BSJ), D.E. # 25 (S.D.N.Y. July 20, 2010); *SEC* v. *J.P. Morgan Sec. LLC*, No. 11 Civ. 4206 (RMB), D.E. # 4 (S.D.N.Y. June 29, 2011).

On November 28, 2011, the district court (Rakoff, J.) refused to approve the Consent Judgment and proposed permanent injunctive relief expressly because CGMI did not admit or acknowledge the allegations in the Complaint ("November 28 Order"). (*See* Ex. 2.) Specifically, the district court found that "[a] large part of what the S.E.C. requests . . . is injunctive relief" and emphasized that the SEC seeks to "impos[e] wide-ranging injunctive remedies on a defendant." (*Id.* at 5, 8.) The district court concluded that it could not impose the "substantial injunctive relief [embodied by the Consent Judgment], enforced by the Court's own contempt power, on the basis of allegations unsupported by any proven or acknowledged facts whatsoever," because such a Consent Judgment was "neither reasonable, nor fair, nor adequate, nor in the public interest." (*Id.* at 14.) The district court directed the parties to be ready to try the case on July 16, 2012.

On December 15, 2011, the SEC filed a Notice of Appeal from the November 28 Order. On December 16, 2011, the SEC filed a motion in the district court, seeking to stay further proceedings pending resolution of its appeal ("Stay Motion") and asserting, among other points, that its appeal has a sufficient likelihood of success and that the parties would suffer irreparable harm absent a stay. (*See* Ex. 3.) On December 19, 2011, CGMI filed a Notice of Appeal from the November 28 Order (together with the SEC's appeal, the "Appeals"). On December 20, 2011, CGMI filed a memorandum in support of the Stay Motion in

the district court. (*See* Ex. 4.)

On December 27, 2011, the SEC filed the instant Motion for Stay and to Expedite in this Court. On that same day, this Court ordered that the SEC's Motion for Stay and to Expedite be submitted to a motions panel on January 17, 2012, and stayed all proceedings in the district court pending further action by the Second Circuit motions panel.

Also on December 27, 2011, shortly after the SEC filed its Motion for Stay and to Expedite, the district court issued a Memorandum Order (the "December 27 District Court Order") denying the SEC's Stay Motion. (*See* Ex. 5.) In the December 27 District Court Order, the district court declined to address the merits of the Stay Motion, concluding that the parties' Appeals are "patently defective" under 28 U.S.C. § 1292(a)(1) because, it now held, the injunctive relief sought by the SEC was not central to the rejected Consent Judgment and that, as a result, the parties would not suffer immediate and irreparable harm from the denial of that portion of the Consent Judgment. (*Id.* at 4–8.)

On December 29, 2011, the SEC filed a petition for a writ of mandamus (the "Mandamus Petition"), which this Court consolidated with the Appeals on January 3, 2012. On December 30, 2011, the SEC filed a Supplemental Memorandum in Support of its Unopposed Motion to Stay the Proceedings Below and to Expedite the Appeal ("Supplemental Memorandum").

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THE APPEALS

In the December 27 District Court Order, the district court refused to stay further proceedings pending appeal because it concluded that this Court does not have jurisdiction over the Appeals. In its Supplemental Memorandum, the SEC asserts that the district court erred because "the Commission is likely to succeed—or at least has 'some possibility of success'—on its assertion that this Court may exercise jurisdiction under 28 U.S.C. 1292(a)(1)." (Supp. Mem. at 4–5 (citing *Thapa* v. *Gonzales*, 460 F.3d 323, 334–35 (2d Cir. 2006).) CGMI respectfully submits that this Court has jurisdiction over the Appeals on one, or more, of the following grounds.

A. By Its Express Terms, the November 28 Order Is an Order Refusing an Injunction.

Section 1292(a)(1) expressly states that "the 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***.

(Ex. 2 at 5, 8, 14–15 (emphases added).)

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

B. Alternatively, the November 28 Order Is an Order That Has the Practical Effect of Refusing an Injunction.

Even if this Court somehow were to conclude that the November 28 Order is not one that expressly refuses to grant injunctive relief, this Court nonetheless has jurisdiction over the Appeals under section 1292(a)(1). The Supreme Court in *Carson* v. *American Brands, Inc*. explicates the circumstances that give rise to jurisdiction over appeals from orders that "d[o] not in terms 'refus[e]' an 'injunctio[n],' [but] nonetheless ha[ve] the practical effect of doing so"—in that case, through the rejection of a proposed consent decree that "would have permanently enjoined" the defendant. 450 U.S. 79, 83–84 (1981) (quoting 28 U.S.C. § 1292(a)(1)). In *Carson*, the Supreme Court held that appellate jurisdiction exists under section 1292(a)(1) where: "(1) the district court, by

refusing to approve a settlement, effectively denied a party injunctive relief and (2) in the absence of an interlocutory appeal, a party will suffer irreparable harm." *Grant* v. *Local 638*, 373 F.3d 104, 108 (2d Cir. 2004) (reciting *Carson* standard); *see also Walsh*, 618 F.3d at 223. Both prongs of the *Carson* test are satisfied here.[3]

1. The November 28 Order Denied the Parties' Request for Injunctive Relief.

The Supreme Court in *Carson* ruled that the refusal to approve a "proposed consent decree" effectively denied injunctive relief where such relief "was at the very core of the disapproved settlement." *Carson*, 450 U.S. at 83–84. In *Carson*, the district court refused to approve a proposed EEOC consent decree in a Title VII discrimination action that would have "permanently enjoined [the employer] from discriminating against black employees" and would have required the employer to adopt procedural changes in its hiring practices. *Id.*

Carson is precisely on point here. The prospective injunctive relief requested by the SEC here, and consented to by CGMI, lies at the "core" of the Consent Judgment, which, if approved, not only would permanently restrain and

[3] In a Supplemental Order dated December 29, 2011, the district court cited *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 884 (1994), for the proposition that "the Supreme Court of the United States had previously ruled that the denial of the fruits of a settlement does not, without more, provide a basis for interlocutory appeal, let alone a stay." (Ex. 6 at 3.) We respectfully submit that *Digital Equipment* is inapposite, because, unlike here, that case did not involve a requested injunction and, unlike here, that case did not involve interlocutory appeals as of right under section 1292(a)(1).

enjoin CGMI from future violations of sections 17(a)(2) and (3) of the Securities Act, but also would "require[ ] [CGMI] to undertake for a period of three years, subject to enforcement by the Court, certain internal measures designed to prevent recurrences of the securities fraud here perpetrated." (Ex. 2 at 3.) In its November 28 Order refusing to approve the Consent Judgment, the district court specifically acknowledged the centrality of the requested injunctive relief, holding 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)." (*Id.* at 5 (emphases added).) The district court further stated that its refusal to approve the Consent Judgment expressly rested on its unwillingness to provide the requested injunctive relief. (*See id.* at 8 (holding that "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" (emphasis added) (footnote omitted)); *see also* Ex. 5 at 4 ("[T]his Court noted that the proposed Consent Judgment's injunctive provisions—including not just its prohibition of future violations but also its imposition of specific prophylactic measures—were relevant and material to the scope and nature of the Court's evaluation.").)

In the December 27 District Court Order, the district court ruled that the parties could not appeal to this Court pursuant to section 1291(a)(1) because they would not suffer irreparable harm specifically from the denial of injunctive relief. The district court asserted that "the gravamen of the parties' appeals has nothing to do with the denial of injunctive relief *per se*." (Ex. 5 at 4.) But the provisions for injunctive relief, in particular the provisions requiring CGMI to enhance its processes for issuing mortgage-related securities, were central to the Consent Judgment that the district court refused to approve. There is no basis for believing that the SEC would have agreed to settle without those provisions. Further, the district court indicated that it was the presence of the injunctive provisions that supported its belief that the Consent Judgment could not be approved absent "proven or acknowledged" facts. (Ex. 2 at 14.)

In short, the injunctive provisions were both an integral part of the Consent Judgment and at the core of the district court's refusal to approve it. They were anything but the "tail of the dog," either with respect to the parties' agreement or the district court's ruling below. The failure to approve the Consent Judgment unquestionably exposes the parties to irreparable harm, *see infra* at 10–15, 18, and the injunctive provisions unquestionably are an integral component of the Consent Judgment. Under *Carson*, the parties have a statutory right to appeal, and there is no basis, legal or otherwise, for a requirement that irreparable harm

flow specifically from the failure to order the injunctive relief.

2. Absent an Interlocutory Appeal, the November 28 Order Will Cause CGMI Irreparable Harm.

As the Supreme Court explained in *Carson*:

> By refusing to enter the proposed consent decree, the District Court effectively ordered the parties to proceed to trial and to have their respective rights and liabilities established within limits laid down by that court. Because a party to a pending settlement might be legally justified in withdrawing its consent to the agreement once trial is held and final judgment entered, the District Court's order might thus have the "serious, perhaps irreparable, consequence" of denying the parties their right to compromise their dispute on mutually agreeable terms.

Carson, 450 U.S. at 87–88. Here, precisely as in *Carson*, the district court "refuse[d] to approve the proposed Consent Judgment" (Ex. 2 at 15), "ordered the parties to proceed to trial," and "den[ied] the parties their right to compromise their dispute on mutually agreeable terms." Here, precisely as in *Carson*, the potential harm to CGMI, absent an interlocutory appeal, is "serious" and "irreparable." *See, e.g.*, *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1456 (D.C. Cir. 1995) (holding that the 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"); *see also 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 "irreparable 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 "plaintiffs, and defendants also, are obviously in danger of suffering loss of 'their right to compromise their dispute on mutually agreeable terms'" (quoting *Carson*, 450 U.S. at 88)).

Here, as in *Carson* and its progeny, an essential term of the Consent Judgment will not be available if the parties are forced to proceed with litigation—namely, the parties' agreement that CGMI would consent to entry of final judgment "[w]ithout admitting or denying the allegations of the complaint." (Ex. 1 ¶ 2; Ex. 2 at 3.)[4]

If the parties are required to proceed with this litigation, the preclusive effect of potentially adverse findings in this SEC enforcement action will have

[4] This case is distinguishable from *Grant*, 373 F.3d at 109, where this Court emphasized that, unlike in *Carson*, the district court gave "no indication that it would never allow a modification of injunctive relief similar to that in the proposed consent decree." *See also New York* v. *Dairylea Cooperative Inc.*, 698 F.2d 567, 570 (2d Cir. 1983) (noting that the district court "explicitly expresse[d] a willingness to consider further proposals"). In stark contrast, the district court here stated categorically in its November 28 Order that it would reject *any* consent judgment requesting injunctive relief that was not based on "proven or acknowledged facts"—violating an essential term of the parties' bargain—because "how can it *ever* be reasonable to impose substantial relief on the basis of mere allegations?" (Ex. 2 at 14 (emphasis added); *see also id.* (concluding 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").)

significant negative consequences for CGMI in pending (and future) private civil litigations, even if the district court's November 28 Order eventually is reversed by this Court on appeal. CGMI and its affiliated companies, including Citigroup Inc. ("Citigroup"), are defending numerous private civil litigations that arise out of the subprime and credit crisis and, in several cases, specifically target CGMI's CDO-related business practices.[5]

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[5] *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 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); *MoneyGram Payment Sys., Inc.* v. *Citigroup Inc.*, No. 27-CV-11-21348 (WRH) (Minn. Dist. Ct. filed Oct. 26, 2011).

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 Allstate Ins. Co.* v. *CitiMortgage Inc.*, No. 11 Civ. 1927 (RJS) (S.D.N.Y. filed Mar. 18, 2011); *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);

Plaintiffs in these civil litigations will argue (indeed, some already have argued) that their claims rest on allegations similar to those at issue in this SEC enforcement action—namely, that CGMI misled investors by making false or misleading statements concerning its involvement in CDO structuring activities and ongoing exposure to CDO positions. As the district court explicitly acknowledged, these plaintiffs will use any adverse findings in this litigation—whether those findings are made in connection with motion practice, discovery issues, or at trial—against CGMI and Citigroup, leading to potentially significant negative consequences in those litigations. (*See* Ex. 2 at 12 (noting that private investors can derive "collateral estoppel assistance" from admitted facts in litigation with the SEC).) *See also DiSorbo* v. *Hoy*, 343 F.3d 172, 183 (2d Cir. 2003) ("Under New York law, 'the mere pendency of an appeal does not prevent the use of the challenged judgment as the basis of collaterally estopping a party to that judgment in a second proceeding.'" (citations omitted)); *Straus* v. *Am. Publishers' Ass'n*, 201 F. 306, 310 (2d Cir. 1912) (a pending appeal "does not suspend the operation of the judgment as an estoppel").[6] Thus, unless CGMI is

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Cambridge Place Inv. Mgmt., Inc. v. *Morgan Stanley & Co.*, No. 11-0555-BLS2 (Mass. Super. Ct. filed Feb. 11, 2011); *The Western & Southern Life Ins. Co.* v. *Residential Funding Co., LLC*, No. A1105042 (Ohio Ct. Com. Pl. filed June 29, 2011).

[6] These risks are not theoretical. On November 4, 2011, plaintiffs in one of these private civil actions—*Union Central Life Ins. Co.* v. *Credit Suisse First Boston Mortgage Sec. Corp.*—sought permission to file an *amicus curiae* brief in the

permitted to proceed with its interlocutory appeal, CGMI and Citigroup face irreparable harm because the potentially adverse impact of this litigation on related proceedings cannot be undone, even if this Court ultimately were to reverse the November 28 Order. *See Brenntag Int'l Chems., Inc.* v. *Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999) (irreparable harm exists when "there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied").

The district court expressly acknowledged that its rejection of the Consent Judgment will force CGMI and Citigroup's shareholders to expend significant resources to defend against the SEC's enforcement action—expenditures that Citigroup's Board of Directors and senior management appropriately and in the exercise of their business judgment determined not to undertake. (Ex. 5 at 6.) Unlike the SEC, CGMI is *not* a party to *SEC* v. *Stoker*, No. 11 Civ. 7388 (S.D.N.Y. 2011), the parallel SEC enforcement action pending before the district court, scheduled to be tried beginning on July 16, 2012.

Accordingly, as a result of the November 28 Order, unless the parties are permitted to proceed with the Appeals and a stay is issued, CGMI will suffer irreparable harm stemming not just from the risk of adverse factual findings that

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district court for the limited purpose of seeking the release of the entire investigative record developed by the SEC in this matter. (Motion, Nov. 7, 2011, D.E. # 23.)

may have collateral estoppel effect in related private civil litigations, but also from reputational risk, collateral regulatory risks, and the significant costs of discovery, motion practice and trial preparation (on an extremely accelerated time frame, given the district court's order that trial commence in six months). *See Carson*, 450 U.S. at 86–87 (noting that consent judgments enable parties to "save themselves the time, expense and inevitable risk of litigation" (citation omitted)).

C. Alternatively, This Court Can Exercise Jurisdiction Based on the SEC's Mandamus Petition.

In its December 27 Order, the district court noted that "the SEC's stated intention to apply for mandamus as an alternative to a statutory appeal generate[s no] obligation on the part of this Court to consider its request for a stay." (Ex. 5 at 8.) On December 29, 2011, the SEC filed the Mandamus Petition, which this Court consolidated with the Appeals on January 3, 2012. As an alternative to exercising jurisdiction under section 1292(a)(1), this Court unquestionably can exercise jurisdiction here based on the SEC's Mandamus Petition. *See SEC* v. *Rajaratnam*, 622 F.3d 159, 169–72 (2d Cir. 2010).

II. THIS COURT SHOULD GRANT THE SEC'S MOTION FOR A STAY PENDING APPEAL

In support of its Motion for Stay and to Expedite, the SEC demonstrated that each factor courts consider in deciding whether to stay proceedings pending appeal is satisfied here. *See Thapa*, 460 F.3d at 334 (setting

forth factors); *Mohammed* v. *Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (same). In particular, the SEC demonstrated that: (1) its appeal has a sufficient likelihood of success; (2) both the SEC and the investing public will suffer irreparable harm absent a stay; (3) a stay is in the public interest; and (4) the parties, including CGMI, would not be prejudiced by a stay. (SEC Mot. at 8–19.) CGMI adopts the SEC's arguments supporting the stay, and makes the following additional arguments.

First, the Appeals satisfy the "some possibility of success" standard. *Thapa*, 460 F.3d at 335. The Appeals involve an issue of substantial importance, with far-reaching policy implications: the district court here imposed an unprecedented, unwarranted, and unworkable condition precedent to approving a proposed consent judgment—specifically, requiring settling parties to provide "proven or acknowledged facts." (Ex. 2 at 14.) The district court cited no precedent in support of its "proven or acknowledged facts" requirement. CGMI is not aware of a *single court* in the United States that has required parties to provide "proven or acknowledged facts" as a condition precedent to approving a consent judgment that provides for prospective injunctive relief. There are literally *hundreds*, if not *thousands*, of instances in which district courts—including two other judges in the Southern District of New York presented with similar consent judgments arising from the same SEC CDO sales practices investigation, as well as

this district court in multiple other regulatory enforcement matters—have approved such consent judgments without requiring "proven or acknowledged" facts.[7] Accordingly, because the district court's November 28 Order is inconsistent with every precedent of which we are aware, and because the policy implications of the district court's ruling are so profound, and extend to all consent judgments entered into by all government regulatory agencies, the Appeals have at least "some possibility of success."

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[7] *See, e.g.*, *SEC* v. *Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 308–10 (S.D.N.Y. 2011) (Rakoff, J.); *SEC* v. *Bank of Am. Corp.*, Nos. 09 Civ. 6829 (JSR), 10 Civ. 0215 (JSR), 2010 WL 624581, at *1 (S.D.N.Y. Feb. 22, 2010) (Rakoff, J.); *FTC* v. *Diet Coffee, Inc.*, No. 08 Civ. 94 (JSR), D.E. # 4 (S.D.N.Y. Jan. 4, 2008) (Rakoff, J.); *United States* v. *New Puck, L.P.*, No. 04 Civ. 5449 (JSR), D.E. # 2 (S.D.N.Y. July 14, 2004) (Rakoff, J.); *SEC* v. *WorldCom, Inc.*, 273 F. Supp. 2d 431, 436 (S.D.N.Y. 2003) (Rakoff, J.); *CFTC* v. *Kelly*, No. 98 Civ. 5270 (JSR), 1998 WL 1053710, at *1 (S.D.N.Y. Nov. 5, 1998) (Rakoff, J.); *SEC* v. *J.P. Morgan Sec. LLC*, No. 11 Civ. 4206 (RMB), D.E. # 4 (S.D.N.Y. June 29, 2011); *SEC* v. *Goldman Sachs & Co.*, No. 10 Civ. 3229 (BSJ), D.E. # 25 (S.D.N.Y. July 20, 2010); *SEC* v. *Quadrangle Group, LLC*, No. 10 Civ. 3192 (PKC), D.E. # 3 (S.D.N.Y. Apr. 19, 2010); *SEC* v. *Bear, Stearns & Co. Inc.*, No. 03 Civ. 2937 (WHP), D.E. # 35 (S.D.N.Y. Oct. 31, 2003); *SEC* v. *Lehman Bros., Inc.*, No. 03 Civ. 2940 (WHP), D.E. # 13 (S.D.N.Y. Oct. 31, 2003); *see also Microsoft*, 56 F.3d at 1461 (remanding with instructions to enter proposed consent decree and stating 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"); *Carson* v. *Am. Brands, Inc.*, 654 F.2d 300, 301 (4th Cir. 1981) (remanding with instructions to enter proposed consent decree), *adopting dissent in Carson* v. *Am. Brands, Inc.*, 606 F.2d 420, 431 (4th Cir. 1979) ("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."); *Metro. Hous. Dev. Corp.* v. *Vill. of Arlington Heights*, 616 F.2d 1006, 1015 (7th Cir. 1980) (affirming order entering consent decree and rejecting argument that "facts must [ ] be established . . . [by] admission or proof").

Second, as discussed, CGMI faces significant irreparable harm, absent a stay. *See supra* at 10–15. The district court has set a trial date of July 16, 2012. If CGMI is required to litigate the underlying SEC enforcement action, it will suffer "serious" and "irreparable" harm because it will be deprived of the opportunity to resolve this matter on the negotiated, agreed-upon terms. *See Carson*, 450 U.S. at 87–88. In addition, absent a stay, CGMI faces the risk that findings will be made in this litigation that will pose collateral estoppel consequences in the numerous pending private civil litigations in which plaintiffs assert allegations similar to those asserted by the SEC here. Further proceedings before the district court—including motion practice and, if necessary, discovery and a trial—enhance the risk of significant adverse consequences in those pending civil proceedings, pose substantial reputational risks and create collateral regulatory risks, even if the district court's November 28 Order eventually is reversed on appeal by this Court. *See supra* at 11–14. Proceeding with this litigation thus would expose CGMI and Citigroup's shareholders to the very litigation and regulatory risks and potential adverse collateral consequences (not to mention the substantial burden and expense) that Citigroup's Board and senior management sought to avoid by agreeing to the Consent Judgment.

Finally, the balance of equities favors a stay. As both parties support a stay, neither will be prejudiced. Issuing a stay here also would serve the public

interest, which is satisfied where sophisticated litigants resolve complicated matters with government agencies on fair and reasonable terms, consistent with the "strong federal policy favoring the approval and enforcement of consent decrees." *SEC* v. *Wang*, 944 F.2d 80, 85 (2d Cir. 1991).

Given the substantial legal and policy issues implicated by the district court's November 28 Order, the substantial risks of irreparable harm to CGMI and Citigroup's shareholders absent a stay, and the lack of prejudice to any party, CGMI respectfully requests that this Court grant the SEC's Stay Motion.

III. THIS COURT SHOULD GRANT THE SEC'S MOTION TO EXPEDITE THE APPEALS

CGMI supports the SEC's request for an expedited appeal. CGMI will submit responsive papers on whatever accelerated schedule this Court deems appropriate and requests oral argument.

An expedited appeal is appropriate here for several reasons, including the significant legal and policy issues at stake in this matter, the *in terrorem* effect the district court's ruling has had (and will continue to have, unless it is overturned) on regulatory enforcement by the SEC and other government regulatory agencies, the potentially significant adverse impact on CGMI and Citigroup's shareholders caused by the ruling, the pendency of the *Stoker* trial and related ongoing pre-trial proceedings, and the intense public interest associated with this matter. *See In re Iceland Inc.*, 112 F.3d 504 (TABLE) (2d Cir. 1997)

(noting that this Court has been "generous in granting" expedited appeal requests). The parties, the public, interested corporate and regulatory constituencies, and district courts in this Circuit and beyond have a substantial interest in receiving this Court's considered views on these important issues as quickly as possible.

CONCLUSION

For these reasons, and those set forth in the SEC's Motion for Stay and to Expedite, CGMI respectfully requests that this Court grant a stay pending resolution of the Appeals and agree to expedite the Appeals.

Respectfully submitted,

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