

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

U.S. SECURITIES AND
EXCHANGE COMMISSION,

Plaintiff-Appellant-Cross Appellee,

v.

CITIGROUP GLOBAL MARKETS
INC.,

Defendant-Appellee-Cross Appellant.

Case Nos. 11-5227 (Lead)
11-5242 (XAP)
11-5375 (Con.)

**RENEWED UNCONTESTED MOTION OF BETTER MARKETS, INC.
FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF WITH AN
INCREASED WORD COUNT**

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Dated: August 20, 2012

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 27 and Local Rules 27.1 and 31.2(c), Better Markets, Inc. (“Better Markets”) respectfully submits this Motion as a renewed uncontested motion seeking leave to file the accompanying *amicus* brief containing additional words.

Because of the highly usual circumstances of this appeal and the recognized breakdown in the adversary process (because the parties are de facto on the same side, making the same argument and seeking the same relief), the Court appointed Mr. John R. Wing (“Mr. Wing”) as pro bono counsel to support the district court’s ruling. Although Mr. Wing has filed an admirable brief, Better Markets, an independent nonprofit organization that exists to promote the public interest in the financial markets, can assist this Court by complementing Mr. Wing’s filing with additional arguments that have not yet been brought to the Court’s attention. However, fully presenting these arguments to the Court will require an increase in the word count the rules specify for an *amicus*.

Both parties, as well as Mr. Wing, are unopposed to the relief sought in this motion.¹ Mr. Wing has consented to the relief sought in this motion. The SEC has

¹ Prior to the Court’s appointment of Mr. Wing, Better Markets filed a motion on February 15, 2012 seeking an enhanced role as an *amicus curiae*, including a briefing length equal to that of a party, a deadline of 30 days after the filing of the parties’ briefs, and leave to participate in oral argument. See Motion of Better

indicated that it does not oppose the relief sought in this motion. Citigroup has indicated that it takes no position on this motion, and that it does not intend to file a response. *See* Local Rule 27.1(b).

ARGUMENT

1. This case raises vital and complex issues related to judicial power, enforcement of the securities laws, regulation of the capital markets, and financial regulatory agencies.

This case involves not just a settlement between the primary—and often only—regulator of the U.S. securities markets and one of the world’s largest banks. It also involves the role, authority, and power of the federal courts to serve as the

Markets, Inc. to Provide this Court with a Full, Fair, and Balanced Presentation of the Issues Raised in this Appeal, SEC v. Citigroup Global Markets Inc., No. 11-5227-cv (Lead) (2d Cir. Feb. 15, 2012) (“Motion for Enhanced *Amicus* Role”). Counsel for the parties consented to the relief sought in Better Markets’ February 15 Motion for Enhanced *Amicus* Role, including in particular the request for leave to file a brief with 14,000 words, i.e., equal in length to that of a party. *See id.* at 4 n.2. On April 3, 2012, Better Markets filed a supplemental memorandum arguing that its prior Motion for an enhanced role as *amicus curiae* should be still be granted notwithstanding the appointment of Mr. Wing. *See* Supplemental Memorandum in Support of Motion of Better Markets, Inc. to Provide this Court with a Full, Fair, and Balanced Presentation of the Issues Raised in this Appeal, SEC v. Citigroup Global Markets Inc., No. 11-5227-cv (Lead) (2d Cir. Apr. 3, 2012) (“Supplemental Memorandum”). The Court has not ruled on the Motion for Enhanced *Amicus* Role, including the request for additional briefing length. Because Better Markets filed its Motion for Enhanced *Amicus* Role in February, 2012, which included a request for additional briefing length equal to that of a party (14,000 words), the requirement that such a motion be filed 14 days before the brief is due as set forth in Local Rule 27.1(e)(3) is satisfied.

only check on executive power in connection with settlements between regulatory agencies and the industries they oversee.

This case, virtually unique in its rejection of a Securities and Exchange Commission (“SEC”) proposed settlement of an enforcement action, will likely long impact the conduct of Wall Street, the U.S. capital markets, corporate America, and securities and financial markets regulators and regulation. It will also have a very significant impact on the public, the public interest, and the enforcement of law. Lastly, it will address key separation of power issues regarding the Executive and Judicial Branches, and importantly, the independence of the judiciary.

The issues involved in this appeal include the following:

- the role of the district court in reviewing proposed settlements submitted to the court by the SEC for approval, where the federal courts conduct the **only** review of such proposed settlements and where those settlements invoke the equity and contempt power and authority of federal courts;
- the form, content, quality, and quantity of information a district court can require in evaluating a proposed settlement to support its determination of whether the settlement meets the applicable test for approval;
- the impact of the breakdown in the adversary process where both parties join together to obtain court approval of their agreed-to settlement as quickly as possible;
- the elements of the legal standard that a district court must apply when evaluating a proposed settlement submitted to the court by the SEC for approval;

- the degree of deference the court owes to the agency seeking approval of a settlement;
- the nature of the alleged misconduct by Citigroup Global Markets Inc. (“Citigroup”), involving an intricate series of transactions in hundreds of millions of dollars of securities and derivatives;
- the multiple consequences of the alleged misconduct by Citigroup, including the damages it caused to investors and the revenues and other benefits it generated for Citigroup; and
- whether or not the proposed settlement at issue in this case actually satisfies the applicable standard.

Resolution of these issues will almost certainly have a broad and lasting impact and merit full presentation to the Court.

2. The parties are aligned in this case, resulting in an imbalance in the advocacy before the Court, which favors the parties, but not a full presentation of the issues to this Court.

Both of the parties, Appellant SEC and Appellee Citigroup, sought interlocutory appeal of the district court’s rejection of their proposed settlement. They made the same arguments in the court below—often adopting each other’s position—and they are advancing the same arguments now before this Court. In substance and effect, this was a one-sided and unopposed appeal. It thus reflected a fundamental breakdown in the normal adversary process in which two self-interested parties opposing each other enable the court to ascertain the truth and render an informed opinion.

In an attempt to remedy this imbalance, at least in part, the court appointed Mr. Wing as pro bono counsel to “advocate for upholding the district court’s order.” However, Mr. Wing is opposed by both parties: the SEC through its Chief Litigation Counsel, and Citigroup, with its virtually unlimited resources, through the law firm of Paul, Weiss, Rifkind, Wharton & Garrison (lead by Mr. Brad Karp, Chairman of the firm). Furthermore, four of the largest and most well-funded business interest groups in the country have submitted *amicus* briefs in support of the parties: The Business Roundtable, the Chamber of Commerce of the United States of America, the Securities Industry and Financial Markets Association, and the Pharmaceutical Research and Manufacturers of America.

The parties (SEC and Citigroup) have submitted briefs totaling over 27,000 words, making virtually the same arguments and seeking the same outcome: reversal of the lower court’s rejection of their joint settlement. Moreover, each party is still entitled to file a reply brief of up to 7,000 words each, representing potential additional arguments of 14,000 words. Although Mr. Wing obtained the Court’s leave to file his one and only brief with 19,969 words, there remains a significant imbalance in the sheer volume of advocacy that will be put before the Court, which favors the SEC and Citigroup by a margin of greater than two-to-one.

3. Given the scope, complexity, and number of key issues presented in this appeal, extended briefing by amici who support appointed pro bono counsel and affirmance of the district court's rejection of the settlement should be allowed to help ensure that all relevant arguments on the issues are fully and fairly presented. Better Markets has the interest and expertise to assist the Court through its brief.

Better Markets is an independent non-profit organization that promotes the public interest in the financial markets. Its mission is to advocate for greater transparency, accountability, and oversight in our financial system through comment letters on agency rules, public advocacy, litigation, and independent research.

Better Markets has a strong interest in supporting the district court's rejection of the parties' joint proposed settlement because a reversal of that order could undermine the power, authority, and duty of federal courts to conduct a meaningful review of proposed settlements in government enforcement actions. The role of the federal courts in these circumstances is vital because the courts perform the **sole** and final review of such settlements. The ultimate impact of a decision reducing the judicial role in the settlement process will likely be a substantial loss of transparency, oversight, and accountability in our financial markets, to the detriment of the public and the public interest.

Better Markets also has the knowledge, experience, and familiarity with the record that is necessary to provide substantively helpful arguments. For example, Better Markets has been actively involved in this case since its inception on

October 19, 2011, when the SEC filed its complaint and memorandum in support of the proposed settlement. Shortly after the SEC initiated the action, Better Markets filed papers in the district court seeking to oppose the proposed settlement and offering **detailed grounds for a finding that the settlement failed to meet the applicable standard.**² Thus, Better Markets is fully familiar with the record, and it can identify deficiencies in the record that would prevent a court from finding that the proposed settlement meets the applicable standard for judicial approval (as set forth in the attached Amicus brief).

Better Markets also offers expertise in the areas of securities law that are central to this case. For example, Better Markets has analyzed and commented on the SEC's proposed rule specifically targeting the type of fraud at issue in this case, in which market participants assemble already or soon-to-be-worthless asset-backed securities, sell them to investors, and then wager against the success of those investments to reap additional profits. *See* Comment Letter from Better Markets to the SEC regarding Prohibition Against Conflicts of Interest in Certain Securitizations, SEC Release File No. S7-38-11 (Feb. 13, 2012).³

² *See* Better Markets' Memorandum in Opposition to Proposed Settlement (attached to its Motion to Intervene Pursuant to Federal Rule of Civil Procedure 24) (JA5, Dkt#14) and Memorandum of Law in Support of Motion to Intervene (JA5, Dkt #15), No. 11-cv-7387 (JSR) (S.D.N.Y Nov. 3, 2011).

³ *Available at* <http://sec.gov/comments/s7-38-11/s73811-36.pdf>. Better Markets has also commented on other proposed rules and concept releases addressing the

Better Markets has also traced the history of enforcement actions against Citigroup for prior violations of the securities laws, including the specific provisions at issue in this case. Finally, Better Markets is led by a former litigation partner at Skadden, Arps, Slate, Meagher & Flom, who specialized in, among other areas of practice, SEC enforcement cases.

Thus, Better Markets' expertise in securities law and its familiarity with the specific factual and legal issues presented in this case enable it to provide this Court with a more full, fair, and balanced presentation of the issues, as set forth in the accompanying brief.

4. To ensure that the key arguments are fully presented to the Court in this context where there is a breakdown of the adversary process, Better Markets requests an increase in the word count.

To ensure that its brief is comprehensive (but without duplicating arguments because it had the benefit of Mr. Wing's brief, filed last week on Monday, August 13, 2012), Better Markets requests an increase in the 15 pages or 7,000 word count normally afforded to an *amicus* under Fed. R. Civ. P. 29(d) and Fed. R. Civ. P. 32(a)(7). Better Markets is seeking leave to file a brief containing 11,246 words.

standards that must apply in the complex realm of asset-backed securities. *See* comment letter on the Re-Proposal of Shelf Eligibility Conditions for Asset-Backed Securities, *available at* <http://sec.gov/comments/s7-08-10/s70810-221.pdf>; and comment letter on the Treatment of Asset-Backed Issuers Under the Investment Company Act, *available at* <http://sec.gov/comments/s7-35-11/s73511-180.pdf>.

This additional word count is necessary to fully develop key issues, either briefly addressed or left unaddressed by the parties and pro bono counsel, including:

- The importance of the SEC's enforcement and settlement practices in policing the financial markets;
- The proper institutional role of the federal judiciary as the sole check on terms of settlement that do not satisfy the applicable standard;
- Numerous alternatives to admissions that could have provided the district court with sufficiently reliable information on which to evaluate the proposed settlement; and
- The omissions and inconsistencies in the record below on critical issues, which made an assessment of the settlement under the applicable standard impossible.

5. Mr. Wing and counsel for the parties are unopposed to this motion.

As noted above, Better Markets has notified the parties and Mr. Wing of this motion and the accompanying brief. Mr. Wing has consented to the relief sought herein; the SEC has no opposition; and Citigroup takes no position but has stated that it will not file a response to the motion. *See* Local Rule 27.1(b).

CONCLUSION

For the foregoing reasons, the Court should grant this motion and allow Better Markets leave to file the accompanying *amicus* brief.

Dated: August 20, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2012, I caused the foregoing motion to be filed via the ECF electronic filing system, and sent by email to each of the parties, as follows:

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