

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

U.S. SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

J.P. MORGAN SECURITIES LLC,
EMC MORTGAGE, LLC, BEAR
STEARNS ASSET BACKED
SECURITIES I, LLC, STRUCTURED
ASSET MORTGAGE INVESTMENTS
II, INC., SACO I, INC., AND J.P.
MORGAN ACCEPTANCE
CORPORATION I,

Case No. 12-CV-1862

ECF CASE

Defendants.

**MOTION OF BETTER MARKETS, INC. FOR RECONSIDERATION
OF THIS COURT'S ORDER APPROVING SETTLEMENT AND FINAL JUDGMENT,
AND MOTION IN THE ALTERNATIVE FOR LEAVE, FOR PERMISSIVE
INTERVENTION, OR FOR STATUS AS AMICUS CURIAE, TO MOVE FOR
RECONSIDERATION**

MOTION FOR RECONSIDERATION

Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (“Rule 59(e)”), Better Markets, Inc. (“Better Markets”) respectfully submits this motion for reconsideration of this Court’s order and Final Judgment entered on January 7, 2013 pursuant to the parties’ proposed settlement agreement (“Proposed Settlement”).¹ A separate memorandum in support of this motion, and a proposed order, are filed herewith.

¹ Pursuant to Local Civil Rule 7(m), Better Markets states that it attempted to contact counsel for Plaintiffs and Defendants in a good faith effort to determine whether there is any opposition to

Reconsideration of the Order and Final Judgment should be granted for the following reasons, as further explained in the accompanying memorandum.

I. The Proposed Settlement, the Order, and Final Judgment had an insufficient factual and legal basis.

The Proposed Settlement, the Order, and the Final Judgment, including a permanent injunction, were based on the following factual deficiencies and legal errors:

1. The factual and legal record provided by the parties was materially deficient, thus preventing this Court from discharging its duty to conduct a meaningful, independent review of the Proposed Settlement prior to approval;

2. The current deficient record shows that the Proposed Settlement is not fair, adequate, reasonable, or in the public interest;

3. The Court applied an incorrect legal standard for approval of SEC settlements, and thereby failed to consider, at a minimum, the fairness and public interest elements of the standard of review applicable to SEC settlements; *see Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1125-26 (D.C. Cir. 1983);

4. The Proposed Settlement also fails to meet the incorrect test applied by the Court; and

5. There is no indication that the legal standard required for the issuance of a permanent injunction was considered, much less satisfied.

II. Better Markets' motion satisfies the requirements of Rule 59(e).

The disposition of a motion for reconsideration under Rule 59(e) is within the Court's discretion, and it should be granted when a court finds that there is an "intervening change of the relief sought in this motion and to narrow the areas of disagreement. Better Markets was either unable to reach counsel or to determine counsel's position on these issues, but it believes that both parties will oppose this motion.

controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). The deficiencies and errors underlying the Order and Final Judgment satisfy the three prongs of the test for reconsideration under Rule 59(e) because they represent:

1. A failure to consider critically important arguments and “new evidence” not previously made available to the Court;
2. “Manifest injustice” arising from the approval of an unacceptably weak settlement that undermines the public interest; and
3. “Clear errors of law” arising from the application of the incorrect standard for reviewing SEC settlements.

III. The Court should vacate the Order and the Final Judgment, conduct further proceedings to remedy the defects in the record, and reevaluate the Proposed Settlement on an appropriate record and under the applicable legal standard.

All of the infirmities underlying the Proposed Settlement, the Order, and the Final Judgment should be corrected through the process of reconsideration. Upon reconsideration, the Court should:

1. Vacate the Final Judgment entered pursuant to the Order and the Proposed Settlement;
2. Order the parties to submit further information and argument to the Court to provide a sufficient record, to set forth the applicable legal standard governing approval of SEC settlements, and to demonstrate how the Proposed Settlement actually meets that standard;
3. Conduct such hearings and other proceedings as necessary to ensure that the Court has all the information and argument it requires to conduct a meaningful review of the Proposed Settlement;

4. Apply the appropriate four-part standard of review to an adequate record in further proceedings and determine whether the Proposed Settlement is fair, adequate, reasonable, and in the public interest; and

5. Apply the appropriate legal standard to the request for a permanent injunction and determine if the request complies with the standard and whether the permanent injunction should be issued.

IV. The motion is timely under Rule 59(e).

In this case, judgment was entered on January 7, 2013, and, this motion, filed February 4, 2013, falls within the 28-day time frame specified under Rule 59(e).

V. Better Markets should be permitted to file this motion for reconsideration even though it is not a party to the main action.

Better Markets is an appropriate entity to file this motion for reconsideration under Rule 59(e). Rule 59(e) nowhere limits its application to parties. Rather, it merely states that “[a] motion to alter or amend a judgment must be filed no later than 28 days after entry of the judgment.” At least one court has expressly held that Rule 59(e) is not limited to parties and has entertained a motion to reconsider from a non-party. *See Medical Building, Inc. v. Medical Management Sciences, Inc.*, 1996 U.S. Dist. LEXIS 16407, Case No. 1:94-CV-1567 (N.D. Ohio 1996) (Also expressing a disinclination to refuse to review the motion on grounds relating to party status given the “important and serious nature of the issues presented”).²

² A number of courts, including this one, have held that only parties to an action may file a Rule 59(e) motion for reconsideration. However, as noted in text, this interpretation conflicts with the plain meaning of the Rule, which contains no language limiting its application to parties. Moreover, the other provisions in Rule 59 relating to *new trials* repeatedly expressly refer to parties, showing that the drafters could have and would have imposed such a party limitation on Rule 59(e) had they so intended. This reading of the rule also comports with its important underlying rationale: preventing “manifest injustice” regardless of party status. Finally, the D.C.

**MOTION IN THE ALTERNATIVE FOR LEAVE,
FOR PERMISSIVE INTERVENTION, OR FOR AMICUS CURIAE STATUS,
FOR THE PURPOSE OF FILING THE FOREGOING MOTION FOR
RECONSIDERATION**

I. If this Court determines that Better Markets non-party, may not file the foregoing motion for reconsideration without leave, then Better Markets moves the Court, in the alternative, for leave to file its motion for reconsideration.

If this Court determines that Rule 59(e) precludes a non-party from moving for reconsideration without leave, then Better Markets moves for such leave, and if such leave is granted, makes the foregoing motion for reconsideration.

Some courts have suggested that non-parties that wish to move for reconsideration must first seek leave of court. *Carver v. Condie*, 1996 U.S. Dist. LEXIS 18504, 3-4 (N.D. Ill. Dec. 9, 1996) (noting movant's failure to seek leave of court to file the motion for reconsideration). Although the standards governing such a motion for leave are unclear, such leave would be appropriate in this case, as the Order and Final Judgment were predicated on material errors of fact and law; important issues are at stake relating to the enforcement of the securities laws and the important role of the judiciary in reviewing settlements that affect the public interest; and the parties, aligned in their desire to defend the Proposed Settlement, have not brought and, absent this Motion, will not bring any of these factual and legal issues before the Court.

II. In the alternative, Better Markets moves the Court for permissive intervention.

If this Court determines that Rule 59(e) does not permit Better Markets to move for reconsideration, and further denies Better Markets' motion for leave to file the motion for reconsideration, then Better Markets moves for permissive intervention under Rule 59(e), and if such intervention is granted, makes the foregoing motion for reconsideration.

Circuit has not ruled on the issue and this Court is therefore free to apply the rule as presented herein.

The decision to allow permissive intervention under Rule 24(b) is committed to the district court's discretion, and the court has “wide latitude” in exercising that discretion. *Equal Employment Opportunity Comm'n v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). To satisfy Rule 24(b), a movant must show “(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action.” *Id.* In addition, “the court must consider whether the proposed intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. Pro. 24(b)(3); *Equal Employment Opportunity Comm'n*, 146 F.3d at 1045.

Here, the Court should grant permissive intervention since Better Markets meets the requirements under Rule 24(b) and any delay or prejudice as to the SEC and Defendants would be minimal. First, Better Markets has an independent basis for subject matter jurisdiction because (1) the case involves an SEC settlement subject to approval in federal court under the federal securities laws, and (2) Better Markets will be harmed if the Court does not reconsider approval of the settlement. Specifically, Better Markets seeks to promote the public interest in the financial markets through increased transparency, accountability, and oversight. Because the Court failed to evaluate whether the settlement was, among other things, consistent with the public interest, and because the settlement on its face is not in the public interest, Better Markets’ objectives will be thwarted if reconsideration is not granted.³

Second, a motion for intervention is timely because Better Markets has filed the motion as soon as practicable after it became aware of the Court’s approval of the settlement and in any

³ In contrast to the “typical” case of permissive intervention where the “movant asks the district court to adjudicate an additional claim on the merits,” Better Markets is requesting that the court “exercise a power that it already has,” namely the power to reconsider its approval of the SEC’s settlement. *Cf. EEOC v. National Children's Ctr.*, 146 F.3d 1042, 1046-1047 (D.C. Cir. 1998) (addressing jurisdiction where intervenor sought to challenge the entry of an order of confidentiality). Thus, an independent jurisdictional basis in the typical sense is unnecessary.

event within the 28-day time frame required for motions to reconsider under Rule 59(e). Because the SEC never filed a motion seeking the Court’s approval of the settlement and the Court did not engage in any public process to alert the public that it would approve the Proposed Settlement as presented, Better Markets did not have an adequate opportunity to apprise the Court of its concerns at an earlier point in time.

Third, Better Markets has a claim that shares questions of fact or law in common with the main action. Better Markets claims that the parties failed to provide the Court with an adequate record, either factual or legal; that the Proposed Settlement approved by the Court is not fair, adequate, reasonable, or in the public interest; and that the Court failed to apply the correct legal standard for reviewing SEC settlements. These are precisely the factual and legal issues that were—or at least should have been—the focus of the main action.

This Circuit has held that “[t]he force of precedent . . . compels a flexible reading of Rule 24(b),” particularly “in special circumstances.” *EEOC v. National Children's Ctr.*, 146 F.3d 1042, 1045-46 (D.C. Cir. 1998) (holding that “third parties may be allowed to permissively intervene for the limited purpose of seeking access to materials that have been shielded from public view either by seal or by a protective order”). Accordingly, the Court should “eschew[] strict readings of the phrase ‘claim or defense,’ allowing intervention even in ‘situations where the existence of any nominate ‘claim’ or ‘defense’ is difficult to find.’” *Id.* at 1046 (citing *Nuesse v. Camp*, 385 F.2d 694, 704 (D.C. Cir. 1967)).

Specifically, this Court has found the existence of a claim or defense under Rule 24(b) in a case involving a government settlement where the movant argued that “it has consistently been arguing that the government's complaints allege anti-competitive harms that affect [its] members and the final judgments do not adequately remedy those harms.” *United States v. SBC*

Communs., 2007 U.S. Dist. LEXIS 45791 (D.D.C. June 26, 2007). In so finding, the Court held that the settlement proceedings “present a special circumstance because outside parties will often be the only ones opposing the entry of proposed consent decrees,” and “[t]herefore, it is appropriate to find that a party has raised overlapping issues of fact or law **if it has raised arguments against the consent decree that are within the scope of [the court’s] review.**” *Id.* (emphasis added).

Similarly, Better Markets has opposed SEC settlements that do not adequately remedy the harm to the public alleged in the complaint. *See* Brief of Better Markets, Inc. as Amicus Curiae in Support of Pro Bono Counsel Appointed to Advocate for Affirmance of the District Court’s Order, *SEC v. Citigroup Global Markets Inc.*, No. 11-cv-5227 (2d Cir. Aug. 20, 2012). Additionally, Better Markets is raising “arguments against the [Proposed Settlement] that are within scope of [the Court’s] review,” *United States v. SBC Communs.*, 2007 U.S. Dist. LEXIS 45791, including the argument that the Proposed Settlement fails to meet the applicable standard and that the record did not permit meaningful review. Better Markets should therefore be deemed to have a claim that shares questions of law or fact in common with the main action.

Fourth, the parties will not suffer undue delay or prejudice. The settlement, although already entered, does not impose any undertakings on the parties beyond a transfer of money and a duty of Defendants to obey the law in the future. Defendants are not required to perform any remedial undertakings, such as a change in business practices. *See* Final Judgment. Moreover, although the transfer of money was required to occur within 14 days of entry of the final judgment, and presumably has already occurred, the SEC must still hold the funds pending further order of the Court, and the SEC has yet to propose its intended plan of distribution for injured investors. *See* Order at 3-4.

Finally, and perhaps most importantly, if an organization like Better Markets is prohibited from seeking reconsideration of orders and judgments such as those at issue here, which were entered without any notice or motion, then there is likely no one who will ever be able to seek such reconsideration, even in cases—unlike this one—where the settlement was not only deficient and inadequate, but illegal or the result of collusion or other misconduct.⁴ This circumstance arises from the unique nature of SEC settlements where the essential adversary process breaks down and the court has only two parties before it and they are both powerfully aligned to obtain its approval of their negotiated settlement with as little scrutiny as possible.

This highlights the indispensable and critical nature of federal courts in these circumstances, but on occasion—such as here—even that is insufficient to ensure that justice is served and that the judicial process works as intended and needed. These very limited and unique circumstances provide another compelling reason for this Court to grant intervention.

III. In the alternative, Better Markets moves the Court to grant it *amicus curiae* status for the purpose of filing the motion for reconsideration.

If this Court determines the Rule 59(e) does not permit Better Markets to move for reconsideration, and it further denies both the motion for leave and the motion for permissive

⁴ A proposed settlement may be deficient and fail to satisfy the legal standard for many reasons having nothing to do with bad or venal motives or even sloppiness or incompetence. The natural dynamics of negotiating a settlement can sometimes cause both parties to negotiate away or agree to all sorts of provisions that others not part of the settlement process would find unacceptable, inexplicable, and, even, shocking. Moreover, once a settlement is reached, regardless of its terms and, often, its wisdom and basis, the parties are personally, professionally, bureaucratically, and reputationally committed to getting it approved. This pressure is much more intense in the SEC settlement context because the SEC issues press releases touting the enormous benefits of the settlement when agreed to, not waiting until a court reviews or approves it (as would be wise). The ensuing high public profile and press coverage of the merely proposed settlement and the SEC's claims about it make the desire, indeed, need to have it approved even greater. Thus, the indispensable court role of a meaningful review of settlements is not to second guess, but to ensure that, notwithstanding those dynamics and pressures, a proposed SEC settlement is nonetheless fair, adequate, reasonable and in the public interest.

intervention, then Better Markets moves for amicus curiae status, and if such status is granted, makes the foregoing motion for reconsideration.

District courts have “inherent authority” to grant participation by an *amicus curiae*, which is derived from Federal Rule of Appellate Procedure 29. *Youming Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008). In determining whether to grant leave to participate as an *amicus*, this Court has “broad discretion,” *Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, 519 F. Supp. 2d 89, 93 (D.D.C. 2007). *Amicus* status is generally allowed when “the information offered is timely and useful.” *Ellsworth Assocs. v. U.S.*, 917 F. Supp. 841, 846 (D.D.C. 1996).

Specifically, this Court “normally allow[s]” an *amicus* brief “when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Youming Jin v. Ministry of State Sec.*, 557 F. Supp. 2d at 137 (citing *Ryan v. Commodity Futures Trading Comm’n*, 125 F. 3d 1062, 10564 (7th Cir. 1997)); *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003) (same). This assistance to the court may take many forms, including “ideas, arguments, theories, insights, facts or data that are not to be found in the parties' briefs.” *See Northern Mariana Islands v. United States*, 2009 U.S. Dist. LEXIS 125427, 3-4 (D.D.C. Mar. 6, 2009). The Court has granted leave to participate as *amicus* to non-profit organizations where those organizations had “a special interest in [the] litigation as well as a familiarity and knowledge of the issues raised therein that could aid in the resolution of [the] case.” *Ellsworth Assocs. v. United States*, 917 F. Supp. at 846.

This Court has repeatedly granted participation by an *amicus* specifically in cases where the *amicus* sought reconsideration of the Court’s order. *See Hard Drive Prods. v. Does*, 2012 U.S. Dist. LEXIS 137719 (D.D.C. Sept. 26, 2012) (granting *amicus* status although denying

motion to reconsider); *see also Parks v. Fine*, 783 F.2d 1036, 1036-1037 (Fed. Cir. 1986) (granting leave to file as an amicus to movant “who was not a party to the original appeal” and who “urged this court to ‘vacate (or change) its decision’”). *Cf. United States v. Ammidown*, 497 F.2d 615, 624 (D.D.C. 1973) (“The amicus curiae appointed to represent the interest of the District Judge has, with leave of court, filed a petition for reconsideration to enlarge the perspective for considering whether the second degree murder plea may reflect a sentence disparity so blatant as to constitute an intrusion upon the judicial domain.”).

Under these standards, Better Markets should be granted leave to file a motion for reconsideration as an *amicus curiae*. It has a strong interest in the case, and it can provide important assistance to the Court, as it offers “ideas, arguments, theories, insights, facts or data that are not to be found in the parties’ [submission]” *See Northern Mariana Islands*, 2009 U.S. Dist. LEXIS 125427, 3-4 (D.D.C. Mar. 6, 2009)

With respect to interest, Better Markets is a non-profit organization founded to promote the public interest in the financial markets. It advocates for greater transparency, accountability, and oversight in the financial system through a variety of activities, including commentary on rules proposed by the financial agencies and departments, public advocacy, litigation, and independent research.⁵

Better Markets has an interest in this case because the Order, if not reconsidered and vacated, will undermine effective enforcement of the securities laws and further erode the public’s already low confidence in the ability of government to protect investors and the

⁵ In the event the Court accepts Better Markets’ Motion for Reconsideration as an *amicus* filing, Better Markets hereby states, by analogy to FED. R. APP. P. 29, that no counsel for any party authored this amicus brief in whole or in part; no party or counsel for any party contributed money that was intended to fund the preparation or submission of this brief; and no person—other than Better Markets, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief.

financial markets. Accountability and deterrence are particularly important to the proper functioning of the financial markets, upon which our economy and standard of living so heavily depend. The financial crisis of 2008 and the Great Recession which has followed it vividly and painfully illustrate the enormous costs that lawless and reckless behavior on Wall Street inflicts on our markets and our economy as a whole.⁶ Weak settlements not only fail to punish and deter economic crime, they actually incentivize it, by keeping the “cost” of breaking the law so low that it becomes a virtually meaningless cost of doing business to global, multi-trillion dollar financial institutions. This case, along with a number of other cases involving similarly weak SEC settlements of large-scale frauds committed by U.S. financial institutions, will have a lasting impact on the conduct of Wall Street, corporate America, and financial market regulation.⁷

With respect to the assistance Better Markets can offer, it is clear that the parties did not provide the Court with the factual information and legal support that was essential for the Court to conduct a meaningful review of the Proposed Settlement. Better Markets’ motion for reconsideration and memorandum in support thereof highlights the need for this additional information, supplies some of it to the Court, and points to the correct legal standard that applies to a court’s review of a Proposed Settlement. This information is contained exclusively in the

⁶ See BETTER MARKETS, THE COST OF THE WALL STREET-CAUSED FINANCIAL COLLAPSE AND ONGOING ECONOMIC CRISIS IS MORE THAN \$12.8 TRILLION (Sept. 15, 2012), *available at* http://bettermarkets.com/sites/default/files/Cost%20Of%20The%20Crisis_0.pdf.

⁷ Although historically federal courts rarely undertook the required review of settlements proposed by the SEC in enforcement actions—an unfortunate fact in itself—there is a growing trend among district courts to reject requests for summary, rubber-stamp approval and to discharge their duty by conducting a more meaningful review of such proposed settlements in the government enforcement context. *See, e.g.*, Transcript of Status Conference at 9, SEC v. Int’l Bus. Machines Corp., No. 11-cv-563(RJL) (D.D.C. Dec. 20, 2012); *see also* discussion *supra* in text.

motion of Better Markets and in none of the parties' submissions. The Court should therefore accept the motion for reconsideration at least in Better Markets' capacity as an *amicus curiae*.

CONCLUSION

For all of the reasons set forth in the accompanying supporting Memorandum and hereinabove, this Court should accept the motion for reconsideration and grant it.

Dated: February 4, 2013

Respectfully submitted,

/s/ Dennis M. Kelleher
Dennis M. Kelleher
Stephen W. Hall
Katelynn O. Bradley
Better Markets, Inc.
1825 K Street N.W., Suite 1080
Washington, D.C. 20006
Tel: 202- 618-6464
Fax: 202-618-6465