

**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.)

**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**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29, Better Markets, Inc. (“Better Markets”) hereby states as follows:

1. Better Markets has no parent corporation.
2. There is no publicly held corporation that owns 10% or more of the stock of Better Markets.

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SUMMARY

Better Markets respectfully submits this supplemental memorandum in further support of its motion for an enhanced role as *amicus curiae*. See 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. Feb. 15, 2012) (“Motion”).¹

Even though able counsel has been appointed “to argue in support of the district court’s position,” pursuant to this Court’s order, *SEC v. Citigroup Global Markets Inc.*, No. 11-5227-cv (Lead) (2d Cir. Mar. 15, 2012) (“Order”), at 3, it is still appropriate for Better Markets to be granted an enhanced role as *amicus curiae* to provide the Court with a complete presentation of all of the issues raised in this important appeal.

Specifically, Better Markets can offer valuable assistance to the Court in the following three ways, as explained more fully below:

1. Better Markets can address issues and present arguments that fall outside the scope of the task assigned to appointed Counsel, which is “to argue in support of the district court’s position.” Order, at 3. For example, while Better Markets would advocate strongly for affirmance of the ruling,

¹ Prior to filing the Motion, Better Markets consulted with counsel for both parties, neither of which objected to the request for an enhanced *amicus* role, subject only to the proviso that the SEC would object to the request for oral argument if that request were to reduce the SEC’s time for oral argument.

and would defend **some** aspects of the district court's rationale, it would also provide alternative grounds on which to affirm the district court's decision.

2. The issues presented in this appeal are sufficiently numerous, complex, and important to warrant additional advocacy from Better Markets to counter the combined positions of the Securities and Exchange Commission ("SEC") and Citigroup Global Markets, Inc. ("Citigroup"), notwithstanding the abilities of appointed counsel. Those issues include the precise elements of the standard that a district court must apply when evaluating a proposed settlement; the appropriate role of the district court in that process of review; the degree of deference owed to the agency involved; and whether or not the settlement agreement at issue here actually satisfies the applicable standard.

3. Better Markets offers knowledge and expertise in specific areas of securities law that are central to this case, including the issuance of asset-backed securities and SEC enforcement actions. Consequently, Better Markets can provide a unique perspective on the specific type of fraud alleged against Citigroup; the gravity of those alleged offenses; and the adequacy of the proposed settlement agreement fashioned by the SEC and Citigroup as a means of addressing those alleged violations. Moreover, as demonstrated by its filing in the court below, Better Markets is thoroughly

familiar with the record developed in this Court, in the district court, and in the securitization that is the subject of the proposed settlement. Better Markets therefore can readily identify critical information that the record is lacking for purposes of evaluating the proposed settlement agreement.

To assist this Court in the foregoing ways, and to fully restore adversarial balance in this case, Better Markets should be granted an enhanced role as an *amicus curiae*, as set forth herein and in the Motion.

BACKGROUND

On February 15, 2012, Better Markets filed its Motion seeking an enhanced role as *amicus curiae*. The Motion was predicated on the fact that both parties in this case, although nominally on different sides, were completely aligned and were making the same arguments in a joint effort to overturn the district court's rejection of their proposed settlement. To remedy this imbalance, and to ensure that the Court would receive a full, fair, and balanced presentation on all of the issues presented in this appeal, Better Markets specifically requested three enhancements to the role normally afforded to an *amicus curiae*: (1) leave to file a brief equal in length to that of a party, (2) leave to file a brief not less than 30 days after both the SEC and Citigroup have filed their briefs, and (3) leave to participate in oral argument.

On February 17, 2012, this Court issued an order referring Better Markets' Motion to "the panel that will determine the merits of the appeal." Order, *SEC v. Citigroup Global Markets Inc.*, No. 11-5227-cv (Lead) (2d Cir. Feb. 17, 2012).

On March 15, 2012, this Court issued an order granting the parties' motion for a stay pending the outcome of the appeal, but denying their motion for expedited appeal. Order at 7. In its opinion, the Court also acknowledged the breakdown of the adversary system in this case and ordered the appointment of counsel "to argue in support of the district court's position," so that the panel deciding the merits would receive "briefing on both sides." *Id.* at 3. On March 16, 2012, and in accordance with the Court's Order, the Clerk of the Court appointed John R. Wing, Esq. of Lankler, Siffert & Wohl, 500 Fifth Avenue, 33rd Floor, New York, NY 10110, to fill that role.

The Clerk's appointment of Mr. Wing was an important step to help ensure that this Court receives a more full, fair, and balanced presentation of the issues raised in this case. Mr. Wing's background demonstrates that he is both experienced and knowledgeable. Nevertheless, good cause exists for this Court to grant the pending Motion notwithstanding the appointment.²

² In light of the appointment of Mr. Wing, Better Markets would modify its request in one respect, as to the timing of its brief. Better Markets suggests that the deadline for its *amicus* brief be set not less than 7 days after Mr. Wing's brief is submitted. This deadline would be consistent with the general rule governing the

ARGUMENT

I. Better Markets will provide arguments that go beyond the scope of the advocacy assigned to appointed counsel.

In its Order, the Court assigned Mr. Wing the task of arguing “in support of the district court’s position.” Order at 3. However, Mr. Wing’s advocacy, as defined by the Order, will not necessarily encompass all of the important considerations that should be placed before the Court.

For example, the district court’s central ruling was that the parties did not supply an adequate record on which to evaluate the settlement. The court rested this decision primarily on the absence of either admissions or adjudicated facts concerning Citigroup’s role in the alleged fraud. *See* Opinion and Order, *SEC v. Citigroup Global Markets Inc.*, 11-Civ-7387 (JSR) (S.D.N.Y. Nov. 28, 2011), at 4 (concluding that the settlement could not be approved “because the Court has not been provided with any proven or admitted facts upon which to exercise even a modest degree of independent judgment.”) The task appropriately assigned to Mr. Wing will be to focus on this rationale and to argue in support of it, based either on current law or on a claim that the law should be extended.

Better Markets would also support the district court’s ruling that the record was inadequate, but it would offer a broader rationale on which to justify

timing of *amicus* briefs under Rule 29. *See* Fed. R. App. Pro. 29(e) (an *amicus* brief is due “7 days after the principal brief of the party being supported is filed”).

affirmance.³ There are in reality a variety of mechanisms, other than admissions or adjudicated facts, that the parties could have used to ensure that the record before the district court was sufficiently reliable to allow a meaningful review of the proposed settlement agreement. These mechanisms have the added virtue of resolving one of the major concerns about the court's rationale: the fear that if courts routinely require admissions in connection with settlements, defendants will rarely settle because they will face collateral estoppel in private actions seeking damages. *See* Transcript of hearing on district court's request for additional information from the parties, *SEC v. Citigroup Global Markets Inc.*, No. 11-Civ-7387 (JSR) (S.D.N.Y. Nov. 9, 2011) ("Tr."), at 8-9 (colloquy regarding Citigroup's desire to avoid collateral estoppel arising from admissions); Citigroup's memorandum in support of SEC motion for stay, *SEC v. Citigroup Global Markets Inc.*, No. 11-Civ-7387 (JSR) (S.D.N.Y. Jan. 9, 2012), at 18 (explaining that forcing the case to trial would create a risk of adverse findings and collateral consequences in private litigation that the company sought to avoid via the consent judgment, which would not have required admissions).

³ Such an alternative ground for the district court's ruling can support affirmance even if the district court relied on other grounds for its decision. "This Court is 'free to affirm an appealed decision on any ground which finds support in the record, regardless of the ground upon which the trial court relied.'" *Millares Guiraldes de Tineo v. United States*, 137 F.3d 715, 719 (2d Cir. 1998) (citing *Leecan v. Lopes*, 893 F.2d 1434, 1439 (2d Cir.), *cert. denied*, 496 U.S. 929, 110 L. Ed. 2d 647, 110 S. Ct. 2627 (1990)); *see also Beal v. Stern*, 184 F.3d 117 (2d Cir. 1999) (same, in case involving denial of preliminary injunction).

Thus, with respect to one of the central holdings of the district court, Better Markets seeks to offer an additional perspective that extends beyond the important task assigned to appointed counsel. It was not simply the lack of admissions or adjudicated findings that rendered the proposed settlement agreement not fair, adequate, reasonable, or in the public interest, but also the lack of other alternative mechanisms that could have created an adequate record upon which the district court could have evaluated the settlement.

II. The sheer number, complexity, and importance of the issues raised by this appeal warrant enhanced participation by Better Markets as *amicus curiae*.

This case raises a wide range of important and complex issues. They include—

1. The power and authority of Federal district courts to approve or reject proposed settlements in actions by the government to enforce the law;
2. The power and authority of Federal district courts to insist that parties seeking approval of a proposed settlement supply the court with sufficient information, in a credible and reliable form, upon which to evaluate the proposed settlement;
3. The level of deference a Federal district court must give to the SEC and other federal agencies when evaluating a proposed settlement, and in

particular whether, as framed by the district court, the court must simply “use [its] power but not [its] judgment;” Tr. at 8;

4. The precise nature of the test that a Federal district court must apply when reviewing a proposed settlement, and whether or not the public interest must be part of that test, or whether, as argued by the SEC, a settlement satisfying certain elements must be approved even if it disserves the public interest; Tr. at 3-9; and

5. Whether the proposed settlement in this case is in fact either fair, reasonable, and adequate; or fair, reasonable, adequate, *and* in the public interest, according to the criteria for evaluating and approving such proposed settlements.

The resolution of these issues ultimately will affect not only the way that the nation’s securities laws are enforced, but, much more broadly, the role of the judiciary in protecting the public interest in the settlement of governmental enforcement actions, and the balance of power between the courts and the executive branch.

Given the breadth, complexity, and significance of the issues presented, as well as the unified positions of the government and the industry on those issues, this appeal warrants advocacy in defense of the district court’s ruling in addition to the arguments that appointed counsel will advance.

III. Better Markets offers expertise in securities law that is uniquely relevant to this case, and it is thoroughly familiar with the record.

Better Markets offers expertise in areas of securities law that are central to this case. Better Markets is a non-profit organization that promotes the public interest in the financial markets by advocating for greater transparency, accountability, and oversight in the financial system. To advance these goals, Better Markets comments extensively on proposed financial regulations, engages in public advocacy, conducts original research, and participates in significant litigation affecting financial market regulation.

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 asset-backed securities, sell them to investors, and then wager against the success of those investments to reap 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).⁴ This expertise will enable Better Markets to assist the Court by illuminating the seriousness of the offenses allegedly committed by Citigroup, and

⁴ Available at <http://sec.gov/comments/s7-38-11/s73811-36.pdf>.

by addressing the adequacy of any settlement as a means of deterring future violations and remediating the harm done to investors.⁵

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. Moreover, Better Markets is led by a former securities litigation partner at Skadden, Arps, Slate, Meagher & Flom, who specialized in, among other areas of practice, SEC enforcement cases.

Finally, 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. *See* Complaint and Memorandum by Plaintiff Securities and Exchange Commission in support of Proposed Settlement, No. 11-cv-7387 (JSR) (S.D.N.Y. Oct. 19, 2011). 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. *See* Better Markets' Motion to Intervene Pursuant to Federal Rule of Civil Procedure 24,

⁵ Better Markets has also commented on other proposed rules and concept releases addressing the 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>.

Memorandum of Law in Support of Motion to Intervene, and Memorandum in Opposition to Proposed Settlement, No. 11-cv-7387 (JSR) (S.D.N.Y. Nov. 3, 2011). Thus, Better Markets is uniquely familiar with the record, and it can readily identify deficiencies in the record—in addition to the lack of admissions—that would prevent any court from finding that the proposed settlement agreement meets the applicable standard for judicial approval.

Better Markets' expertise in securities law and its familiarity with the factual and legal issues presented in this case will enable it, if granted adequate participation rights as an *amicus curiae*, to provide this Court with a full, fair, and balanced presentation of the issues and to materially assist the Court in reaching a just resolution.

CONCLUSION

For the foregoing reasons, the Court should grant the motion of Better Markets for leave to submit a brief equal in length to that of the SEC and Citigroup; leave to file its brief 7 days after Mr. Wing has filed his brief in support of the district court's position; and leave to participate in oral argument.

Dated: April 3, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2012, I caused the foregoing “Supplemental Memorandum of Better Markets, Inc. in Support of Motion for Enhanced Role as *Amicus Curiae*” to be filed via the ECF electronic filing system and sent by email for each of the parties, as follows:

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