UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff v. CITIGROUP, INC., Defendant	Civil Action No. 10-1277 (ESH)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF STANLEY LERNER TO APPEAR AS *AMICUS CURIAE*

Stanley Lerner ("*Amicus*"), by his undersigned counsel, respectfully submits this memorandum in support of his motion for leave of Court to appear as *amicus curiae* in the above-captioned action commenced by the Securities and Exchange Commission (the "Commission" or "SEC") against Citigroup, Inc. ("Citigroup" or the "Company").[1] For the reasons stated below, the motion should be granted, *Amicus* should be permitted to appear as *amicus curiae* for purposes of opposing the entry of the proposed consent judgment submitted by the parties, including an appearance at the hearing scheduled for August 16, 2010 (and any and all future hearings) concerning the proposed consent judgment.

I. BACKGROUND

Amicus is and at all relevant times has been a shareholder of Citigroup. *Amicus*, as well, is the plaintiff in a shareholder's derivative suit pending in the Supreme Court of New York County, State of New York, Index No. 650417/09 (the "*Lerner* Action"). A copy of the Amended Complaint therein, filed June 22, 2010, is attached as Exhibit B to

[1] By letter dated August 5, 2010, Richard D. Greenfield, Esq., counsel for Mr. Lerner, advised the Court that that this motion would be filed. A copy of the letter is attached as Greenfield Decl., Exh. A.

the Declaration of Richard D. Greenfield, Esq.[2]

On July 29, 2010, the SEC commenced this action with the filing of its Complaint (the "SEC Complaint") together with a proposed consent judgment (consented to by Citigroup's Board of Directors) pursuant to which the Company, in settlement of the SEC's claims, would be required to, *inter alia,* pay to the Commission $75 million and consent to such judgment. It is not entirely clear why the SEC brought the action in this judicial district, as Citigroup has its principal place of business in the Southern District of New York, where many proceedings arising from the same operative facts have been pending for some time.

As of this date, the Court has not yet addressed or entered the form of judgment provided to it by the parties.[3] It should be noted that this action, and the proposed settlement before the Court, are a matter of great public import due to the massive TARP bailouts of Citigroup and the Treasury Department's present ownership of approximately 18% of the common stock the Company. In addition, this proposed settlement has been the subject of substantial media coverage.

The proposed settlement of this enforcement action takes place in the context of the virtual "meltdown" of Citigroup and other major financial institutions requiring

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[2] Should the Court approve the proposed settlement and enter the Judgment before it, *Amicus* anticipates that he will seek to amend of the Complaint in the *Lerner* Action and/or commence a separate action before this Court (1) alleging, *inter alia*, the waste of at least $75 million of Citigroup's corporate assets as a result of the wrongdoing of certain of its officers and directors, and/or (2) seeking to recover the amount of the settlement from the responsible wrongdoers.

[3] A related Administrative Proceeding, File No. 3-13985, was settled on or before July 29, 2010 and is the subject of SEC Release No. 62593, issued on such date. That Proceeding was brought against two Citigroup officers, Gary L. Crittenden, its former Chief Financial Officer and Arthur H. Tildesley, Jr., a relatively low-level officer responsible for certain external communications. It made certain findings of fact and provided for "cease and desist" orders against the respondents and required them to pay relatively nominal penalties. These individuals appear to be the "fall guys" for Citigroup's former Chief Executive Officer, Charles O. Prince, III and other members of the Company's senior management and Board of Directors.

massive federal government bailouts and administrative intervention. In the wake of such government aid, the United States Treasury became a major shareholder of the Company, and now holds approximately 18% of its outstanding equity (it recently held a larger share, but has sold some of its holdings). The NEW YORK TIMES on July 29, 2010 observed that:

> …the $75 million penalty represents a tiny fraction of the more than $40 billion of subprime mortgage bonds that [the SEC says] the bank failed to disclose…The S.E.C. Complaint paints a picture of a broken disclosure process at Citigroup that entangled risk management officers and executives in its investment bank **and even the bank's top officers**. But regulators singled out Mr. Crittenden, who read the misleading statements, and Mr. Tildesley, who prepared them. [emphasis added]

Not surprisingly, given the strong public interest in what has occurred in the nation's financial institutions and at Citigroup in particular, the settlement has been analyzed in the news media. To date, it has been criticized by leading business commentators who have criticized it for numerous reasons, not the least of which is that the Company (i.e. its shareholders) are paying the $75 million. Andrew Ross Sorkin, in The NEW YORK TIMES of August 3, 2010, in his article, "Punishing Citi, or Its Shareholders?" wrote:

> Is this what we mean by holding Wall Street accountable?...On its face, the settlement looked like a win for the good guys. The S.E.C. was finally holding Wall Street accountable for misleading shareholders. But take a step back and ask this question: Who is paying that $75 million fine? The answer is Citigroup's shareholders—the same people who were arguably defrauded by Citigroup's failure to disclose its exposure to subprime mortgages in the first place. And that means you and I are liable, too. Taxpayers own 18 percent of the company.

Mr. Sorkin quoted Harvey L. Pitt, a former Chair of the SEC, who stated:

> A class of innocent shareholders is being asked to pay for the misconduct of corporate officers….The most effective way to deal with this is to impose the fines and penalties on the individuals. They should feel the sting of it.

Id. Similarly, Judge Jed S. Rakoff, in considering a proposed $33 million cash and

injunctive relief settlement in an SEC proceeding brought against Bank of America Corporation, said that it:

> "is not fair, first and foremost, because it does not comport with the most elementary notions of justice and morality, in that it proposes that the shareholders who were the victims of the bank's alleged misconduct now pay the penalty for that misconduct."

SEC v. Bank of America Corporation, No. 09 civ 6829, 653 F.Supp.2d 507, 509 (S.D.N.Y. 2009).

II. ARGUMENT

As noted by Judge Posner in *Ryan v. Commodity Futures Trading Comm'n,* 125 F.3d 1062 (7th Cir.1997), there are, generally speaking, three circumstances in which *amicus* briefs should be permitted:

> An *amicus* brief should normally be allowed when a party is not represented competently or is not represented at all, when the *amicus* has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the *amicus* to intervene and become a party in the present case), or 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.

Id. at 1063. *Accord, e.g.*, *Community Ass'n for Restoration of Environment (CARE) v. DeRuyter Bros. Dairy,* 54 F.Supp.2d 974, 975 (E.D. Wash. 1999). For the reasons discussed in some detail below, all three circumstances are present in this action, and support the granting of leave to appear as *amicus curiae*.

A. There is No Party, or Counsel, Adequately Representing the Interests of the Company's Independent Shareholders

Here, proposed *Amicus* Lerner, a non-party, is a long-time Citigroup shareholder. He is not represented competently, nor is he represented at all, by counsel for either party.

Citigroup's counsel in this case, Wachtell, Lipton, Rosen & Katz, LLP ("Defense Counsel"), does not adequately represent the interests of Citigroup or its shareholders in this proceeding, but, rather, serves at the pleasure of the Company's Board of Directors.

More importantly, it has diligently sought, at the *expense* of the Company, to protect the interests of its present or former senior officers and directors whom it has, to date, successfully *shielded* from personal liability for their wrongdoing by actively seeking the dismissal of claims brought derivatively on behalf of the Company. A valid ground for inquiry would center on what precise role it had in advising Citigroup to move to dismiss derivative claims brought on its behalf, in coordinating Citigroup's litigation strategy and in drafting the language of the SEC's Complaint in this action. In cannot be expected that Defense Counsel, which has provided advice and counsel to Citigroup, its senior officers and directors, will voluntarily disclose to the Court the facts it has available to it and the Company. To do so would condemn the proposed settlement because the disclosure of such facts would demonstrate that the SEC's suit should have been directed toward Citigroup's senior officers and Board members (including Chairman and CEO Charles O. Prince, III, Vice-Chair Robert Rubin, and senior investment banker Tommy Maheras, who pocketed $30 million while exposing his employer over $50 billion in losses, among others) and who have been culpable in the underlying wrongdoing. As noted recently by NEW YORK TIMES columnist Gretchen Morgenson, it was these "financial wizards like Robert Rubin and Charles Prince [who] helped oversee Citi during the years that it stuffed itself so full of those toxic assets [they concealed] that taxpayers had to bail out the bank." Gretchen Morgenson, *With Friends Like This*, The NEW YORK TIMES, August 1, 2010.

Additionally, it cannot be said, based upon the sparse record before this Court, that the Commission has provided any serious representation to *Amicus* and the other shareholders of Citigroup. Its anemic Complaint is utterly devoid of any real detail.[4]

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[4] Such a Complaint probably would not pass muster under Rule 9(b) of the Federal Rules and one may wonder why it fails to name therein a single culpable person. Further, the conduct at issue also amounts to, *inter alia*, securities fraud under §10(b) of the Securities Exchange Act of 1934. Perhaps the Commission can explain why there is no reference in the Complaint to this statute, why "securities fraud" is not even mentioned and why not

More importantly, by failing to name the officers and directors responsible for the massive securities fraud perpetrated by them, the SEC has demonstrated an utter lack of regulatory zeal. Based upon the substance of the proposed settlement here and the ones described below, it appears that the SEC, however its good intentions, is seeking "notches in its belt" rather than litigating cases to conclusion and effecting material substantive change.

The Complaint simply refers to "senior officials" who played a part in the cause of action, without naming them or even specifying their rank. There is no reason to believe the SEC did this out of sheer ignorance; in context, it is apparent that the SEC had conducted investigations within Citigroup that had revealed who had been involved, and how. This is information of critical importance to a shareholder, yet Citigroup and the SEC have combined to deny it to all shareholders. Among other effects, this prevents the shareholder from asserting that the cease-and-desist relief (money aside) should extend to other participating "senior officials." The shareholder has every reason to expect that the Court will not grant what amounts to pardon and absolution to fraudulent top officials.

In seeking perfunctory injunctive relief and a token settlement amount to be paid by Citigroup back to its own shareholders and former shareholders accomplishes little other than to encourage others to have disdain for its regulatory oversight. Simply, the SEC has provided no effective representation of *Amicus* and the other Citigroup shareholders in negotiating the proposed settlement.[5] Indeed, by requiring Citigroup itself to pay the $75 million, the Company's shareholders are paying for the wrongdoing of those who had a fiduciary duty to them and to Citigroup itself.

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even a single person is identified as being responsible for the underlying wrongdoing at issue.

[5] *Amicus* reserves decision as to whether to seek intervention in this case and/or whether he will commence a related derivative suit based solely on the waste of $75 million of Citigroup's funds to resolve claims that should have been directed at former CEO Prince and others.

B. A*micus* Has an Interest in the *Lerner* Action that May be Affected by the Decision in This Case

It is beyond dispute that Defense Counsel and the defendants in the *Lerner* Action and other derivative litigation will use the settlement of this case, if approved by the Court as presented, to argue in the respective courts that if there was serious wrongdoing at Citigroup, the SEC would have exacted more serious penalties and named specifically in its Complaint, the culpable parties. In comparison to the SEC's anemic efforts, *Amicus* provides as examples of rigorous prosecution of individual wrongdoers, (1) the Complaint in *People of the State of New York v. Bank of America Corporation, et al* , Index No. 450115/2010 (Sup. Ct. New York Co., N.Y.) Greenfield Decl., Exh. C, where the New York Attorney General has "named names" and detailed the wrongdoing, and (2) the aforementioned Amended Complaint in the *Lerner* Action. As the plaintiff in the *Lerner* Action, *Amicus* has a serious interest in what happens in this case and its impact upon the defenses that will be proffered in the *Lerner* Action and the other shareholder derivative litigation.

C. *Amicus* and his Counsel Have Unique Information and Perspective That Can Help the Court Beyond the Help That the Lawyers for the Parties are Able to Provide

Finally, and most importantly, *Amicus* should be permitted to appear in this action because he is prepared to advance arguments that have not heretofore been advanced by any party, and are not going to be advanced by any party. *Amicus* is more likely than either the Commission's lawyers or Defense Counsel to "fill in the blanks" with regard to the strengths and weaknesses of the *substance* of the proposed settlement and, in particular, to point out to the Court the numerable questions that should be asked in the *process* of determining whether the parties' requested resolution of the SEC's claims should be approved.

Point 1: The Court Should Not Consider Entering the Proposed Judgment on the Present Record

As a matter of process, *Amicus* will argue that the Court should evaluate the proposed judgment only on a complete record. While the Court has taken an important step in scheduling an initial hearing, *Amicus* respectfully submits that this hearing should be the beginning, rather than the conclusion, of this process.

Although the Court is quite capable of asking the "right questions" of the proponents of the settlement, There is little of substance in the record to date to permit the Court to evaluate the value of the proposed settlement and its claimed benefits. *Amicus* requests that he and other stakeholders be permitted to make presentations and elicit information on the record from such proponents and/or any witnesses they proffer. Among the questions that would be appropriate to ask would be the identity and level of culpability of, *inter alia,* the unidentified "members of senior management" who Messrs. Crittenden and Tildesley reported to and met with in connection with the wrongful conduct attributed to them in the Administrative Proceeding.[6] Among the questions that should be asked are whether Messrs. Crittenden and Tildesley were the designated "fall guys" for their superiors at Citigroup. Indeed, the Company put out a press release saying that despite their very serious wrongdoing amounting to securities fraud: "We are pleased that we have reached agreement with the S.E.C. to put this matter concerning certain 2007 disclosures behind us." The release went on to praise Messrs. Crittenden and Tildesley as "highly valued" employees and emphasized that the Commission had not charged the Company or either man with reckless or intentional misconduct. As The NEW YORK TIMES of July 29, 2010 observed: "That could strengthen Citigroup's hand in

[6] Mr. Crittenden, a former Chief Financial Officer of Citigroup, reported to its Chief Executive Officer, Charles O. Prince, III, and the Company's Board of Directors. Mr. Tildesley, still an employee of Citigroup, was a subordinate who worked in the Investor Relations Department of the Company. They consented to pay $100,000 and $80,000, respectively, which amounts, upon information and belief, are being paid or being reimbursed to them by Citigroup.

defending a wave of private shareholder lawsuits."

At a hearing in the *SEC v. Bank of America* action on August 10, 2009, before rejecting the initial $33 million settlement therein, Judge Rakoff observed:

> A fine by its very nature is quasi punitive and provokes the public interest in that sense and therefore the court's role may be more engaged in that situation.

August 10, 2009 Hearing Transcript, at 45. On the eve of a trial of the SEC's case, following extensive intervention by Judge Rakoff, and extensive submissions to the Court, the settlement was re-negotiated and Bank of America agreed to pay $150 million with the funds specifically dedicated to compensating the victims of the alleged wrongdoing in that case. *Amicus* is not suggesting here that Citigroup be further penalized here. Rather, he suggests that the Court need to have before it as much information as Judge Rakoff had at his disposal and, whatever the amount the SEC seeks, it should be paid in full by the responsible officers and directors and not their underlings. The Court needs to know the identities of the culpable parties and the extent of their responsibility that the SEC and Defense Counsel want to lay at the feet of Messrs. Crittenden and Tildesley.[7]

While *Amicus* recognizes that the Commission does not have unlimited resources so as to enable it to litigate to conclusion every case that comes before it, the collapse of Citigroup and its accompanying securities fraud dwarfs in consequence the highly publicized misrepresentations of companies such as Enron. This course of conduct, and its consequences, are described in some detail in the *Lerner* Complaint submitted herewith as well as the numerous securities fraud Complaints pending against the

[7] It is unknown to *Amicus* whether, during the SEC's investigation of Messrs. Crittenden and Tildesley as well as of Citigroup, attorney-client privilege was asserted to thwart the Commission's investigations. If so, the Court should ask Citigroup, as Judge Rakoff did with respect to Bank of America, to waive the claim of attorney-client privilege in order that there be, *inter alia*, a fully-developed record of what transpired including the extent to which, if at all, the parties relied upon the advice of counsel in doing what they did.

Company…all of which resulted from the conduct of its senior officers and directors.[8] Thus, even though the Commission is capable of bringing before this Court all material facts that resulted in the conduct of which it complains generally, its Complaint does not do so.

As evidenced by the submission of a proposed judgment with no briefing or factual materials, unfortunately, it is evident that neither of the parties to this action believes that the Court should evaluate the proposed judgment on a more complete record. *Amicus*, uniquely, will raise this procedural concern with the Court.

Point 2: The Proposed Judgment is Not Fair or Reasonable

A district court should enter a proposed consent judgment only if it is fair, reasonable and equitable and does not violate the law or public policy. *See Citizens for a Better Environment v. Gorsuch,* 718 F.2d 1117, 1125-26 (D.C.Cir.1983). If permitted to appear, *Amicus* would contend that, for the reasons stated below, the Consent Judgment must be altered radically, or rejected.[9]

a. The Judgment Should Not Be Entered Unless Modified So as to Have the Penalty Paid by the Actual Wrongdoers

Amicus will articulate the view that the actual wrongdoers should be held responsible for the damage that they have caused to Citigroup and its shareholders. As discussed above, this is a view that has been shared by many prominent voices, as reflected in the criticism of the proposed settlement in this action by former SEC Chairman Harvey Pitt, and financial columnist Andrew Ross Sorkin of the NEW YORK TIMES. It is also reflected in the initial rejection of a proposed settlement by the United

[8] *See, e.g.* the Consolidated Class Action Complaint in *In re Citigroup, Inc. Sec. Litig.*, 07-civ- 9901 (S.D.N.Y.) attached as Greenfield Decl., Exh. D.

[9] While the Court cannot unilaterally modify a "Consent" Judgment, it can use its influence, as Judge Rakoff did in *SEC v. Bank of America,* to effectuate an improved result. Hopefully, with such influence, the parties will consent to a vastly different and much improved settlement of this case. If not, *Amicus* asks the Court to reject the existing settlement as unfair, inadequate and not in the public interest.

States District Court for the Southern District of New York (Rakoff, J.) in *SEC v. Bank of America*. It is evident that neither party to this action is prepared to take the position that those responsible for the wrongdoing should be held accountable, even though that position would certainly be in the interests of both the Company (which should not be eager to dispense with its own funds to account for the wrongdoing of former management), and the SEC (which, ostensibly, should be seeking to punish the actual wrongdoers and deter similar conduct in the future).

b. *Amicus* Will Proffer Several Modifications That Would Render the Settlement More Reasonable

Amicus will articulate the view that the settlement could be improved through the addition of non-monetary relief that would benefit the corporation, its shareholders, and the investing public.

The SEC's Complaint alleges what amounts to a securities fraud on the part of un-named persons who, *de facto*, intentionally materially misrepresented the reported assets and earnings of Citigroup. Putting aside *Amicus'* contention that the culpable individuals should pay whatever the SEC seeks (assuming the amount is appropriate to the wrongdoing), *Amicus* believes that the Consent Judgment should be further modified to provide for meaningful non-monetary relief.

If the commencement of this action and its ultimate settlement is to have any therapeutic benefit and be in the public interest, *Amicus* suggests that the following provisions be added to it not only in the context of the sparse allegations made by the SEC in its Complaint but in the broader context of the continued deception of the investing public through all of 2007 and 2008, by which point that public had finally determined that the Company was on the brink of collapse and, absent TARP and other elements of the governmental bailout, it would have failed:

1. The selection and appointment by the Court, for a period of three years from the date of appointment, from a list of non-"Big Four" independent auditing firms, a firm or person, to assess the Company's

accounting controls, reporting and procedures to assure that they are sufficient to result in compliance with Generally Accepted Accounting Principles ("GAAP") and appropriate disclosure to the investing public and to make appropriate recommendations to the Audit and Risk Management Committee ("ARM" Committee) of the Company's Board of Directors.[10] Alternatively, a consultant or academic with appropriate experience in practice would also be an appropriate person to carry out the foregoing responsibilities;

2. A requirement that, within six months of the date of the Court's Judgment, the ARM Committee be re-constituted so that none of its members had served thereupon prior to January 1, 2009l

3. The appointment by the Court of an independent disclosure counsel to provide advice and counsel to the Company's Board of Directors for a period of three years following the date of the Court's Judgment. It is suggested that such counsel be someone other than a lawyer who has represented banks but with relevant banking, accounting and securities disclosure experience;

4. Inasmuch as the motivation for the deception of Citigroup's shareholders and the investing public is tied to, in *Amicus'* opinion, compensation packages based upon the Company's reported earnings, the appointment of a compensation consultant by the Court to evaluate all of Citigroup's compensation practices and procedures, whether contractual or otherwise, and make written recommendations to the Compensation Committee of Citigroup's Board as to appropriate, such report to be included in the Company's Proxy Statement following issuance. *Amicus* recommends the selection of a consultant who has not previously such services to any financial institution that has received TARP funds from the United States Treasury.[11]

5. Citigroup, in its Proxy Statement, should give to its shareholders a "say on pay" (a policy recommended by the SEC) and, in particular, as

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[10] Each of the "Big Four" accounting firms has been enmeshed in the auditing of the financial statements of America's major banks and has been implicated in related audit failures including failures to report on violations of GAAP. *Amicus* recommends that the next tier of accounting firms, perhaps four in number, have sufficient resources, bank auditing experience and stature to fulfill the responsibilities that would be undertaken.

[11] Such consultant should be made aware by the Court of Judge Rakoff's observation in his February 22, 2010 Opinion and Order in *SEC v. Bank of America* :

> …too many compensation consultants have a skewed focus when it comes to executive compensation, concentrating on what they perceive is necessary to attract and keep "talent"…and more generally favoring ever larger compensation packages, while rarely taking account of limits that a reasonable shareholder might place on such expenditures.

2010 WL 624581, *4 (S.D.N.Y. Feb. 22, 2010).

to the recommendations of the Court-appointed compensation consultant.

6. It is also suggested that, pursuant to the provisions of the Sarbanes-Oxley Act [cite] as well as common law principles of unjust enrichment, since Citigroup has, *de facto*, restated its financial results covering the relevant period, its former Chief Executive Officer, Charles O. Prince, III, and former Chief Financial Officer, Gary Crittenden, should be required to surrender to Citigroup their compensation and bonuses paid during or attributable to such period; and
7. Should the Court approve the $75 million payment (or any other amount) to be paid by Citigroup or anyone else, it is suggested that the SEC should be required to not only place the payment in a "FAIR" Fund account but should be required to make a specific proposal to the Court as to how the Fund would be allocated, to whom and pursuant to what mechanism (i.e. notice, claims process, etc.) with such proposal to be approved by the Court.

It is evident, from the proposed judgment containing a nominal financial penalty to be paid by the Company, and little else, that the parties did not carefully consider additional elements of relief that would be beneficial to the Company, its shareholders and the public, and that would further the policies underlying civil enforcement by the SEC. *Amicus*, in contrast, will ensure that the dialogue before the Court includes consideration of these elements.

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The undersigned have conferred with counsel for the parties concerning the subject matter of this motion. Both parties oppose Mr. Lerner's appearance as *amicus curiae*, although Plaintiff Securities and Exchange Commission has indicated that it does not oppose Mr. Lerner's submission of comments concerning the proposed settlement.

III. CONCLUSION

For the foregoing reasons, Citigroup shareholder Lerner respectfully prays that the Court grant him leave to appear as *Amicus Curiae* in this action and the Court evaluate the proposed settlement on a complete record. Alternatively, should the Court not be inclined to permit Mr. Lerner to appear as *amicus* in this litigation, he asks that the

proposed settlement be summarily rejected.

Dated: August 12 ,2010

Respectfully Submitted,

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