To be argued by Brad S. Karp

11-5227-cv(L),

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

United States Court of Appeals
for the
Second Circuit

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

-v.-

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

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

BRIEF OF DEFENDANT-APPELLEE-CROSS-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

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

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PRELIMINARY STATEMENT

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

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

[1] Citations in the form of "JA-__" refer to pages in the Joint Appendix. Citations in the form of "SPA-__" refer to pages in the Special Appendix.

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

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

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

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

The district court's order rejecting the parties' proposed consent judgment on the grounds that it is "neither fair, nor reasonable, nor adequate, nor in the public interest" expressly because it was not supported by proven or acknowledged facts constitutes an abuse of the district court's extremely limited discretion. ("November 28 Order" or "*CGMI I*" at 8, SPA-8.) The parties' proposed consent judgment plainly satisfies the standard this Court and federal courts nationwide apply in reviewing consent judgments of this type: (i) the settlement is fair—it reflects an agreement "reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery," *Wal-Mart Stores, Inc.* v. *Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005); (ii) the settlement

is reasonable and adequate—it provides for comprehensive relief, negotiated and agreed to by the parties after each weighed the significant litigation risk involved in proceeding to trial; and (iii) the settlement serves the public interest—as determined by the SEC, in the appropriate exercise of its authority to regulate the federal securities laws. (*See CGMI II* at 6–12, JA-306–12.)

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

JURISDICTIONAL STATEMENT

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

based on the SEC's petition for a writ of mandamus, filed on December 29, 2011 ("Mandamus Petition," JA-291), pursuant to 28 U.S.C. § 1651(a). (*See CGMI II* at 5–6, JA-305–06.)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

STATEMENT OF FACTS

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

The SEC's Complaint alleges that CGMI violated sections 17(a)(2) and (3) of the Securities Act in connection with its structuring and sale of a single, highly complex synthetic collateralized debt obligation transaction ("CDO") called Class V Funding III ("Class V"). (JA-33–34.) CGMI structured Class V more than five years ago and marketed it to a handful of ultra-sophisticated institutional investors. (JA-21–26, JA-29–31.) These investors were among the most sophisticated commercial players in the global financial markets, all with extensive

experience investing in and, in many cases, managing CDO transactions. Notwithstanding the extensive disclosures CGMI made to these ultra-sophisticated investors in the Class V offering documents and marketing materials, the Complaint alleges that certain disclosures regarding the selection of assets for inclusion in Class V as well as CGMI's or its affiliates' interests in the transaction were incomplete and misleading. (JA-26–29.)

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

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

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

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

particulars of the Class V transaction, and the terms of, and rationale supporting, the proposed settlement. (JA-68–70.)

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

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

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

(JA-97.)

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

On November 9, 2011, the district court conducted a hearing to consider whether to approve the Consent Judgment. During the hearing, among other issues, the SEC addressed the agency's practice of allowing defendants to settle claims without admitting or denying the asserted allegations (JA-205–14), and advised the district court that, "based on the facts and circumstances, including

our interview of witnesses, our review of hundreds of thousands, if not millions, of pages of documents, the numerous instances of testimony we took, our evaluation of the law that applies, we concluded that in this instance, there was not sufficient evidence to support a finding of scienter" (JA-221).

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

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

The district court's November 28 Order rests on three essential, and related, determinations. First, the district court concluded that *any* consent judgment—unsupported by "proven or acknowledged facts"—would not serve the public interest because it would prevent "the public . . . [from] ever knowing the truth in a matter of obvious public importance," and deprive private litigants from using the consent judgment to pursue their own claims because the consent

judgment would have "no evidentiary value and no collateral estoppel effect" in any private civil litigation. (*Id.* at 8–10, SPA-8–10.) Second, the district court concluded that *any* consent judgment—unsupported by "proven or acknowledged facts"—would be unfair because it would create "the potential for abuse in imposing penalties on the basis of facts that are neither proven nor acknowledged." (*Id.* at 14, SPA-14.) Finally, the district court concluded that *any* consent judgment—unsupported by "proven or acknowledged facts"—would be unreasonable and inadequate because it would deprive a court of any "assurance that the substantial injunctive relief it is being asked to impose has any basis in fact." (*Id.* at 9, SPA-9.) For these reasons, the district court rejected the Consent Judgment, concluding that it is "neither reasonable, nor fair, nor adequate, nor in the public interest." (*Id.* at 14, SPA-14.)

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

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

only if "liability has been conceded or proved and is embodied in the judgment." (*Id.*) In its ruling, this Court rejected each of the three core premises underlying the district court's reasoning.

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

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

Finally, the Second Circuit panel rejected the district court's stated concern that it lacked the ability to evaluate the Consent Judgment in the absence of "proven or acknowledged facts," observing that the district court had an

adequate "basis available to assess the underlying facts"—namely, the SEC's "substantial" investigatory record. (*Id.* at 11, JA-311.) This Court further noted that a rule requiring "proven or acknowledged facts" to support a settlement would "undermine any chance for compromise." (*Id.* at 10–12, SPA-10–12.)

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

SUMMARY OF ARGUMENT

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

First, the district court's new rule, requiring settling parties to provide "proven or acknowledged facts," is inconsistent with the standard uniformly applied by hundreds of federal district courts that have considered—and approved—federal regulatory agency consent judgments over the past several decades. The standard—applied by courts in this Circuit and around the country—is that district courts should approve consent judgments so long as they are "fair, reasonable and adequate." As noted by this Court, there is "*no precedent* that

supports the [district court's] proposition that a settlement will not be found to be fair, adequate, reasonable, or in the public interest unless liability has been conceded or proved and is embodied in the judgment." (*CGMI II* at 12, JA-312 (emphasis added).)

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

Third, the district court's refusal to follow this established standard for reviewing consent judgments vitiates the strong policy encouraging negotiated resolutions. A key consideration in resolving a litigation short of trial for a

defendant like CGMI is to avoid the risks and collateral consequences associated with ongoing litigation and potentially adverse findings. By forcing defendants to make admissions of liability as a condition of settlement, the district court's proposed standard "would in most cases undermine any chance for compromise." (*CGMI II* at 10, JA-310.)

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

STANDARD OF REVIEW

The question whether the district court erred in rejecting the proposed Consent Judgment on the ground that the settling parties failed to provide "proven

or acknowledged facts" is an issue of law that is reviewed *de novo*. *See City of New York* v. *Golden Feather Smoke Shop, Inc.*, 597 F.3d 115, 120 (2d Cir. 2010). The question whether the district court erred in finding that the proposed Consent Judgment was not fair, adequate, reasonable, or in the public interest because it was not supported by "proven or acknowledged facts" is reviewed under an abuse of discretion standard. *See id*. A district court necessarily abuses its discretion if it "(1) base[s] its ruling on an erroneous view of the law, (2) ma[kes] a clearly erroneous assessment of the evidence, or (3) render[s] a decision that cannot be located within the range of permissible decisions." *Lynch* v. *City of New York*, 589 F.3d 94, 99 (2d Cir. 2009) (internal quotations omitted).

ARGUMENT

I.

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

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

After spending "long hours trying to determine whether, in view of the substantial deference due the S.E.C. in matters of this kind, the Court [could] somehow approve [the] problematic Consent Judgment," the district court concluded that it could *not* because it had "not been provided with any proven or

admitted facts upon which to exercise even a modest degree of independent judgment." (*CGMI I* at 4, SPA-4.) The district court elaborated, holding that:

> [T]he proposed Consent Judgment is neither fair, nor reasonable, nor adequate, nor in the public interest. Most fundamentally, this is because it does not provide the Court with a sufficient evidentiary basis to know whether the requested relief is justified under any of these standards. Purely private parties can settle a case without ever agreeing on the facts, for all that is required is that a plaintiff dismiss his complaint. But when a public agency asks a court to become its partner in enforcement by imposing wide-ranging injunctive remedies on a defendant, enforced by the formidable judicial power of contempt, the court, and the public, need some knowledge of what the underlying facts are: for otherwise, the court becomes a mere handmaiden to a settlement privately negotiated on the basis of unknown facts, while the public is deprived of ever knowing the truth in a matter of obvious public importance.

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

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

The district court cited no precedent in support of its new standard, which is not surprising: as this Court noted in its March 15 Opinion, there exists

"*no* precedent" that supports the district court's proposed standard. (*CGMI II* at 12, JA-312 (emphasis added).) In fact, all existing reported authority holds precisely the opposite: federal district courts should approve consent judgments so long as they are fair, reasonable and adequate. For the reasons set forth in Part II, *infra*, the Consent Judgment easily satisfies this well-established standard.

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

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

The standard for judicial review and approval of a proposed consent judgment in an SEC enforcement action—indeed, the *only* standard imposed by federal courts across the country—is whether the proposed settlement is fair, reasonable and adequate. *Randolph*, 736 F.2d at 529; *see Wang*, 944 F.2d at 85

(quoting *Randolph*).[3] (*See also CGMI II* at 12, JA-312.) This standard has been consistently applied by courts approving settlements of SEC enforcement actions. *See, e.g.*, *SEC* v. *WorldCom, Inc.*, 273 F. Supp. 2d 431, 436 (S.D.N.Y. 2003) (Rakoff, J.) (noting that "a Court reviews a settlement proposal . . . on the basis of whether the settlement is fair, reasonable, and adequate" (citing *Wang*, 944 F.2d at 85)).

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

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

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

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

The D.C. Circuit emphatically rejected the district court's proposed heightened standard of review and remanded the case—to a different district judge—with instructions requiring the approval and entry of the proposed consent decree. In so ruling, the D.C. Circuit specifically noted that "a district judge must

be careful not to exceed his or her constitutional role." *Microsoft*, 56 F.3d at 1462. The D.C. Circuit emphasized the substantial deference that should be accorded a government regulator's judgment of how to proceed in an enforcement action, and expressly observed that "a district judge [cannot] assume the role of Attorney General." *Id.* The D.C. Circuit further emphasized that "the district judge's criticism of Microsoft for declining to admit that the practices charged in the complaint actually violated the antitrust laws was [ ] unjustified." *Id.* at 1461.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

While district courts do have a limited role in reviewing proposed consent judgments (*see id.* at 8, JA-308), "when evaluating a settlement agreement, the court is not to substitute its judgment for that of the parties." *In re Sony Corp. SXRD.*, 448 F. App'x 85, 87 (2d Cir. 2011) (summary order) (citing *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974), *abrogated on other grounds, Goldberger* v. *Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000)); *see also Petrovic* v. *Amoco Oil Co.*, 200 F.3d 1140, 1148–49 (8th Cir. 1999). Nor is it a court's

"function to determine whether this is the best possible settlement that could have been obtained, but only whether it is fair, adequate and reasonable." *United States* v. *Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991); *United States* v. *Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990) ("The relevant standard, after all, is not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute.").

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

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

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

Given this limited scope of review, the factors courts permissibly may consider generally concern whether the proposed consent judgment exceeds the scope of the court's authority, *see Kozlowski* v. *Coughlin*, 871 F.2d 241, 244 (2d Cir. 1989) (holding that courts may reject a consent decree that falls outside the scope of the court's subject matter jurisdiction or the scope of the pleadings); whether the proposed consent decree would violate other laws, *see Conservation Law Found. of New England, Inc.* v. *Franklin*, 989 F.2d 54, 58–59 (1st Cir. 1993) (observing that a proposed consent judgment should be reviewed to ensure that it does not violate statutes or law); or whether it would impose an unreasonable burden on judicial resources, *see In re United States*, 503 F.3d 638, 641 (7th Cir. 2007) (noting that a court in a civil action may reject a consent decree if "implementing the decree would create a drain on judicial resources"). These

factors never have included whether the parties provided proven or acknowledged facts in connection with the consent decree. *See supra* Part I.A.

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

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

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

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

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

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

United States v. *Armour & Co.,* 402 U.S. 673, 681 (1971). Simply stated, the primary role of federal courts in reviewing a consent judgment should be "to give

effect to the terms negotiated by the parties." *Levine*, 881 F.2d at 1181 (construing SEC consent decree after approval by district court); *see also N.Y. Times*, 196 F.3d at 78 (observing that courts "may not replace the terms of a consent decree with its own, no matter how much of an improvement it would make in effectuating the decree's goals").

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

The district court attempted to justify its novel approach as one designed to police the "potential for abuse" by the government in imposing

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

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

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

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

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

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

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

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

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

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

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

The district court's preferred policy agenda is expressly at odds with the "strong federal policy favoring the approval and enforcement of consent decrees." *Wang*, 944 F.2d at 85; *see also United States* v. *Glens Falls Newspapers,*

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

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

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

II.

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

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

A. The Consent Judgment Is Fair.

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

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

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

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

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

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

established standard, and the district court abused its discretion in concluding otherwise.

B. The Consent Judgment Is Reasonable and Adequate.

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

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

through the parties' extensive written submissions and at a hearing. (*Id.* (citing SEC Mem. in Resp. to Questions Posed by the Court Regarding Proposed Settlement, JA-94–100).)

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

settlement delay of "years before consumers received any meaningful restitution" even if regulators prevailed).[13]

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

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

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

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

A consent judgment containing such comprehensive monetary and injunctive relief, especially in light of the significant litigation risk—as determined by sophisticated and counseled parties, following a lengthy investigation—is both "adequate" and "reasonable." *See, e.g.*, *Dist. of Columbia* v. *Potomac Elec. Power Co.*, No. 11 Civ. 282 (BAH), 2011 WL 6000851, at *7 (D.D.C. Dec. 1, 2011) (settlement approved where consent decree provided for "remediation requirements," and regulator retained right to sue to "enforce any liability for

future remedial actions"); *United States* v. *McGraw-Edison Co.*, 718 F. Supp. 154, 158 (W.D.N.Y. 1989) (accepting hazardous waste CERCLA settlement where "the proposed judgment adequately and fairly addresses the problems which Congress meant to correct when it enacted the statutes upon which this lawsuit is based").

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

C. The Consent Judgment Is in the Public Interest.

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

(holding that the SEC "is presumed to represent the interests of the investing public aggressively and adequately"); *WorldCom*, 273 F. Supp. 2d at 436 (Rakoff, J.) (holding that public agency's "determinations as to why and to what degree the settlement advances the public interest are entitled to substantial deference").

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

This Court repeatedly has cautioned, consistent with Supreme Court precedent, that a district court's authority to consider the "public interest" in the context of evaluating a consent judgment is highly circumscribed: this Circuit

permits district courts to consider the public interest in evaluating proposed injunctions only to "ensure that [*the*] *injunction does not cause harm* to the public interest." (*Id.* at 7 n.1, JA-307 (emphasis added).) *Accord Winter* v. *NRDC, Inc.*, 555 U.S. 7, 24 (2008); *eBay, Inc.* v. *MercExchange*, 547 U.S. 388, 391 (2006); *Salinger* v. *Colting*, 607 F.3d 68, 80 (2d Cir. 2010).

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

served in securing these injunctive benefits and the monetary relief associated with the proposed Consent Judgment.

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

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

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

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

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

> A *large part* of what the S.E.C. requests, in this . . . consent judgment[], is *injunctive relief* . . . . But when a public agency asks a court to become its partner in enforcement by imposing *wide-ranging injunctive remedies* on a defendant . . . the court, and the public, need some knowledge of what the underlying facts are . . . . [T]he Court is forced to conclude that a proposed Consent Judgment that asks the Court to impose *substantial injunctive relief* . . . on the basis of allegations unsupported by any proven or acknowledged facts

> whatsoever, is neither reasonable, nor fair, nor adequate, nor in the public interest. . . . *The injunctive power* of the judiciary is not a free-roving remedy to be invoked at the whim of a regulatory agency, even with the consent of the regulated. . . . ***Accordingly, the Court refuses to approve the proposed Consent Judgment***.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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New York, New York

Respectfully submitted,

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

The undersigned counsel for Defendant-Appellee-Cross-Appellant Citigroup Global Markets Inc. certifies that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B)(i). This brief contains 13,623 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certificate, I relied on the word count program in Microsoft Word.

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Dated: May 14, 2012