11-5227-cv(L),

11-5375-cv(con), 11-5242-cv(XAP)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellant Cross-Appellee,

v.

CITIGROUP GLOBAL MARKETS, INC.,

Defendant-Appellee Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA SUPPORTING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c)(1), counsel state that Chamber of Commerce of the United States of America has no parent company, nor has it issued any stock. Pharmaceutical Research and Manufacturers of America has no parent company, nor has it issued any stock.

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United States v. Cannons Engineering Corp.,
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United States v. Lexington-Fayette Urban County Government,
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United States v. New Puck, L.P.,
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United States v. Undermined Quantities of Boxes of Articles of Device, Labeled in Part,
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United States v. Worldwide Fish & Seafood, Inc.,
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REGULATIONS

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OTHER AUTHORITIES

Administrative Office of U.S. Courts, Federal Court Management Statistics, District Courts Report – September 2011, *available at* http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2011/District FCMS Profiles September 2011.pdf&page=1 9

John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L. J. 547 (2010) 9

Black's Law Dictionary (6th ed. 1990)..8

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Anthony DiSarro, *Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation*, 60 Am. U. L. Rev. 275 (2010)...10

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PhRMA, *2012 Profile: Pharmaceutical Industry* (2012), *available at* www.phrma.org/sites/default/files/159/profile_2012_final.pdf......................2

Judith Resnik, *Judging Consent*, 1987 U. Chi. Legal F. 43 ....5, 10

U.S. Chamber Institute for Legal Reform, *Securities Class Action Litigation: The problem, its impact, and the path to reform* (July 2008), *available at* http://www.instituteforlegalreform.com /sites/default/files/SecuritiesBooklet.pdf..12

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a nonprofit association of the country's leading research-based pharmaceutical and biotechnology innovator companies.[2] In 2011 alone, PhRMA's member companies invested an estimated $49.5 billion to discover and develop new medicines that will allow patients to live longer, healthier, and more productive

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1(b), *amici* state that this brief was not authored in whole or in part by the counsel of any party, and no party, party's counsel, or person other than *amici* and their members or their counsel contributed money intended to finance the preparation or submission of this brief.

[2] A complete listing of PhRMA's member companies can be found at PhRMA Member Companies, www.phrma.org/about/member-companies (last visited May 16, 2012).

lives. PhRMA, *2012 Profile: Pharmaceutical Industry* 50 (2012), *available at* www.phrma.org/sites/default/files/159/profile_2012_final.pdf. PhRMA's mission is to advocate for public policies that encourage the discovery of life-saving and life-enhancing new medicines for patients. PhRMA closely monitors legal issues that impact the pharmaceutical industry and regularly participates as *amicus curiae* in cases that impact its members.

These consolidated interlocutory appeals and petition for mandamus challenge the district court's order refusing to approve the parties' proposed consent judgment. The district court concluded that the settlement reached between the SEC and Citigroup was not fair, adequate, reasonable, or in the public interest, primarily because Citigroup had not admitted liability as part of the settlement. Although this case arises in the securities-enforcement context, the potential implications of the district court's decision are far-reaching, as regulatory agencies of all stripes regularly settle enforcement actions with regulated entities through court-approved agreements that do not require admission of wrongdoing. That is so even where the judgment provides for injunctive relief.

The district court's sweeping decision runs head-long into decades of nearly-uniform precedent approving such settlements and, if permitted to stand, would upset the long-settled expectations of the nation's business community, drastically altering the legal landscape against which businesses determine how to respond to

government enforcement actions. The Chamber and PhRMA therefore have a significant interest in participating as *amici curiae* in this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court held that a proposed settlement agreement between a government agency and a regulated party could not be approved without "cold, hard, solid facts, established either by admissions or by trials." *U.S. SEC v. Citigroup Global Mkts. Inc.*, --- F. Supp. 2d ---, 2011 WL 5903733, at *6 (S.D.N.Y. Nov. 28, 2011). That sweeping proposition—which is not in any way limited to the circumstances of this case or to SEC settlements—is fundamentally at odds with well-established law permitting regulated companies to settle alleged violations without being forced to admit guilt. The district court's decision in this case impugns the validity of a staggering number of agency settlements that lack detailed factual findings or admissions yet have been universally approved by the courts. If left intact, the district court's decision would inflict enormous costs on regulated companies and on administrative agencies (and ultimately, the public). The net result of the district court's extreme position would be loss of the consent judgment vehicle altogether, because it is difficult to imagine why any rational company would admit liability to settle an enforcement action against it, where doing so would expose it to potentially enterprise-threatening collateral consequences in private civil litigation, including class action lawsuits. The district court's rule is flatly contrary to the strong federal policy encouraging settlement, favoring instead outcomes that will provide "collateral estoppel

assistance" to would-be private civil litigants. *Id.* at *5. The decision should be reversed.

ARGUMENT

THE DISTRICT COURT'S NOVEL REQUIREMENT OF "PROVEN OR ACKNOWLEDGED FACTS" WOULD EFFECTIVELY ELIMINATE THE CONSENT JUDGMENT VEHICLE AND INFLICT ENORMOUS COSTS ON THE BUSINESS COMMUNITY AND THE PUBLIC

The district court concluded that "the proposed Consent Judgment is neither fair, nor reasonable, nor adequate, nor in the public interest," primarily because it does not include "any proven or acknowledged facts" or otherwise provide "a sufficient evidentiary basis [for the district court] to know whether the requested relief is justified." 2011 WL 5903733, at *4, *6. The court therefore directed the parties to be ready to try the case within a matter of months.

1. As the district court acknowledged (*id*. at *4), the use of agreed-upon judgments to settle disputes is far from a new development. *See generally* Judith Resnik, *Judging Consent*, 1987 U. Chi. Legal F. 43, 50-53. And for decades, consent judgments with federal agencies (including the SEC) have routinely included language stating that the defendant or target company neither admits nor denies the agency's allegations. In the past four decades alone, federal district courts have approved more than 700 consent judgments to which a federal agency was a party without requiring any admission of liability. *See U.S. SEC v. Citigroup Global Mkts. Inc.*, 673 F.3d 158, 166 (2d Cir. 2012) (finding "no

precedent" supporting the district court's holding). Those consent judgments involved a broad array of federal regulators, including the SEC, the Food and Drug Administration, the Department of Justice, the Equal Employment Opportunity Commission, the Environmental Protection Agency, the Federal Trade Commission, and the Department of Housing and Urban Development. *See Consent Decrees in Judicial or Administrative Proceedings,* Securities Act Rel. No. 33-5337 (Nov. 28, 1972); 17 C.F.R. § 202.5(e) (codifying this practice); *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995) ("'Ordinarily, defendants do not admit to having violated the antitrust or other laws alleged as violated in complaints that are settled.'" (citation omitted)); *see also, e.g., United States v. Lexington-Fayette Urban Cnty. Gov't*, 591 F.3d 484, 486 (6th Cir. 2010) (Clean Water Act); Consent Order 2, *United States v. Undermined Quantities of Boxes of Articles of Device, Labeled in Part*, No. 07-cv-1769 (D.N.J. June 22, 2007), ECF No. 62 (FDA) (explicit statement that the defendant did not admit the allegations against it); Consent Decree 1, *United States v. Worldwide Fish & Seafood, Inc.*, No. 06-cv-4424 (D. Minn. Apr. 18, 2007), ECF No. 25 (same); Consent Decree of Permanent Injunction 1, *United States v. Eli Lilly & Co.*, No. 05-cv-1884 (S.D. Ind. Feb. 10, 2006), ECF No. 11 (FDA) (same); *Rodrigues v. Herman*, 121 F.3d 1352, 1354 (9th Cir. 1997) ("defendants [in ERISA action] neither admitted nor denied the allegations"); *United States v.*

AT&T, 552 F. Supp. 131, 143, 211 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (decree in Sherman Act case "would not constitute any evidence against, an admission by, or an estoppel against AT&T"); *SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 308-10 (S.D.N.Y. 2011) (Rakoff, J.) (acknowledging long history of consent decrees in which defendants resolve the case "without admitting or denying the allegations of the Complaint"); *SEC v. Bank of Am. Corp.*, Nos. 09 Civ. 6829 (JSR), 10 Civ. 0215 (JSR), 2010 WL 624581, at *1 (S.D.N.Y. Feb. 22, 2010) (Rakoff, J.) (summary order); Stipulated Final Judgment and Order for Permanent Injunction 2, *FTC v. Diet Coffee, Inc.*, No. 08-cv-94-JSR (S.D.N.Y. Jan. 4, 2008), ECF No. 4 (Rakoff, J.) ("Defendant DCI, without admitting the allegations of the Commission's Complaint, stipulates and agrees to entry of this Order"); Consent Decree 2, *United States v. New Puck, L.P.*, No. 04-cv-5449-JSR (S.D.N.Y. July 14, 2004), ECF No. 2 (Rakoff, J.) (same); *SEC v. WorldCom, Inc.*, 273 F. Supp. 2d 431, 436 (S.D.N.Y. 2003) (Rakoff, J.); *CFTC v. Kelly*, No. 98 Civ. 5270 (JSR), 1998 WL 1053710, at *1 (S.D.N.Y. Nov. 5, 1998) (Rakoff, J.) (summary order) (same); *cf. Citizens for a Better Envt. v. Gorsuch*, 718 F.2d 1117, 1125-26 (D.C. Cir. 1983) ("[T]he long-standing rule is that a district court has power to enter a consent decree without first determining that a statutory violation has occurred." (citing *Swift & Co. v. United States*, 276 U.S. 311, 327 (1928)).

The practice of neither admitting nor denying the allegations of the complaint is so commonplace that it has become part of the definition of the term "consent decree." *See Black's Law Dictionary* 410 (6th ed. 1990) (defining "consent decree" as a judgment "whereby the defendant agrees to stop alleged illegal activity without admitting guilt or wrongdoing"). Amicus is aware of only two instances in which a district court has ever withheld approval of a proposed consent judgment on the ground that it lacks an admission of liability—and both decisions were reversed on appeal. *See United States v. Microsoft Corp.*, 159 F.R.D. 318, 324, 327 (D.D.C. 1995), *rev'd*, 56 F.3d 1448 (D.C. Cir. 1995); *Carson v. Am. Brands, Inc.*, 446 F. Supp. 780, 788, 791 (E.D. Va. 1977), *rev'd on remand*, 654 F.2d 300, 301 (4th Cir. 1981).

2. The district court's unprecedented requirement is also misguided as a policy matter. The Supreme Court has repeatedly endorsed the use of consent judgments, citing the "time, expense, and inevitable risk of litigation" that parties can avoid through the consent judgment vehicle. *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). Those expenses are significant, and continue to rise. In 2008, the average litigation cost for Fortune 200 companies (excluding judgments and settlements) was $115 million, which was a 73% increase as compared to

2000.[3] In commercial litigation, discovery costs alone rose from an estimated $700 million in 2004 to $2.9 billion in 2007.[4] Litigation also inflicts significant secondary costs on a company in terms of diverted resources and negative press that may result from protracted litigation. In 2011, the median time from filing to trial in a federal civil case was more than two years, and there were 40,435 pending cases (or 14.9% of pending civil cases) more than three years old.[5] Settlement allows injured parties to obtain relief sooner and avoid the long wait for a judicial resolution.[6] And "[n]ot only the parties, but the general public as well, benefit from the saving of time and money that results from the voluntary settlement of litigation." *Gorsuch*, 718 F.2d at 1126.

Consent judgments, when entered into by sophisticated parties represented by skilled counsel, take into account the costs and risks (direct and collateral) of litigation while saving both the potential litigants and the courts the time and

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[3] *See* Lawyers for Civil Justice, et al., *Litigation Cost Survey of Major Companies* at 2, 7 (May 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf.

[4] *See* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L. J. 547, 574 (2010).

[5] *See* Administrative Office of U.S. Courts, Federal Court Management Statistics, District Courts Report – September 2011, *available at* http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2011/District FCMS Profiles September 2011.pdf&page=1.

[6] *See* Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 Fordham L. Rev. 1177, 1196-97 (2009).

expense of litigation. *See United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990) ("Respect for the agency's role is heightened in a situation where the cards have been dealt face up and a crew of sophisticated players, with sharply conflicting interests, sit at the table. That so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered out an agreement at arm's length and advocate its embodiment in a judicial decree, itself deserves weight in the ensuing balance."). Such agreed-upon judgments can be a particularly valuable form of settlement because they embody the parties' private agreement in a judicially enforceable order.[7] In cases involving the government, consent decrees are a particularly important enforcement tool. Through publication as a court order, a consent decree may have a deterrent effect on others that would not flow from purely private resolution of the dispute.

Consistent with the "strong federal policy favoring the approval and enforcement of consent decrees," *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991), the primary role of a federal district court reviewing a proposed consent judgment is "to give effect to the terms negotiated by the parties"—not to delve into the merits of the dispute and impose the court's own ad hoc sense of whether the penalties borne by the defendant are sufficiently severe. *SEC v. Levine*, 881 F.2d 1165,

[7] *See* Anthony DiSarro, *Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation*, 60 Am. U. L. Rev. 275, 276-77 (2010); *Judging Consent*, 1987 U. Chi. Legal F. at 47.

1181 (2d Cir. 1989); *see also United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991) (there is "a presumption in favor of voluntary settlement" which "is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative agency like EPA which enjoys substantial expertise in the environmental field"); *cf. WorldCom, Inc.*, 273 F. Supp. at 436 (Rakoff, J.) (noting that a court's role is to approve consent judgment "not on the basis of what [it] determine[s] is the appropriate penalty but on the basis of whether the settlement is fair, reasonable, and adequate" (citing *Wang*, 944 F.2d at 85)). "A ruling that litigation may not be settled unless a party formally admits liability, or formally concedes legality, or a court determines liability or a lack thereof, would defeat the general policy of the law to foster settlements since the very purpose of a settlement is usually to avoid an adjudication or a concession of rights." *Carson v. Am. Brands, Inc.*, 606 F.2d 420, 431 (4th Cir. 1979) (Winter, J., dissenting) (adopted on remand from U.S. Supreme Court, 654 F.3d 300, 301 (4th Cir. 1981)); *see also Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 615-16 (1984) (Blackmun, J., dissenting) ("Any suggestion that a consent decree can provide relief only if a defendant concedes liability would drastically reduce, of course, the incentives for entering into consent decrees. Such a result would be incongruous, given the Court's past

statements that 'Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims.'" (citation omitted)).

Indeed, the district court's rule, if upheld, would effectively eliminate the consent-judgment vehicle altogether. As this Court noted in its opinion granting a stay in this case, "[r]equiring such an admission would in most cases undermine any chance for compromise." *Citigroup*, 673 F.3d at 165; *see also Carson v. Am. Brands, Inc.*, 450 U.S. 79, 87-88 (1981) (requiring parties to admit liability as a condition of settlement effectively orders the parties to "proceed to trial" and "den[ies] the parties their right to compromise their dispute on mutually agreeable terms"). That is undoubtedly true in the regulatory enforcement context, because of the grave potential for consequences in related litigation. Businesses often will have to defend civil litigation—including class actions—based on the same allegations as those asserted by the agency. The ubiquitous "no admit, no deny" feature of consent judgments is designed precisely to avoid impairing the company's ability to defend itself in future litigation. Even under the best of circumstances, defendants face enormous pressure to settle class actions for millions and sometimes billions of dollars—in order to avoid the possibility of an unpredictable and potentially catastrophic trial verdict.[8] In light of that well-

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[8] *See* U.S. Chamber Institute for Legal Reform, *Securities Class Action Litigation: The problem, its impact, and the path to reform*, at 8-9 (July 2008),

known dynamic, it is difficult to imagine why any rational company would agree to forego its day in court on terms requiring its public admission of guilt.

The district court's rule would inflict certain and enormous costs on the public by effectively taking consent judgments off the table—forcing agencies into protracted and expensive litigation on one end of the extreme (an option which is limited by the finite resources of the agency), or purely private settlements. Nothing prevents the government and a defendant from voluntarily dismissing a suit and settling privately on terms identical to the proposed consent decree. But if that is the result of the district court's heavy-handed approach to reviewing consent judgments, the public will gain nothing—and will lose much. The terms of the settlement, to which the court objected, remain the same. Private settlement deprives the relevant business community of guidance as to the government's enforcement policies. It also decreases accountability, because without public court filings, the executive branch may shield its enforcement activity from the critical scrutiny of the public.

3. The district court's rule turns the strong federal policy favoring settlements on its head, preferring instead a policy favoring outcomes that will provide "collateral estoppel assistance" to would-be private civil litigants (here, sophisticated institutional investors). As this Court put it, "[w]hat the [district]

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available at http://www.instituteforlegalreform.com/sites/default/files/SecuritiesBooklet.pdf.

court found contrary to the public interest was not the terms of the injunction, but rather the fact that the parties had settled on terms that did not establish Citigroup's liability for the benefit of civil claimants against it." *Citigroup*, 673 F.3d at 163 n.1. The district court's reasoning is badly flawed.

The SEC "is presumed to represent the interests of the investing public aggressively and adequately," *SEC v. Bear, Stearns & Co.*, Nos. 03 Civ. 2937 (WHP), *et al.*, 2003 WL 22000340, at *3 (S.D.N.Y. Aug. 25, 2003) (summary order), and its "determinations as to why and to what degree the settlement advances the public interest are entitled to substantial deference," *WorldCom*, 273 F. Supp. 2d at 436 (Rakoff, J.). *See also SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984) ("[T]he courts should pay deference to the judgment of the government agency which as negotiated and submitted the proposed judgment.").

For that reason, the courts—including the Supreme Court—have rebuffed attempts by third parties to modify consent decrees on the ground that they do not adequately further the public interest. In *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961), for example, the issue before the Court was whether Sam Fox, a small music publisher, could intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure in order to modify an antitrust consent decree entered in the government's suit against the American Society of Composers, Authors, and Publishers (ASCAP) and some of its members. The government alleged that large

music publishers had restrained competition among the smaller publishers by controlling seats on ASCAP's board of directors. The suit was settled by a consent decree in which ASCAP agreed to select board directors by membership vote. Sam Fox Publishing Co., which was not a party to the litigation, believed that the government had not gone far enough in ending the large publishers' domination of ASCAP and, therefore, sought to intervene.

The Court rejected Sam Fox's arguments for intervention, principally because Sam Fox was not bound by the terms of the consent decree and therefore not barred from filing its own antitrust suit against ASCAP. *Id*. at 695. The Court further noted that, even if Sam Fox could have intervened, "sound policy would strongly lead [the Court] to decline appellant's invitation to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting." *Id*. at 689. In stating that it might second-guess the government only if Sam Fox could show some gross misconduct, the Court recognized the government's role as representative of the public interest. But because Sam Fox was not bound by the consent decree and could file its own action challenging ASCAP's conduct, the Court determined it did not need to decide whether the government had acted in bad faith. The Court's refusal to scrutinize the consent decree in Sam Fox is therefore also indicative of its general

unwillingness to evaluate the substance of a proposed consent decree negotiated by sophisticated parties, which—unlike class action settlements, for example—binds only the consenting parties. *See also Pac. R.R. v. Ketchum*, 101 U.S. 289, 297 (1880) ("Parties to a suit have the right to agree to any thing they please in reference to the subject-matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings.").

For similar reasons, the district court's concern about the effect (or lack thereof) of the proposed consent decree on third parties is entirely misplaced. The proposed decree does not impair private plaintiffs' ability to bring lawsuits based on the alleged conduct, and the district court did not point to anything suggesting that the SEC acted in bad faith in negotiating the Citigroup settlement.

The district court's lament that putative plaintiffs would lose out on the potential collateral estoppel benefits of having a judgment in which Citigroup has admitted wrongdoing suffers from an additional, more egregious flaw: it assumes that Citigroup is guilty of wrongdoing (and that the SEC could have proved that at trial). A defendant who does not believe itself guilty of any wrongdoing may settle for any number of reasons, including that the projected costs of litigation are too high, as measured against the penalties sought through a consent judgment. *See In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 749 (E.D.N.Y. 1984)

(given expenses of trial, settlement was reasonable option for Agent Orange defendants even though possibility of a liability finding was "slight"), *aff'd*, 818 F.2d 145 (2d Cir. 1987). Some may settle to avoid the adverse publicity that would be generated by a lengthy trial, fearing severe secondary effects on the business. And a defendant who does not believe it has violated any law may nevertheless agree to socially beneficial reform, such as clean-up measures requested by an environmental agency, in order to improve its reputation in the community. *Cf. id.*

The SEC made a judgment that its interests in enforcement of the law, allocation of resources, and deterrence were best served by obtaining a consent judgment—rather than trying to prove liability at trial for the possibility of marginally more severe penalties or entering into a purely private settlement—and concluded that it would not be able to do so if it conditioned its assent on Citigroup's admission of liability. In light of the presumed good faith of the agency's pursuit of the public interest, *see Sam Fox*, 366 U.S. at 689, and the discretion conferred on an agency's decision whether or not to take enforcement action in the first place, *see Heckler v. Chaney*, 470 U.S. 821, 831 (1985), the district court's public interest rationale cannot support its rejection of the proposed consent decree in this case. *See, e.g., Microsoft*, 56 F.3d at 1462 (district court "must be careful not to exceed his or her constitutional role" when it comes to a

federal agency's judgment as to how to resolve a regulatory enforcement action); *Randolph*, 736 F.2d at 528 ("whether the consent decree is in the public interest is best left to the SEC, and its decision deserves our deference").

CONCLUSION

The decision of the district court should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) and (C), the foregoing brief contains 3,925 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), according to the Word Count feature of Microsoft Word. This brief has been prepared in 14-point Times New Roman font.

/s/ Lori Alvino McGill
Lori Alvino McGill

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of May 2012, a true and correct copy of the foregoing **Brief of *Amici Curiae* Chamber of Commerce of the United States of America and Pharmaceutical Research and Manufacturers of America Supporting Reversal** was served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h)(1)& (2).

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