ADDENDUM

11-5227

United States Court of Appeals for the Second Circuit

UNITED STATED 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
No. 1:11-CV-7387-JSR

BRIEF FOR BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

The Business Roundtable has no parent company, nor has it issued any stock.

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INTEREST OF AMICUS CURIAE

The Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies with over $6 trillion in annual revenues and more than 14 million employees. The BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy, and therefore participates in litigation as amicus curiae in a variety of contexts where important interests of business are at stake.

The BRT has a significant interest in the legal issues presented in this case, and its brief addresses important principles that are relevant to the disposition of this case. Fed. R. App. P. 29(b). As set forth below, the district court's rejection of the parties' consent decree could potentially affect most of the BRT's members, as virtually every large company faces enforcement actions by federal regulators. Such companies have a significant interest in resolving enforcement actions through consent decrees, and in many cases would be unwilling or unable to settle them if required to admit or deny each of the agency's allegations. The district court's decision could have a severely adverse effect on the BRT's members, and

the BRT thus has a significant interest in the primary legal issue presented in this appeal.*

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The principal issue before this Court is whether and in what circumstances a district court may reject negotiated settlements between companies and regulatory agencies. This issue affects virtually every large company, because most have been faced at one time or another with a government enforcement action and have had to choose whether to litigate or settle. Similarly, virtually every federal agency exercises its enforcement powers under a limited budget, which requires the agency to weigh the costs and benefits of litigating claims or settling. Moreover, federal enforcement actions will if anything become more frequent with the increase in federal agencies (such as the Consumer Financial Protection Bureau) and the expansion of federal law (such as the Dodd-Frank Wall Street Reform and Consumer Protection Act) that we have witnessed in recent years.

Parties have legitimate reasons to reach negotiated resolutions to disputes, because litigation is time-consuming and expensive, and the outcome is uncertain.

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* Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the BRT states that no one besides the BRT, its members, or its counsel authored the brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief.

It is therefore often in the interest of all parties—the agency, the regulated entity, and the judiciary—to reach a negotiated settlement rather than litigate to judgment or verdict. Indeed, the justice system could not afford (in time or money) to try every government enforcement action. The Supreme Court has therefore endorsed the use of consent decrees on several occasions, due to the "time, expense, and inevitable risk of litigation" that parties are able to avoid. *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). And because of this "strong federal policy favoring the approval and enforcement of consent decrees" (*SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991)), courts have exercised relatively restrained judicial review, allowing parties the latitude to fashion reasonable settlements, *see*, *e.g.*, *SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984) ("Unless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved").

The SEC has for decades included in its settlement documents language stating that the defendant neither admits nor denies the Commission's allegations. *See* Consent Decrees in Judicial or Administrative Proceedings, Securities Act Rel. No. 33-5337 (Nov. 28, 1972); 17 C.F.R. § 2025.5(e) (codifying this practice); *SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 308–10 (S.D.N.Y. 2010) ("Court approval of settlements in which the defendants resolve the serious allegations of fraud brought against them 'without admitting or denying the allegations of the Complaint' … is nothing new"). Indeed, virtually every federal

agency with enforcement powers enters into settlements with defendants that agree to the terms of a consent decree without admitting to the conduct alleged in the complaint. *See, e.g.*, *United States v. Microsoft Corp.*, 56 F.3d 1449, 1461 (D.C. Cir. 1995) ("Ordinarily, defendants do not admit to having violated the antitrust or other laws alleged as violated in complaints that are settled"); *FTC v. Chembio Diagnostic Sys., Inc.*, 2001 WL 34129746, at *11 (E.D.N.Y. Jan. 16, 2001); *CFTC v. Kelly*, 1998 WL 1053710, at *2, *5 (S.D.N.Y. Nov. 5, 1998).

There are numerous benefits to these types of settlements. They allow the Commission to "put the public on notice of what laws [the Commission] believe[s] have been violated," without necessarily litigating the claims through final judgment. Robert Khuzami, Director of the Division of Enforcement of the U.S. Securities and Exchange Commission, Remarks Before the Consumer Federation of America's Financial Service Conference (Dec. 1, 2011), *available at* http://www.sec.gov/news/speech/2011/spch120111rk.htm. And such settlements may bring relief to injured parties more expeditiously than "a long [and uncertain] wait for a judicial finding of wrongdoing." Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 Fordham L. Rev. 1177, 1196–97 (2009). The ability of an agency to set forth clear rules and obtain speedy relief for injured parties often outweighs the agency's interest in obtaining admissions of wrongdoing and a final judgment against a defendant. And a corporate defendant's

ability to resolve enforcement actions without admitting misconduct is important to defending claims in related litigation, obtaining insurance coverage, prudently managing its defense costs, the ability to attract and retain qualified directors and officers, access to the capital markets, and other ongoing business decisions that are exogenous to the matter being settled.

The district court's decision to reject the proposed consent decree here on the basis that Citigroup did not admit the allegations in the complaint would pose a serious threat to this long-standing and appropriate practice of settling enforcement actions without admission of fault. It would place courts in the position of micro-managing agencies' enforcement decisions, even though such decisions are "generally committed to an agency's absolute discretion" by Article II, section 3 of the U.S. Constitution. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). "Courts cannot intelligently supervise the [Commission]'s allocation of its staff's time, because although judges see clearly the claim the Commission has declined to redress, they do not see all the tasks the staff may not accomplish with the time released." *Bd. of Trade v. SEC*, 883 F.2d 525, 531 (7th Cir. 1989); *see also Randolph*, 736 F.2d at 528 ("whether the consent decree is in the public interest is best left to the SEC and its decision deserves our deference"). The district court's decision would also force defendants into protracted and expensive litigation with

regulators, given the adverse effects in private litigation, reputational harm, and collateral regulatory consequences of admitting wrongdoing.

CONCLUSION

The district court's rejection of the parties' consent decree could harm all parties involved and increase the burdens on the already overburdened federal judiciary. This Court should therefore disapprove the novel, and potentially dangerous, approach to reviewing settlement agreements adopted by the court below.

Respectfully submitted this 12th day of January, 2012.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), the typeface requirement of Fed. R. App. P. 32(a)(5), and the typestyle requirements of Fed. R. App. P. 32(a)(6). This brief contains 1,221 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and is prepared in a proportionally spaced typeface (14-point Times New Roman).

/s/ Mark A. Perry