UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION, **100 F Street, N.E.** **Washington, D.C. 20549,** **Plaintiff,** **v.** **CITIGROUP INC.,** **Defendant.**	**Civil Action No. 10-cv-1277-ESH**

MEMORANDUM OF CITIGROUP INC. IN SUPPORT OF ENTRY OF PROPOSED CONSENT JUDGMENT

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PRELIMINARY STATEMENT

Citigroup Inc. ("Citigroup" or the "Company") respectfully submits this memorandum in response to the Court's August 17, 2010 Order and in support of entry of the proposed consent judgment between it and the Securities and Exchange Commission ("SEC" or "Commission"), which Citigroup submits is fair, reasonable, adequate and in the public interest.

The SEC's case is exclusively one of negligent disclosure. It concerns a series of statements that Citigroup made during the second and third quarters of 2007 regarding the amount of "subprime exposure" in the Company's investment bank. Paragraph 1 of the SEC's Complaint (Ex. 1)[1] summarizes the Commission's theory:

- Citigroup stated that it had $13 billion of subprime exposure in its investment bank;
- that amount did not include $39 billion of super-senior CDO securities and liquidity puts;
- while internal Citigroup documents reflected the view that the super seniors and liquidity puts bore only a minimal risk of loss, those positions were collateralized, in substantial part, by subprime assets and therefore should have been included in the calculation of the investment bank's subprime exposure; and
- accordingly, Citigroup "knew or should have known" (a negligence standard[2]) that omitting the super seniors and liquidity puts from the disclosed amount of the investment bank's subprime exposure materially misled shareholders.

The Commission's case is thus concerned with alleged negligence in the manner in which Citigroup disclosed its subprime exposure. The Complaint does not allege any willful, intentional or reckless misconduct by Citigroup or any of its officers, directors or employees.

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1 References herein to "Ex. __" correspond to exhibits annexed to the accompanying declaration of Brad S. Karp, dated September 13, 2010. References herein to "SEC Mem." refer to the Memorandum of Plaintiff Securities and Exchange Commission in Response to the Court's Order of August 17, 2010, dated September 8, 2010, and references herein to "SEC Ex. __" correspond to exhibits appended to that memorandum.

2 *See* Ex. 1 ¶ 48 ("A violation of Section 17(a)(2) of the Securities Act may be established by a showing of negligence."); *see also KPMG, LLP* v. *SEC*, 289 F.3d 109, 120 (D.C. Cir. 2002) (describing the phrase "knew or should have known" as "classic negligence language").

The Commission does not assert any claim that Citigroup's valuation of the super seniors in the second or third quarter of 2007 was improper, or otherwise challenge the accuracy of the Company's financial statements. Nor is it alleged that Citigroup had an independent duty to disclose its subprime exposures in either July or October 2007—in fact, many of Citigroup's peers did not provide *any* information regarding their subprime-related exposures until after Citigroup's disclosures were made. Moreover, the Complaint does not allege that Citigroup or any of its officers, directors or employees engaged in "mismanagement" with respect to the Company's decision to create and retain the super-senior securities, which is the principal focus of the purported derivative action being pursued in New York state court by shareholder (and proposed *amicus*) Lerner.[3]

Instead, the central issue in the Commission's investigation—and the issue addressed by the SEC Complaint—is whether it was improper for Citigroup, once it decided to make disclosure about subprime exposures in its investment bank, to exclude super seniors and liquidity puts from that exposure figure, even if the Company perceived the risk of loss associated with those instruments to be non-material. Ultimately, after a thorough review of the record—including more than 28 million pages of documents, the formal testimony of fourteen witnesses and numerous additional witness interviews (*see* SEC Mem. at 4 n.1)—the Commission concluded that (i) Citigroup failed to exercise reasonable care in excluding the super seniors and liquidity puts from its disclosed subprime exposure figure, and (ii) "the evidence did not warrant the assertion of scienter-based claims" against Citigroup or any of its

3 Indeed, as the Commission has explained (Ex. 2 at 4), such a mismanagement claim is not actionable under the federal securities laws. *See, e.g.*, *Cole* v. *Fed. Home Loan Mortg, Corp.*, 1991 WL 180295, at *5 (D.D.C. Aug. 27, 1991) (citing *Santa Fe Indus., Inc.* v. *Greene*, 430 U.S. 462 (1977)).

officers, directors or employees. (*See id.* at 4–5.) This considered judgment was the result of a "thorough agency process, careful deliberation and a vote of the Commission." (*Id.* at 2.)

Under these circumstances, Citigroup believes the SEC's proposed resolution of this matter is entitled to substantial deference and joins the Commission in urging the Court to approve the proposed settlement as "fair, adequate, reasonable and appropriate." *Citizens for a Better Env't* v. *Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983).[4]

ARGUMENT

The Commission has provided the Court with extensive evidence supporting its claims, including documents and testimonial excerpts, and has described this evidence in detail. (SEC Mem. at 5–14.) Citigroup does not take issue here with the Commission's description of the factual allegations set forth in its Complaint or the other evidentiary considerations cited by the Commission in support of its claims against the Company and Messrs. Crittenden and Tildesley.

Accordingly, Citigroup submits this memorandum to make the following additional points:

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[4] Where a settling party is a public agency, like the SEC, the agency's "determinations as to why and to what degree the settlement advances the public interest are entitled to substantial deference." *SEC* v. *Worldcom, Inc.*, 273 F. Supp. 2d 431, 436 (S.D.N.Y. 2003); *see also SEC* v. *Bank of America Corp.*, 2010 WL 624581, at *6 (S.D.N.Y. Feb. 22, 2010) ("[T]he law requires the Court to give substantial deference to the SEC as the regulatory body having primary responsibility for policing the securities markets, especially with respect to matters of transparency."); *SEC* v. *Bear Stearns & Co.*, 2003 WL 22000340, at *3 (S.D.N.Y. Aug. 25, 2003) (recognizing that the Commission is "presumed to represent the interests of the investing public aggressively and adequately").

A. Scienter-based charges would have been inappropriate here because the individuals involved in preparing the relevant disclosures acted in good faith.

The Court has asked why the SEC did not charge fraud under Section 10(b) of the Securities Exchange Act of 1934. The Court's question highlights the difference between a traditional fraud charge requiring a showing of scienter—that is, "a mental state embracing intent to deceive, manipulate, or defraud," *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 193 n.12 (1976)—and a negligence-based charge, which, while requiring a showing of conduct that falls short of what a reasonable person would engage in under the circumstances, does not require evidence of an intent to mislead, *see Aaron* v. *SEC*, 446 U.S. 680, 697 (1980).

As its memorandum makes clear, after exhaustively investigating the matter, the Commission determined that a scienter-based fraud charge was not appropriate.[5] (SEC Mem. at 4–5.) Citigroup agrees that a scienter-based charge is not justified by the evidentiary record, in particular because there is no evidence that anyone at the Company acted with scienter—that is, with an intent to deceive Citigroup's shareholders. To the contrary, it is Citigroup's view that there is substantial evidence that the Company personnel involved in crafting the disclosures at issue acted in good faith and out of a desire to provide investors with what was believed to be relevant information regarding the investment bank's subprime-related exposures.

The evidence of good faith includes the following:

The disclosures at issue were entirely voluntary. Citigroup was under no obligation to say anything about its "subprime exposure" in the second or third quarter of 2007. Nevertheless, the Company determined in July 2007 that investors would benefit from a more

[5] The SEC has traditionally referred to all of Section 17 of the Securities Act of 1933 as an "anti-fraud" provision (*see, e.g.*, SEC Mem. at 5), perhaps because the Section is captioned "Fraudulent Interstate Transactions." Whatever the label, the SEC has made clear that in this case "the evidence did not warrant the assertion of scienter-based claims." (*Id.* at 4.)

concrete understanding of the amount of subprime exposure in the investment bank and attempted to provide the investing public with an accurate disclosure. Similarly, Citigroup reacted to market developments in October and expanded on what it had disclosed in July. In making these July and October disclosures, Citigroup was among the first of its financial institution peers to provide information of this type to the investing public—powerful evidence that the Company was endeavoring to be forthcoming and not acting out of a desire to mislead investors.

Citigroup personnel believed in good faith that the super seniors and liquidity puts were safe instruments that would not suffer any material losses. As the Commission explains in its factual summary (*see* SEC Mem. at 7), Citigroup's belief that the super seniors and liquidity puts were safe instruments that would not suffer losses was documented in presentations prepared by the business in April and July 2007, which "Excluded" the super seniors from the analysis of subprime exposure "[d]ue to the extremely small probability of default." (SEC Ex. 2 at Citi 203082; SEC Ex. 4 at Citi 1255032.) Consistent with this belief, when a meeting was held on July 10 to brief Citigroup's Chief Financial Officer, Mr. Crittenden, and Investor Relations ("IR") personnel, including Mr. Tildesley, on the investment bank's subprime exposure (Ex. 1 ¶ 19; Ex. 3 at 6), the super seniors and liquidity puts were apparently not even discussed (*see* SEC Mem. at 7–8 & n.3).

The view that the super seniors remained fundamentally safe did not change in the third quarter of 2007. (*See, e.g.*, SEC Ex. 18 at 149:5–11; SEC Ex. 19 at 249:7–25; *see also* SEC Mem. at 9.) The fact that when the crisis worsened in September 2007 the calculated losses on the super seniors were minimal relative to the overall size of the portfolio—less than 1% of the value of the position—confirmed this view. (*See* Ex. 1 ¶¶ 33, 38.)

While in hindsight[6] it is tempting to question Citigroup's (and other investment banks') belief about the safety of the super seniors in light of the significant losses they suffered after October 2007, it is important to bear in mind how widely held that belief was at the time. As Comptroller of the Currency John Dugan explained in 2008: "By being senior to the triple A tranche, the super-senior tranche would have an even lower probability of default than triple A-rated securities generally, including triple A-rated corporate securities. . . . [T]his label was a powerful designation of safe credit to the investing community." (Ex. 4 at 4.) "[T]he fact is that nearly *all* market participants" made the same "mistake"—they "grossly underestimated the risk of super-senior tranches of ABS CDOs." (*Id.* at 11 (emphasis in original).)

The $13 billion subprime exposure figure developed in July (and republished in October) was the result of a good-faith process. In addition to the July 10 meeting (*see* SEC Mem. at 7–8), on July 19, 2007, the day before Citigroup's second quarter earnings call, Mr. Crittenden scheduled a meeting "with senior Citigroup personnel to finalize disclosures related to sub-prime for the company's upcoming earnings call" (Ex. 3 at 7). The decision to disclose a subprime exposure figure for the investment bank, including determining the amount to be disclosed, appears to have been made on this call. Handwritten notes taken by Mr. Tildesley during the meeting reflect that a subprime exposure figure of $13 billion was discussed. (*Id.*) Mr. Tildesley's notes do not reflect any discussion of the super seniors or

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6 As this Court has recognized:

> Securities fraud claims may not be based on "fraud by hindsight"—in other words, "there is no reason to assume that what is true at the moment plaintiff discovers it was also true at the moment of the alleged misrepresentation, and that therefore simply because the alleged misrepresentation conflicts with the current state of facts, the charged statement must have been false."

In re XM Satellite Radio Holdings Sec. Litig., 479 F. Supp. 2d 165, 176 (D.D.C. 2007) (Huvelle, J.) (quoting *In re GlenFed Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994)).

liquidity puts (*id.*), which is entirely consistent with the message from the business that those positions were "Excluded from [the] Analysis" of subprime exposure due to their perceived safety (*see, e.g.*, SEC Ex. 4 at Citi 1255032).

The process of drafting the third-quarter disclosures also was carried out in good faith. As the Commission observes (SEC Mem. at 10, 12), both the October 1 and October 15, 2007 earnings scripts were vetted by a number of individuals from various constituencies at Citigroup (*see, e.g.*, SEC Ex. 11), and none of those individuals suggested that the super seniors or liquidity puts had become risky assets.

Citigroup made extensive disclosures about its credit-crisis related financial difficulties in the third quarter of 2007. In pre-announcing its disappointing third-quarter results on October 1, 2007, Citigroup disclosed that it expected to take a $1.0 billion loss as a result of dislocation in the subprime market. This figure included an approximately $100 million loss on super seniors. Also on October 1, the Company announced that it expected to suffer substantial losses in various other businesses, including a $600 million pre-tax loss in fixed-income credit trading, a $2.6 billion increase in pre-tax credit costs in the consumer business, and $1.4 billion of pre-tax write-downs on highly leveraged financing commitments. (*See* SEC Ex. 13.) This final category of assets was considered to be far riskier at the time than the higher-rated (and still viewed as safe) super seniors.[7] Nevertheless, Citigroup disclosed to the market that it had $57 billion of leveraged financing exposure as of the end of the third quarter (*id.*)—a figure greater than the Company's super-senior exposure. Such disclosures are not indicative of a company attempting to hide bad news and deceive its shareholders.

[7] For example, Patrick Ryan, the co-head of risk management for the investment bank, testified in regard to the third-quarter flash call: "I don't recall talking about subprime in much detail. I remember talking about leveraged finance more so. . . . I don't remember talking about super seniors on that call." (SEC Ex. 24 at 117:19–118:21.)

When Citigroup realized, following the unprecedented ratings downgrades in mid-October 2007, that it had misjudged the risk associated with the super seniors, it promptly made additional disclosure regarding those securities. As the Commission explains, the previously held view that the super seniors were not risky securities changed shortly after the Company announced its third-quarter earnings on October 15. (SEC Mem. at 13.) At that point, Citigroup determined that the broad ratings agency downgrades of subprime-related assets would have a significant effect on the value of the Company's super seniors. (*See id.*) Without prompting, Citigroup, led by Mr. Crittenden, conducted a thorough reanalysis of the super-senior valuation and determined that the losses on the portfolio could range from $8 to $11 billion. (*See id.*; *see also* SEC Ex. 19 at 286:6–287:20.)

As a result, on November 4, 2007, Citigroup promptly disclosed to the market both the size of its super-senior portfolio and the fact that the Company expected to take billions of dollars of additional write-downs on that portfolio during the fourth quarter. (*See* SEC Mem. at 13–14.) Citigroup's conduct in promptly disclosing this negative information regarding the super seniors further belies any claim that the Company had set out to mislead investors regarding that same portfolio only a few weeks earlier.

* * *

Accordingly, we agree with the SEC that "the evidence did not warrant the assertion of scienter-based fraud claims under Section 10(b) of the Exchange Act or other scienter-based provisions of the federal securities laws." (*Id.* at 4–5.)

Moreover, because we believed the evidence developed by the Commission established that the individuals involved in the disclosure drafting process acted in good faith in attempting to provide investors with timely information regarding the Company's subprime-related positions that were believed to be at risk, we argued during the course of the Commission's investigation that neither the Company nor any individuals should be charged. In particular, we argued that while the process of crafting the July and October disclosures had been imperfect, there was no "villain" in the story—that is, Citigroup did not believe, and still does not believe, that any of its personnel acted with an intent to mislead investors.

These arguments notwithstanding, the Commission exercised its discretion and determined that charges against the Company and Messrs. Crittenden and Tildesley were appropriate.[8] Following negotiations between the Commission and counsel for those individuals, the parties agreed to the entry of the administrative cease-and-desist order with which the Court is familiar. (*See* Ex. 3.) The Commission explains why it believed that these two individuals should be charged. (*See* SEC Mem. at 14–15.) At the same time, the Commission has made clear that it does not believe either individual acted with an intent to mislead. (*See id.* at 4.)

The Commission also explains its decision not to charge other individuals. While it is true that a number of Citigroup senior executives (besides Messrs. Crittenden and Tildesley)—including Mr. Prince, Citigroup's CEO; Mr. Rubin, Chairman of the Executive Committee; Mr. Bushnell, Citigroup's Chief Risk Officer; Mr. Maheras, co-head of Citigroup's investment bank; members of the Company's finance department reporting to Mr. Crittenden; members of the business reporting to Mr. Maheras; and members of independent risk reporting to Mr. Bushnell—were aware in the third quarter that the super seniors were incurring mark-to-market losses (representing less than 1% of the value of the Company's super-senior holdings), the Commission determined that none of these individuals was "tied to the misleading

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[8] Messrs. Crittenden and Tildesley were vigorously represented by separate counsel. Both they and Company counsel argued that these individuals were honorable and able professionals who had unblemished careers and had acted in good faith.

disclosures [as] closely [as] Messrs. Crittenden and Tildesley." (*Id.* at 15.) Indeed, the fact that so many Citigroup employees were aware of both the disclosure and the valuation process—which resulted in a minimal loss, relative to the size of the portfolio, and therefore would not have suggested that the super seniors had become high-risk securities—and nonetheless did not note the central issue identified by the Commission in its Complaint, only underscores the weakness of any possible case against additional parties.

Ultimately, as the Court recognizes (*see* Ex. 2 at 47), the Commission has prosecutorial discretion to decide whom to charge. (*See* SEC Mem. at 15 n.4 (citing *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985)).) In exercising that discretion here, the Commission decided—after considering the massive evidentiary record and Citigroup's arguments that no individuals should be charged—that it was appropriate to charge the two executives closest to the disclosures in question. The Court, we respectfully submit, should defer to the Commission's assessment of the evidence and its judgment about whom to charge.

B. The proposed penalty is fair, adequate and reasonable.

The Court raised a set of questions concerning the SEC's proposed $75 million civil penalty. The SEC describes why it believes that amount is fair, reasonable, adequate and in the public interest. (SEC Mem. at 16–26.) In particular, the SEC explains that the penalty is consistent with both its own published guidelines concerning the imposition of monetary penalties and past precedent. In the Commission's view, a penalty is warranted to achieve general and specific deterrence, among other things, and to take away a corporate benefit resulting from the failure to make disclosure. Moreover, the Commission observes that the Fair Fund component of the proposed settlement will facilitate the distribution of the penalty to any harmed investors and notes that the relatively small size of the penalty (0.3% of Citigroup's revenue for the recent quarter) will have a minimal impact on a per share basis.

While the Commission's analysis certainly reflects a rational exercise of its discretion, Citigroup argued against the imposition of any penalty, contending, among other reasons, that the Company's current shareholders would bear the expense.

Citigroup's Board, which includes both a majority of independent directors and a majority of directors elected since the events in question, ultimately approved the settlement, including its imposition of a $75 million penalty. It did so in large part because the alternative—public and costly litigation—presented numerous risks to the Company, including risks arising from the uncertain outcome of litigation and the possible collateral consequences of an unfavorable outcome, business and reputational risks, and risks stemming from being involved in protracted litigation with one of the Company's primary regulators.[9] The Board also took note of the fact that the proposed $75 million penalty falls well within the range of recent penalties imposed (and approved by courts) for comparable non-scienter-based disclosure cases against financial institutions,[10] and that the settlement funds will be placed in a Fair Fund account, available to recompense shareholders, if any, who were actually damaged by the disclosure violations that are the subject of the Complaint.[11]

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9 As the SEC itself has noted, even in far simpler times with far fewer media outlets and predating the blogosphere, settlement is desirable from an adverse party's point of view, because, "apart from the costs and expenditure of time involved, a prolonged proceeding is likely to result in repeated adverse publicity and may have other undesirable, and, possibly, unintended effects." U.S. Sec. and Exch. Comm'n, Report of the Advisory Committee on Enforcement Policies and Practices 34 (June 1, 1972).

10 *See* Final Judgment, *SEC* v. *Wachovia Corp.*, No. 04-cv-1911 (D.D.C. Nov. 12, 2004) ($37 million penalty for violation of proxy rules and corporate reporting provisions); *SEC* v. *Bank of America Corp.*, 2010 WL 624581, at *5 (S.D.N.Y. Feb. 22, 2010) ($150 million penalty for disclosure violations in connection with Merrill Lynch merger). (*See also* SEC Mem. at 23–24 (discussing these cases).)

11 Shareholder Lerner does not argue for a larger penalty (Amicus Reply Mem. at 10), and he concedes that the Company—and therefore current shareholders—can have civil liability to former shareholders (*id.* at 12 n.19). Rather, shareholder Lerner's contention is that the

As the Commission notes, none of the $75 million civil penalty will be paid out of TARP funds. (SEC Mem. at 26.) Citigroup obtained $45 billion in TARP funds and repaid $20 billion in cash (with interest) on December 23, 2009. The government converted the remaining $25 billion into 7.7 billion shares of Citigroup common stock as of December 31, 2009.[12] Accordingly, TARP dollars will not fund the settlement.

C. Citigroup has undertaken significant efforts to improve its disclosure and risk management processes.

The Court's August 17 Order asks about the forms of non-monetary relief that shareholder Lerner believes the SEC should have pursued. Citigroup agrees with the Commission that none of shareholder Lerner's proposed reforms—all of which have been lifted wholesale from the entirely inapposite consent judgment entered by the court in the SEC's *Bank of America* matter—makes sense in the context of this case. (*See* SEC Mem. at 26–28.)

In addition, Citigroup has already taken extensive steps, beginning in late 2007, to address the internal control issues described in the SEC's Complaint, rendering further non-monetary relief or internal reforms in the context of this settlement unnecessary. Among other changes:

- The Company has substantially overhauled its senior management and Board since late 2007. Citigroup has a new CFO and a new head of Investor Relations. Citigroup also has a new CEO, a new head of Risk Management, and a new head of its Investment Bank. In addition,

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Company's executives, and not Citigroup, should pay the penalty. (*Id.* at 10–11.) But that is a matter that can be addressed in a demand on the Board and a possible state law derivative action, if appropriate. In fact, shareholder Lerner has already indicated that he anticipates filing such an action if this Court approves the proposed settlement. (*See* Amicus Op. Mem. at 2 n.2.) The SEC for its part has confirmed that it does not believe there was a legal basis to recover compensation from former Citigroup executives. (SEC Mem. at 27.)

12 At present, the Treasury Department has sold approximately 2.6 billion shares of Citigroup stock for a profit of approximately $2 billion. (*See* Ex. 5.) The government's remaining shares, acquired at $3.25 a share, had a market value at the close of business on Friday, September 10, 2010, of $3.91 a share.

a majority of the Board has been replaced since November 2007, with nine new independent outside directors elected since that time.

- The Company has revamped its Disclosure Committee charter and Disclosure Controls and Procedures to clarify and formalize the processes and responsibilities around the Company's public reporting. These enhancements include, among other things, the establishment of an Earnings Subcommittee to oversee the preparation and review of the earnings press release for each quarter, and the requirement that all individuals responsible for disclosures execute a Statement of Accountability prior to the release of earnings information or other public disclosures.

- The Company has implemented comprehensive changes to its risk management processes. The risk organization has been restructured to facilitate review and discussion across businesses, regions and products. A comprehensive revision to the business-limit framework has been implemented, which, in many instances, substantially reduces risk limits for specific products to reflect the Company's reduced risk appetite. The new risk team has also enhanced the quality and completeness of the risk information received by Citigroup's senior management and Board, through a risk-reporting system that provides both quantitative and qualitative risk assessment.

Taken together, these reforms and personnel changes comprehensively address any shortcomings in the disclosure process that may have contributed to the alleged inadequacies in the Company's subprime disclosures described in the SEC's complaint.

D. Shareholder Lerner should not be permitted to challenge the Commission's resolution of this nearly three-year-old investigation on the basis of nothing but his own unsupported allegations.

By his own admission, shareholder Lerner has not seen the SEC's investigative file or taken any discovery in connection with any related proceeding. (*See* Amicus Reply Mem. at 10 n.16; Ex. 2 at 46, 49.) Nevertheless, he seeks to appear as a "friend of the Court" not only to criticize the SEC for failing to reach a different result in its exhaustive three-year investigation, but also to suggest that the SEC should have conducted a different investigation altogether.[13] Permitting shareholder Lerner to undermine the proposed settlement, on so thin a

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[13] Indeed, shareholder Lerner faults the SEC for failing to investigate, in addition to the subprime-related disclosures addressed by the proposed settlement, a number of unrelated issues, including "Credit Default Swaps," "DTAs," and "SIV-lites." (Amicus Reply Mem. at 7.)

record as his own say-so, would establish a pernicious precedent that would severely undermine the Commission's investigatory and prosecutorial authority.

Moreover, and in any event, the claims that shareholder Lerner would have the SEC pursue in lieu of the proposed settlement are classic mismanagement claims that are not actionable under the federal securities laws, *see, e.g.*, *Cole* v. *Fed. Home Loan Mortg. Corp.*, 1991 WL 180295, at *5 (D.D.C. Aug. 27, 1991) (citing *Santa Fe Indus., Inc.* v. *Greene*, 430 U.S. 462 (1977)), and fall outside of the Commission's regulatory authority (*see* Ex. 2 at 4). That shareholder Lerner's claims concern mismanagement is clear from the first sentence of the amended complaint that he filed in New York state court (Ex. 6 ¶ 1), which states that the purpose of his derivative action is to recoup "the damages caused Citigroup by, *inter alia*, the massive mismanagement of the Company."[14] Shareholder Lerner's reply memorandum similarly speaks in terms of mismanagement. (*See, e.g.*, Amicus Reply Mem. at 5–6, 9.) The proper avenue for pursuing claims of this nature would be to make a demand on Citigroup's Board and, if proper, commence a derivative action in the name of the Company—which is precisely what shareholder Lerner already has done in the New York forum.

Accordingly, Citigroup submits that—regardless of whether the Court is inclined to permit shareholder Lerner to participate as *amicus* in this action—his unsubstantiated allegations of mismanagement should be given no weight in the Court's consideration of the proposed settlement.

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[14] Shareholder Lerner's claim that he has "pursued the identical substantive issues [as the SEC] since 2007" (Amicus Reply Mem. at 4), cannot be squared with his amended complaint in the New York action. Indeed, his amended complaint does not assert a single disclosure-related claim; nor does it quote any of the subprime-related disclosures that are the focus of the proposed settlement. *See* Ex. 6.

CONCLUSION

For all of the foregoing reasons, Citigroup respectfully requests that this Court enter the Proposed Consent Judgment.

Dated: September 13, 2010

Respectfully submitted,

/s/ Charles E. Davidow

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