UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF PLAINTIFF SECURITIES AND EXCHANGE COMMISSION IN RESPONSE TO THE COURT'S ORDER OF AUGUST 17, 2010

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INTRODUCTION

The Securities and Exchange Commission ("Commission" or "SEC") respectfully submits this memorandum in response to the Court's Order of August 17, 2010 and in further support of the entry of the proposed consent judgment.

In its August 17, 2010 Order, the Court directed the Commission to file a memorandum addressing eight categories of questions concerning the proposed settlement of this action. *See* Dkt. #12. In response to the Court's Order, the Commission is submitting this memorandum, a supporting Appendix of Exhibits ("App. Exh.") and the supporting Declaration of Raymond Wolff, Ph.D. concerning an economic analysis performed in connection with this matter. For the reasons set forth in this memorandum, the supporting documents and the Memorandum in Support of Entry of the Proposed Consent Judgment filed by the Commission on August 12, 2010, Dkt. #9, the Commission respectfully submits that the proposed settlement is fair, reasonable, adequate, in the public interest and should be approved. The claims brought by the Commission are consistent with the facts in the investigative record as applied to the relevant legal standards. In particular, the $75 million corporate penalty contemplated by the proposed settlement is consistent with the applicable statutory framework and reasonably accounts for the seriousness of Citigroup's alleged misconduct, principles of specific and general deterrence and prior precedent in corporate disclosure cases, while giving full and fair consideration to the interests of shareholders and the public.

BACKGROUND

On July 29, 2010, the Commission filed a complaint ("Complaint") alleging that defendant Citigroup Inc. ("Citigroup") violated Section 17(a)(2) of the Securities Act of 1933 ("Securities Act"), Section 13(a) of the Securities Exchange Act of 1934 ("Exchange Act") and

Exchange Act Rules 12b-20 and 13a-11. The Complaint alleges that from July through October 2007, Citigroup made a series of materially misleading statements concerning the extent of the company's exposure to sub-prime mortgage-related assets in earnings calls and public filings. Together with the Complaint, the Commission filed the Consent of Defendant Citigroup Inc. and a proposed consent judgment that would resolve this matter on a settled basis. *See* Dkt. # 2. The filing of the Complaint and proposed settlement followed an extensive investigation and careful consideration of the appropriate claims and relief. The Commission's determination of the appropriate claims to assert and relief to seek was the subject of a thorough agency process, careful deliberation and a vote of the Commission. If approved by the Court, the proposed consent judgment would require Citigroup to pay a civil penalty of $75 million and contemplates the establishment of a "fair fund" to distribute the full amount of the penalty to harmed Citigroup shareholders subject to the Court's approval. In addition, the proposed judgment would enjoin Citigroup from violating certain provisions of the federal securities laws.

On the same day the Commission filed this action against Citigroup, it instituted administrative proceedings against Citigroup's former Chief Financial Officer, Gary Crittenden, and Citigroup's former head of Investor Relations, Arthur Tildesley, for their roles in causing Citigroup to make certain of the misleading statements alleged in the Complaint. In their offers of settlement related to those proceedings, Messrs. Crittenden and Tildesley consented to the entry of a cease-and-desist order finding that each of them caused violations by Citigroup of Section 13(a) of the Exchange Act and Exchange Act Rules 12b-20 and 13a-11. In addition, Mr. Crittenden undertook to pay $100,000 and Mr. Tildesley undertook to pay $80,000 for submission to the United States Department of Treasury.

In the Memorandum in Support of Entry of the Proposed Consent Judgment, submitted by the Commission on August 12, 2010, Dkt. #9, the Commission set forth the standards governing judicial review of the proposed consent judgment and the reasons that the proposed judgment is fair and reasonable. The memorandum summarized the allegations in the Complaint, the relief proposed in the consent judgment and the manner in which the Commission sought to balance the applicable factors and considerations based on the evidence and the governing law. At a hearing on August 16, 2010, the Court requested additional information as reflected in its Order dated August 17, 2010. This memorandum addresses the various issues raised by the Court.

A. <u>THE EVIDENCE SUPPORTING THE COMMISSION'S CLAIMS.</u>

In its August 17, 2010 Order, the Court requested that the Commission address the "evidence that supports the charges that defendant committed fraud via negligence" and the reason it did "not charge fraud under Section 10(b) of the Securities Exchange Act of 1934." *See* Dkt. #12 at 1. After extensive development of the investigative record and an application of the facts to the applicable legal standards, the Commission determined that the most appropriate claims to assert against Citigroup were violations of Section 17(a)(2) of the Securities Act, Section 13(a) of the Securities Exchange Act and Exchange Act Rules 12b-20 and 13a-11. The evidence supporting these claims includes: (i) written presentations prepared for Mr. Crittenden, Mr. Tildesley and other investor relations personnel; (ii) statements made by Mr. Crittenden during earnings calls referenced in the Complaint; (iii) the public filings referenced in the Complaint; (iv) drafts of those statements and public filings; (v) electronic mail messages and other communications among Mr. Crittenden, Mr. Tildesley and other Citigroup personnel; (vi) witness testimony taken during the course of the Commission's investigation; and (vii) other

documents.[1] A detailed description of the evidence supporting the claims is set forth below at pages 5-14 together with references to an Appendix of Exhibits containing evidentiary material.

As set forth below, the Commission determined that the evidence established a failure by Citigroup to disclose material information concerning its investment bank's sub-prime exposure as a result of a lack of reasonable care by Citigroup executives and a deeply flawed disclosure process. The evidence did not, however, clearly demonstrate an intent to deceive by Citigroup executives. Messrs. Crittenden and Tildesley were personally involved in the development, drafting, review and approval of the misleading disclosures at issue. Mr. Crittenden personally made the misleading statements alleged in the Complaint. Internal documents provided to Messrs. Crittenden and Tildesley identified the super senior tranches of collateralized debt obligations ("CDOs") and liquidity put assets that were undisclosed as sub-prime exposure. A number of these documents, however, included an explanation as to why those assets were "excluded from analysis" of the investment bank's sub-prime exposure for internal purposes, and there is no witness testimony establishing that sub-prime exposure from super senior CDO tranches and liquidity puts was the subject of substantive attention during meetings attended by Mr. Crittenden or Mr. Tildesley relating to the company's disclosures. Although there is evidence that Mr. Tildesley received an electronic mail message containing a discussion as to whether certain draft disclosures may be interpreted as misleading, the evidence suggests that Mr. Tildesley assumed that the issue was fully addressed and resolved in subsequent revisions to the disclosure.

In sum, although Citigroup's failings were serious and significant, the evidence did not warrant the assertion of scienter-based claims under Section 10(b) of the Exchange Act or other

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[1] During its investigation, the Commission's staff took the formal testimony of fourteen witnesses, conducted interviews of numerous additional witnesses and received and reviewed more than twenty-eight million pages of documents obtained from Citigroup and other sources.

scienter-based fraud provisions of the federal securities laws. *See Ernst & Ernst v. Hochfelder et al.*, 425 U.S. 185, 193 n. 12 (1976) (to sustain a fraud charge under Rule 10(b) and Exchange Act 10b-5, the Commission has the burden of establishing scienter, which is defined as "an intent to deceive, manipulate or defraud"). The Commission did not believe that allegations of "an intent to deceive, manipulate or defraud" were appropriate under all of the circumstances. *Id.* The Commission believes that the fraud claims it asserted under Section 17(a)(2) of the Securities Act together with the other violations of the securities laws alleged in the Complaint are entirely appropriate.

Section 17(a)(2) prohibits securities fraud and makes unlawful materially false or misleading misrepresentations and omissions in the offer or sale of securities. *See* 15 U.S.C. §77q(a)(2); *see also Aaron v. SEC*, 446 U.S. 680, 697 (1980); *Ernst & Ernst v. Hochfelder et al.*, 425 U.S. 185, 195 (1976). A misrepresentation or omission is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988). Section 17(a)(2) does not require a showing of scienter. *See Aaron*, 446 U.S. at 696-697. Liability for a violation of Section 17(a)(2) does not require an intent to defraud and may be established based on negligent conduct. *See Weiss v. SEC*, 468 F.3d 849, 855 (D.C. Cir. 2006) (proof of negligence is sufficient to establish a violation of Section 17(a)(2)); *SEC v. Steadman*, 967 F.2d 636, 643 n. 5 (D.C. Cir. 1992)(same).

A detailed description of the evidence supporting the claims here follows:

First Quarter 2007

As alleged in the Complaint, shortly after joining Citigroup as its Chief Financial Officer, Mr. Crittenden requested information and briefings on Citigroup's exposure to sub-prime

mortgage-related assets. *See* Complaint ¶ 13, App Ex. 1. In April 2007, Citigroup's investment bank prepared a PowerPoint presentation, entitled "Overview of Subprime Exposure in the Global Structured Credit Product Business" ("April Overview Presentation"), which contained a summary showing that Citigroup's investment bank's Global Structured Credit Product ("GSCP") unit had approximately $9.7 billion in sub-prime exposure excluding certain sub-prime assets related to secondary trading and market making activities. *See* App. Exh. 2 at 00203071. A separate section of the April Overview Presentation entitled "Excluded from Analysis" further showed that GSCP had $37.8 billion of sub-prime exposure from super senior tranches of CDOs and from liquidity put positions. *Id.* at 00203077, 00203082. This section described the super senior CDO tranches and liquidity puts as having an "extremely small" risk of default and explained that, as a result, the $37.8 billion was "excluded" from the total sub-prime exposure set forth in the summary. *Id.* at 00203077, 00203082. Both Mr. Crittenden and Mr. Tildesley received copies of the April Overview Presentation, but neither recalls reviewing the presentation. *See* App. Exh. 18 at 63:1 – 64:9 (referring to the April Overview Presentation that was attached to Mr. Crittenden's testimony transcript as Exhibit 273), Exh. 20 at 59:1 – 61:1.[2]

<u>Second Quarter 2007</u>

In July 2007, in preparation for its second quarter earnings release, Citigroup's investment bank created a ninety-six page PowerPoint presentation entitled "Second Quarter 2007 Earnings Review" ("July Flash Deck"). Included in the July Flash Deck was a seven-page section prepared by Citigroup Risk Management personnel that addressed areas of risk to the investment bank. *See* App. Exh. 3. In that section was a page entitled "Sub-prime" that

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[2] Citigroup did not include disclosures concerning sub-prime exposure during the earnings call for the first quarter of 2007.

contained a table showing approximately $9.5 billion in sub-prime exposure from super senior tranches of CDOs and $24.5 billion of exposure from liquidity puts. *Id*. at 04365198. The July Flash Deck was presented by Citigroup's investment bank at a meeting known as a "Flash Call" that was attended by, among others, Mr. Crittenden, Mr. Tildesley, three of Mr. Tildesley's reports from Investor Relations (Kavita Mahtani, Stephen Schiller and Pablo Burbridge), Citigroup's Controller, John Gerspach, Citigroup's Chief Risk Officer, David Bushnell, and the head of Financial Planning and Analysis, Steffan Parratt. Witnesses who testified during the Commission's investigation could not recall any discussion of sub-prime exposure during the July Flash Call. *See* App. Exh. 18 at 80:19 – 82:15, Exh. 25 at 24:9-25:14. Neither Mr. Crittenden nor Mr. Tildesley recalled seeing the references to super senior tranches or liquidity puts in the July Flash Deck. *See* App. Exh.18 at 80:19 – 82:15, Exh. 20 at 168:16 – 170:1.

Immediately following the July 10 Flash Call, Mr. Crittenden, Mr. Tildesley, Ms. Mahtani, other members of Mr. Tildesley's staff from Investor Relations and representatives from Citigroup's investment bank met at Mr. Crittenden's request to review GSCP's sub-prime holdings. During this meeting, the investment bank distributed an update to the April Overview Presentation ("July Overview Presentation"). Like the April Overview Presentation, the July Overview Presentation contained a summary showing that GSCP, a unit in Citigroup's investment bank, had approximately $13 billion of sub-prime exposure, and a separate section, entitled "Excluded from Analysis" showing that GSCP had approximately $39.5 billion of additional sub-prime exposure from super senior CDO tranches and liquidity put positions with an "extremely small" risk of default. *See* App. Exh. 4 at 01255027, 01255032. Mr. Crittenden and Mr. Tildesley did not recall whether super senior CDO tranches or liquidity puts were

discussed during the July 10 meeting that followed the July 10 Flash Call. *See* App. Exh. 18 at 90:5 – 92:1, Exh. 20 at 120:11 – 121:18.[3]

Mr. Crittenden, Mr. Tildesley, Ms. Mahtani and other members of Mr. Tildesley's Investor Relations staff participated in preparing drafts of and finalizing Citigroup's second quarter earnings disclosures. On July 20 and 27, 2007, Citigroup conducted telephone conference calls with investors and analysts in which Mr. Crittenden represented that the company's investment bank had reduced its exposure to sub-prime assets to $13 billion. On the July 20, 2007 investor call, Mr. Crittenden stated:

> Our subprime exposure in Markets and Banking can be divided into two categories, which together account for 2% of the Securities and Banking revenues in 2006. The first is secured lending and the second is trading. With regards to secured lending, we have been actively managing down our exposure for some time. We had $24 billion in assets here at the end of 2006. It was $20 billion at the end of the first quarter [of 2007] and $13 billion at the end of the second quarter while adjusting at the same time collateral and margin requirements.

App. Exh. 5 at 00000146-147.

On the July 27, 2007 call, Mr. Crittenden stated "[s]ince our last fixed income investor review we've reduced our exposure to sub-prime secured lending by roughly 45% to $13 billion at the end of the second quarter while adjusting collateral and margin requirements." App. Exh. 6 at 00895608.

In response to questions during the July 20 and 27, 2007 calls, Mr. Crittenden made additional statements that described $13 billion as the investment bank's total sub-prime exposure from CDOs and collateralized loan obligations. *See* App. Exh. 5 at 00000154 – 155, Exh. 6 at 00895612 – 613. These statements understated Citigroup's investment bank's sub-

[3] One of the co-heads of Risk Management for Citigroup's investment bank testified that he did not recall the super senior CDO tranches or liquidity puts being discussed during the meeting. *See* App. Exh. 24 at 38:14.

prime exposure by more than $39 billion because they excluded the exposure attributable to the super senior CDO tranches and liquidity puts.

Mr. Crittenden has testified that at the time he made these statements in July, he was not aware that Citigroup held super senior CDO tranches and liquidity puts and there is no witness testimony establishing that these issues were specifically raised with him. *See* App. Exh. 19 at 148:8 – 149:25. Evidence indicates that until September, Mr. Tildesley believed that the super senior CDO tranches and liquidity puts were subsumed by the reference to "trading" assets excluded from the number disclosed during the July 20, 2007 earnings call. *See* App. Exh. 7.

Third Quarter 2007

By August or September 2007, Mr. Crittenden knew that Citigroup had significant super senior holdings, which he testified he understood to be "completely safe . . . better than investment grade." *See* App. Exh. 18 at 148:8 – 149:25, Exh. 19 at 249:6 – 251:25, 255:6 – 257:18. Around this time, Citigroup began re-examining its method of determining the market value of super senior tranches of CDOs. The valuation methods under discussion showed that based on developing market conditions, the company could incur current losses of $15 million to over $2 billion. In early September 2007, Mr. Crittenden received a briefing on the valuation issues related to the super senior CDO tranches. *See* App. Exh. 8. In mid-September, both Messrs. Crittenden and Tildesley received information that the losses on the super senior CDO tranches were anticipated to be in the range of $300 million to $500 million. *See* App. Exh. 9. In anticipation of losses for the third quarter, including the anticipated losses on the super senior tranches, Citigroup decided on or around September 19, 2007, to issue a pre-announcement of its results for the third quarter of 2007.

Messrs. Crittenden and Tildesley had responsibility for the drafting, review and approval of a script for a recorded pre-announcement call with investors and analysts. The initial draft created by Mr. Tildesley did not specifically reference the super senior CDO tranches or liquidity puts, but included a figure for losses on CDOs ($1.2 billion) that incorporated the $300 million anticipated losses on the super senior CDO tranches and liquidity puts. *See* App. Exh. 10. Mr. Crittenden, however, requested that the draft be modified to clarify that at least a portion of the losses related to the "highest rated tranches." *See* App. Exh. 23 at 189:17 – 192:9. Ms. Mahtani incorporated the language that Mr. Crittenden requested and circulated a revised draft to various recipients including, but not limited to, Mr. Tildesley. *See* App. Exh. 11.

On September 29 and 30, 2007, Mr. Tildesley was copied on an electronic mail discussion between certain members of his Investor Relations staff, and members of the investment bank, in which Shawn Feeney, a member of the investment bank, asked whether the draft script might confuse investors into believing that the $13 billion exposure figure included all of the investment bank's sub-prime exposure, and suggested revising the script to remove the reference to "highest rated tranches" so as not to raise questions about the super senior CDO tranches. *See* App. Exh. 12. Ms. Mahtani responded to Mr. Feeney's email by stating that "the listener will conclude that the total sub-prime exposure is $13 [billion] since we've never talked about the super seniors separately." *Id.* She further stated that if "the super senior concept" was not introduced, she was not sure they could "do anything other than let the listener conclude that total sub-prime exposure is $13 [billion]. Thoughts?" *Id.* Mr. Tildesley did not respond to either Mr. Feeney's or Ms. Mahtani's electronic mail messages. *See id.* Ultimately a revised draft was developed and circulated that removed one of two references to "the highest rated tranches," but

did not clarify the ambiguity raised by Mr. Feeney. *See id*. There is no evidence that Mr. Crittenden received a copy of or was made aware of this electronic mail exchange.

On October 1, 2007, Citigroup released the approved pre-announcement. In the pre-announcement, Mr. Crittenden stated:

> We took significant write-downs in the value of mortgage-backed securities in the "warehouses" and CDOs.
>
> This is a business where we accumulate pools of mortgages or mortgage backed securities (mostly sub-prime), and hold them in a warehouse until we have sufficient assets to create a CDO for sale in the market.
>
> We typically have sold the lowest rated tranches of the CDOs and held onto most of the highest rated tranches, where historically values have been stable. In July, however, actions by the rating agencies which involved methodology changes and downgrades of certain CDO tranches caused investors to suddenly pull back from the entire CDO market, resulting in a rapid decline in CDO values.
>
> Starting in January of this year, we began to lower our exposure to these sub-prime assets as we saw the market changing. At the beginning of this year we had $24 billion of secured sub-prime exposure in our lending and structuring business. That number was $13 billion at the end of June, and declined slightly this quarter. Despite our aggressive efforts this year to work these positions down, and to put in place appropriate hedges, we were still holding mortgage assets in our warehouse, or holding undistributed tranches of CDOs, when the market dislocated. Although hedging activity produced gains, they only partially offset our losses, which netted to a write-down of approximately $1.0 billion.
>
> App. Exh. 13 at Exhibit 99.2 page 3 of 7.

In the pre-announcement, Mr. Crittenden did not disclose the amount of the investment bank's sub-prime exposure from super senior CDO tranches and liquidity puts. Citigroup's October 1, 2007 pre-announcement script was incorporated in a Form 8-K that was filed with the Commission. *See id*., Exh. 99.2. Mr. Crittenden testified that at the time he approved the October 1, 2007 pre-announcement he thought the super senior CDO tranches "had low risk of loss" and were not part of the exposure the company had to the sub-prime market. App. Exh.19 at 270:17 – 276:23.

On October 4, 2007, Citigroup held a Flash Call to discuss internally results for the third quarter of 2007. Messrs. Crittenden and Tildesley attended this meeting together with others including Citigroup's Controller, John Gerspach, deputy Controller and head of Accounting Policy, Robert Traficanti and head of Financial Planning and Analysis, Nayan Kisnadwala. A sixty-three page PowerPoint presentation was prepared for the call that included a five-page section prepared by Risk Management entitled "Third Quarter 2007 Earnings Review, October 4, 2007." *See* App. Exh. 14. The Risk Management portion of the presentation included a page containing a box labeled "Sub-Prime Exposure" listing several categories of sub-prime exposure, including $16.1 billion in super senior CDO tranches and $27 billion in liquidity puts. *Id.* at 04346675. Witnesses who attended the October 4 Flash Call could not recall whether there was any discussion of sub-prime exposure, or any mention of the super senior tranches or liquidity puts during the October 4, 2007 call. *See* App. Exh. 21 at 449:10 – 454:3, Exh. 22 at 108:21 – 111:25, Exh. 24 at 117:19 – 121:14.

Between October 4 and October 15, 2007, investor relations personnel worked on preparing the script for the third quarter earnings call. They sought review and comments from others throughout Citigroup. There is no evidence of anyone raising questions about the sub-prime exposure numbers in the draft script. The initial draft script referred to the total CDO-related write downs, which included approximately $300 million of losses on the super senior tranches, and then stated "[o]ur subprime exposure related to these positions stood at $XX billion at the end of the quarter, compared to $13 billion at the end of last quarter and $24 billion at the beginning of the year." App. Exh. 15 at 00208546. That language remained essentially unchanged through various iterations of the script. During the course of the drafting of the script, Mr. Tildesley and Ms. Mahtani met several times with Mr. Crittenden to review and edit

the script. *See* App. Exh. 23 at 258:8 – 260:19. There is no evidence of any discussion during this period of whether the super senior CDO tranches and liquidity puts should be discussed in the script, or whether the exposure from those instruments should be included in the sub-prime exposure figure. Citigroup held its regular earnings call for the third quarter on October 15, 2007. On that call, reading from a script that both he and Mr. Tildesley approved, Mr. Crittenden made the following statements describing the source of Citigroup's losses for the quarter:

> " . . . $1.6 billion from write-downs in mortgage-backed securities, which were warehoused for future CDO or CLO securitizations as well as CDO positions. Our sub-prime exposure related to these positions was $24 billion at the beginning of the year, $13 billion at the end of the second quarter, and declined slightly during the third quarter."

App. Exh. 16 at 00000237.

By this time, the investment bank's sub-prime exposure from the super senior CDO tranches and the liquidity puts was approximately $43 billion.

Following the October 15, 2007 Earnings Call, certain rating agencies downgraded tranches of CDOs backed by sub-prime assets. Beginning on October 22, Mr. Crittenden participated in meetings discussing the impact of the rating agency downgrades. In one such meeting on or about October 27, Citigroup decided that significant losses resulting from the downgrades in the range of $8 billion to $11 billion would be disclosed. Mr. Crittenden testified that it was during this series of meetings in late October 2007 that he first understood the super senior tranches "as having the potential for major risk of loss." App. Exh. 19 at 284:24 – 290:20.

On November 4, 2007, Citigroup issued a press release, which Mr. Crittenden reviewed and approved, that for the first time disclosed that the investment bank held more than $55

billion in sub-prime exposure including the bank's exposure from super senior CDO tranches and liquidity puts. *See* App. Exh. 17.

B. REFERENCES TO SENIOR MANAGEMENT IN THE COMPLAINT.

The Court's August 17, 2010 Order requests that the Commission identify the individuals referred to in the Complaint as "senior management." Attached as Exhibit 1 of the Appendix of Exhibits is a chart listing, with respect to each paragraph of the Complaint referencing "senior management," the individuals included in those references. For the Court's convenience, the chart also includes those individuals referred to as "IR Personnel" in the Complaint.

C. THE COMMISSION'S ADMINISTRATIVE PROCEEDINGS AGAINST CRITTENDEN AND TILDESLEY.

In its August 17, 2010 Order, the Court directed the Commission to address its decision to pursue claims against Mr. Crittenden and Mr. Tildesley, and not other individuals, based on the misconduct alleged in the Complaint. *See* Dkt. #12 at 1.

The Commission pursued claims against Messrs. Crittenden and Tildesley because the investigative record established that they caused Citigroup to make certain of the misleading statements alleged in the Complaint. In particular, Mr. Crittenden approved and made the statements during the earnings calls concerning the investment bank's sub-prime exposure that are the subject of the Complaint. As described above, prior to making the misleading statements, Mr. Crittenden had been provided with several documents containing information concerning the undisclosed exposure relating to super senior CDO tranches and liquidity puts. Despite having such information, Mr. Crittenden failed to include these items in the description of sub-prime exposure he provided to investors.

As head of Investor Relations, Mr. Tildesley was responsible for supervising the preparation of the scripts used for earnings calls. Like Mr. Crittenden, Mr. Tildesley also

received several documents that contained information about sub-prime exposure relating to super senior CDO tranches and liquidity puts. In addition, Mr. Tildesley was aware of the ongoing and increasing investor and analyst interest in Citigroup's sub-prime exposure. Mr. Tildesley nevertheless approved disclosures of Citigroup's sub-prime exposure that misleadingly excluded exposure relating to super senior CDO tranches and liquidity puts. Moreover, Mr. Tildesley received an electronic mail message from a subordinate expressly referring to the risk that investors might be confused by draft disclosures concerning these issues. *See* App. Exh. 12.

In addition to the claims asserted against Messrs. Crittenden and Tildesley, the Commission carefully considered whether claims should be asserted against other individuals in connection with the false and misleading disclosures concerning sub-prime exposure. After careful consideration, it was determined that claims against additional individuals were not warranted based on the investigative record. No other individuals were tied to the misleading disclosures more closely than Messrs. Crittenden and Tildesley. Both Messrs. Crittenden and Tildesley served in senior supervisory positions in which they were responsible for developing and communicating Citigroup's disclosures of its sub-prime exposure as well as ensuring the accuracy of those disclosures. In particular, both played significant roles in the preparation of Citigroup's misleading October 1, 2007 disclosure. During his investigative testimony, Mr. Crittenden acknowledged that, as Chief Financial Officer, he was ultimately responsible for the accuracy of the disclosures at issue in the Complaint. *See* App. Exh. 19 at 233:1-7.[4]

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[4] The decision to not charge certain individuals or to not bring certain charges is left to the discretion of the Commission. *See e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement"). Moreover, courts have held that consent judgments should be assessed based on the allegations in the complaint independently of charges or allegations that could have been, but were not made. *See United States v. Microsoft Corp.*, 56 F. 3d 1448,

D. THE PROPOSED $75 MILLION CORPORATE PENALTY IS FAIR, ADEQUATE, REASONABLE AND WILL SERVE THE PUBLIC INTEREST.

In its August 17, 2010 Order, the Court requested that the Commission address why the $75 million civil penalty included in the proposed consent judgment is fair, adequate, reasonable and in the public interest. *See* Dkt. #12 at 1-2. The Court also asked the extent to which the proposed penalty is consistent with the Commission's policy on corporate penalties. *See id*. For the reasons discussed below and in the Commission's prior submissions, the proposed penalty is fair, reasonable and in the public interest. It also is fully consistent with the Commission's corporate penalty guidance.

The Commission's authority to seek monetary relief in cases such as the present action is governed by the Remedies Act, which is codified in Section 20(d)(2) of the Securities Act and Section 21(d)(3) of the Exchange Act. The Remedies Act sets forth three "tiers" of penalties, with the amount of the penalty dependent on the nature of the violative conduct and whether the penalty is being sought from a natural person or other entity. For violations that occurred in 2007, the statutes provide the Commission authority to seek monetary penalties from corporations in an amount that does not exceed the greater of: (i) the gross amount of pecuniary gain to the corporation as a result of the violation, or (ii) a penalty for each violation up to $65,000 for first tier violations, $325,000 for second tier violations, or $650,000 for third tier violations.[5] *See* 17 C.F.R. §201.1004. Congress also provided the Commission authority to seek

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1459 (D.C. Cir. 1995) (finding that the mandate that the proposed settlement be in the public interest does not authorize a district court to "redraft the complaint").

[5] Second tier violations must involve fraud deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. A violation is considered to be third tier if it involves fraud, deceit, manipulation or deliberate or reckless disregard of a regulatory requirement and directly or indirectly results in substantial losses or created a significant risk of substantial losses to other persons. *See* 15 U.S.C. §77t(d), 15 U.S.C. §78u(d)(3).

penalties from natural persons for either the gross pecuniary gain to the person as a result of the violation or a penalty for each violation not to exceed $6,500 (first tier), $65,000 (second tier) or $130,000 (third tier). *See id*. To determine the gross pecuniary gain to the defendant from the violation, there must be a causal connection between the gain and the alleged wrongdoing. *See SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000); *SEC v. First City Financial Corp., Ltd.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989).

1. The Commission's Economic Analysis of Citigroup's Estimated Pecuniary Gain.

In developing the appropriate penalty in accordance with the Remedies Act, the Commission considered an economic analysis of the approximate pecuniary gain to Citigroup based on its sale of bonds during the period it is alleged to have issued misleading statements concerning its sub-prime exposure. Economists in the Commission's Division of Risk Strategy and Financial Innovation ("Risk Fin") conducted an economic analysis by performing an event study using a portfolio of Citigroup's domestic bonds with maturity dates prior to 2018. *See* Declaration of Raymond Wolff, Ph.D. ("Wolff Decl.) ¶¶ 2-6.[6] The event study estimated the amount the bond prices were inflated by Citigroup's alleged failure to fully disclose its sub-prime exposure by analyzing the approximate price impact on a portfolio of Citigroup bonds when the full extent of the bank's sub-prime exposure was publicly announced, controlling for changes in comparable treasury bonds. *See* Wolff Decl. ¶¶ 3-4, 7-13.

Using this methodology, Risk Fin estimated that the portfolio bond price fell .65% more than similar maturity treasury securities on the trading day following Citigroup's November 4, 2007 announcement that it held approximately $55 billion in sub-prime exposure. *See* Wolff Decl. ¶¶ 3-4, 7-13. Based on this estimate, and taking into consideration other concurrent

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[6] A description of Risk Fin's economic analysis is set forth in the Declaration of Raymond Wolff, Ph.D. submitted herewith. Dr. Wolff is a Financial Economist at the Commission.

disclosures made by Citigroup on November 4, 2007, Risk Fin estimated that the benefit to Citigroup from issuing bonds prior to revealing that it had an additional $43 billion in sub-prime exposure fell into a range, the lower limit of which was $0 and the upper limit of which was $123 million. *See* Wolff Decl. ¶¶ 5-6, 17-20, Exhs. 1 and 2. The Commission used this range as an element of determining the appropriate proposed penalty.

2. The Commission's Consideration of the Relevant Penalty Factors.

The Commission also considered each of the factors set forth in the Commission's corporate penalty guidance, *Statement of the Securities and Exchange Commission Concerning Financial Penalties* ("*Penalty Statement*"), SEC Rel. No. 2006-04 (Jan. 4, 2006), which identifies nine factors "that may be pertinent" to the assessment of whether to seek financial penalties against a corporation. These factors include: (i) corporate benefits from the violation; (ii) impact on injured investors and current shareholders; (iii) need for deterrence; (iv) pervasiveness of the conduct; (v) degree of scienter; (vi) extent of the harm to investors; (vii) difficulty of detecting the violations; (viii) voluntary remedial measures; and (ix) extent of the cooperation, if any, with the Commission and other law enforcement agencies. *Id*. Not every factor applies in every case and some factors carry more weight than others. The Commission has stated that the two principal considerations are "*[t]he presence or absence of a direct benefit to the corporation as a result of the violation"* and "[t]*he degree to which the penalty will recompense or further harm the injured shareholders*." *Id*. at 3 (emphasis in original). In addition, the Commission "proceeds from the fundamental principle that corporate penalties are an essential part of an aggressive and comprehensive program to enforce the federal securities laws, and that the availability of a corporate penalty, as one of a range of remedies, contributes to

the Commission's ability to achieve the appropriate level of deterrence through its decision in a particular case." *Id*. at 3.

As set forth below, the $75 million proposed penalty is fully consistent with this guidance.

a. The presence of a direct benefit to the corporation as a result of the violation.

As described above and in the Wolff Declaration, the Commission performed an economic analysis to determine the presence of a pecuniary benefit to Citigroup as a result of issuing bonds during the period it is alleged to have materially understated the amount of sub-prime exposure in public disclosures. The proposed $75 million penalty falls squarely within the range of the benefit Citigroup is estimated to have received from the misconduct alleged in the Complaint. As noted above, the presence of a direct benefit to a corporation is one of the primary factors the Commission considers in determining the appropriateness of a penalty.

b. The degree to which the penalty will recompense or further harm the injured shareholders.

The proposed penalty amount achieves a fair balance between providing compensation to injured shareholders without unfairly burdening current shareholders. The proposed $75 million penalty represents less than 0.3% of Citigroup's revenue for the most recent quarter, and should not cause an undue negative financial impact on the company's business, or significant harm to current Citigroup shareholders. At the same time, the penalty could provide relief to shareholders harmed by the misrepresentations alleged in the Complaint. The proposed consent judgment contemplates the establishment of a fair fund, pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002, so that the entire $75 million penalty can be distributed to harmed shareholders. As part of the proposed settlement, Citigroup has agreed that

it will pay all of the costs associated with distributing the proposed penalty amount separate from the disgorgement and penalty amounts it has agreed to pay as part of the judgment. The distribution of the funds would be subject to the Court's approval and further order of the Court. *See* Dkt. #2, Exh. A at 3-4.

Any distribution plan for the contemplated fair fund proposed by the Commission is expected to exclude any officers, directors and employees of Citigroup who, based on information in the investigative record, knew, or had access to, undisclosed information concerning Citigroup's sub-prime exposure from June 20, 2007 through November 4, 2007.[7]

This factor, which also is one of the primary factors considered by the Commission, firmly supports the proposed $75 million penalty.

c. The need to deter the particular type of offense.

The $75 million penalty contemplated by the proposed settlement takes into account the seriousness of the misconduct alleged in the Commission's Complaint and the need for general and specific deterrence. It is sufficiently substantial to send a clear message that misleading statements by a corporation on issues of importance to investors cannot go unaddressed.

d. The extent of injury to innocent parties.

At the same time that the proposed penalty sends a serious message of deterrence, it does not impose an undue burden on innocent shareholders. Citigroup currently has more than 28 billion shares outstanding. Its securities are among the most widely traded in the world. Because of the large number of current shareholders and the size of the company, the $75 million penalty should not have an undue negative financial impact on innocent parties. Indeed, the

[7] In response to questions raised in the Court's August 17, 2010 Order, the Commission has provided additional information concerning the source of the proposed fair fund and the possible beneficiaries of the fund at pages 24-26 of this Memorandum.

Commission estimates that the penalty will equal less than one-third of one cent per share outstanding.

e. Whether complicity in the violation is widespread throughout the corporation.

Although a relatively small number of individuals were involved in the conduct underlying the securities law violations alleged in the Complaint, the disclosure failures resulted from deeply flawed processes together with careless and irresponsible actions and inaction by senior corporate executives including Citigroup's former Chief Financial Officer. The proposed penalty reasonably reflects these failures.

f. The level of intent on the part of the perpetrators.

As described above, the allegations of the Complaint involve careless and unreasonable conduct by senior corporate personnel. Although there is no allegation of scienter, the Complaint alleges fraud and misleading statements arising from careless and irresponsible conduct of senior personnel.

g. The degree of difficulty in detecting the particular type of offense.

The November 4, 2007 announcement by Citigroup concerning the full extent of its sub-prime exposure revealed the inaccuracy of its prior public statements. The extensive review of the documentary record during the course of the investigation permitted detection of the specific conduct alleged in the Complaint.

h. Presence or lack of remedial steps by the corporation.

Citigroup took several remedial steps following the wrongful conduct alleged in the Complaint. It provided certain additional information concerning its sub-prime exposure in its November 2007 disclosures. In addition, the company made significant changes in its senior

management. The company announced the departure of its Chief Executive Officer and others in November 2007. Mr. Crittenden also has left the company.

i. Extent of cooperation with the Commission and other law enforcement.

Citigroup reasonably cooperated with the Commission's investigation.

j. Other relevant factors considered by the Commission.

In addition to the specific factors listed above, the Commission also considered other factors relating to the interests of the public and investors. For example, the Commission considered the guidance providing that the Commission is expected to "seek penalties from culpable individual offenders acting for a corporation." *Penalty Statement* at 2. Accordingly, the Commission brought claims against Mr. Crittenden and Mr. Tildesley in connection with Citigroup's disclosure violations. Mr. Crittenden and Mr. Tildesley each consented to the entry of a cease-and-desist order alleging that they caused violations of Section 13(a) of the Exchange Act and Exchange Act Rules 12b-20 and 13a-11. In the order, Mr. Crittenden undertook to pay $100,000 and Mr. Tildesley undertook to pay $80,000. Under the applicable statutory provisions, there is no proper legal basis to require that Mr. Crittenden and Mr. Tildesley pay the proposed $75 million corporate penalty. The statutory framework does not support such a result.[8]

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[8] At the hearing on August 16, 2010, the Court referenced the Commission's settlement with defendant Eugene Melnyk in *SEC v. Biovail Corp.*, Civil Action No. 08 Civ. 2979 (S.D.N.Y.) (LAK). *See* Dkt. #13 at 56:8-15. In *SEC v. Biovail Corp.*, defendant Melnyk stipulated to entry of judgment as to the Commission's claim that he violated Section 13(d) of the Exchange Act and Exchange Act Rules 13d-1 and 13d-2 by failing to disclose his ownership of Biovail shares through certain trusts. *See* SEC Lit. Rel. No. 20880 (Feb. 4, 2009). In addition to a permanent injunction, the Commission obtained monetary relief from Melnyk in the form of $1 in disgorgement and a $1,000,000 civil penalty. *See id.* As it did in this case, the Commission calculated the penalty in the settlement with Melnyk in accordance with the authority provided under the Remedies Act. The calculation of Melnyk's penalty was not based on pecuniary gain, but on the tier system authorized under the Remedies Act and Melnyk's filing of sixteen Schedules D that failed to disclose his interest in Biovail shares owned by trusts. By treating each filing

3. The Commission's Consideration of Comparable Prior Precedent.

In its August 17, 2010 Order, the Court requested that the Commission address how the proposed $75 million penalty compares with "other penalties paid under comparable facts and circumstances." Dkt. #12 at 2. The proposed penalty is reasonably consistent with penalties imposed in recent cases involving inadequate disclosures by large financial institutions.

In *SEC v. Bank of America Corp.*, Nos. 09 Civ. 6829 (JSR), 10 Civ. 0215 (JSR), 2010 WL 624581, at *6 (S.D.N.Y. Feb. 22, 2010), the court approved a settlement that required Bank of America to pay a penalty of $150 million in connection with proxy disclosure violations related to the company's merger with Merrill Lynch & Co. ("Merrill"). The settlement resolved two separate cases in which Bank of America was alleged to have engaged in two different disclosure violations. In the first case, filed on August 3, 2009, the Commission alleged that Bank of America failed to disclose certain compensation-related information. In the second case, filed on January 12, 2010, the Commission alleged that Bank of America failed to disclose certain losses sustained by Merrill prior to the merger vote. The settlement approved by the court on February 22, 2010 included a $150 million penalty and resulted in the resolution of both cases. As is true of the proposed penalty in this case, the full amount of the penalty approved by the court in the Bank of America case is expected to be distributed to harmed shareholders. *See Bank of America Corp.*, 09 Civ. 6829 (S.D.N.Y. July 16, 2010), Dkt. #110 (approving the proposed distribution plan submitted by the Commission on July 2, 2010).

The $75 million corporate penalty proposed in this case also is reasonably consistent with the civil penalty imposed in *SEC v. Wachovia Corp.*, Civ. A. No. 04-1911, SEC Rel. No. 2004-152 (D.D.C. Nov. 4, 2004). In *Wachovia Corp.*, the court approved a settlement that imposed a

by Melnyk as a violation and multiplying each times the statutorily prescribed dollar amount, the Commission requested and obtained a $1,000,000 penalty.

$37 million penalty on Wachovia for alleged violations of both the proxy rules and corporate reporting provisions. The Commission alleged that after the announcement of a merger, Wachovia failed to disclose in proxy statements and subsequent periodic reports management's authorization of certain stock purchases intended to increase the price of the company's stock and effectuate the merger at a higher level.

Although there are facts and circumstances that distinguish each of *Bank of America Corp.* and *Wachovia Corp.* from this case, the Commission believes the proposed $75 million penalty amount is reasonably consistent with the penalties in both of those cases. [9]

4. The Source of the Fair Fund and Contemplated Beneficiaries.

In its August 17, 2010 Order, the Court also asked the Commission for additional information about: (i) the source of the money that will comprise the proposed fair fund, and (ii) the beneficiaries of the contemplated fair fund. *See* Dkt. #12 at 2. Under the proposed consent judgment, the source of the fair fund is the penalty amount to be paid by Citigroup. The fund will be distributed to harmed shareholders based on a plan to be submitted by the Commission and approved by the Court.

The proposed judgment directs Citigroup to pay $75 million into an interest-bearing account with the Court Registry Investment System (CRIS) or other type of interest bearing

[9] In addition to *Bank of America Corp.* and *Wachovia Corp.*, the Commission also examined other cases involving large, complex issuers that resulted in a wide range of civil monetary penalties. *See e.g.*, *SEC v. Raytheon Co.*, SEC Lit. Rel. No. 19747 (June 28, 2006) (imposing a $12 million penalty for false and misleading disclosures and improper accounting practices which hid deterioration in important business line); *SEC v. Healthsouth Corp.*, SEC Lit. Rel. No. 19280 (June 23, 2005) (imposing a $100 million penalty for a $1.4 billion earnings overstatement in case involving intentional or reckless fraud claims under Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5); *SEC v. Huntington Bank Shares, Inc.*, SEC Lit. Rel. No. 19243 (June 2, 2005) (imposing a $7.5 million penalty for material misstatements of earnings in 2002 and 2003); *SEC v. Halliburton Co. and Robert Muchmore*, SEC Lit. Rel. No. 18817 (Aug. 3, 2004) (imposing a $7.5 million penalty against Halliburton for violation Section 17(a)(2) and (3) of the Securities Act in connection with misleading disclosures in various filings, earnings calls and press releases that overstated the company's pre-tax earnings by tens of millions of dollars each period).

account. In particular, the proposed judgment provides that the Commission may "propose a plan to distribute the Fund subject to the Court's approval" and the fund shall be distributed "pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002." Dkt. #2, Exh. A at 3-4. Accordingly, distribution of the funds is subject to further order of the Court. The Commission expects to propose a specific plan to the Court based in part on future developments in certain pending private litigation involving Citigroup. To facilitate the efficient distribution of the proposed penalty funds to harmed shareholders, the proposed judgment contemplates that the distribution of funds will be deferred pending the resolution and entry of judgment in cases against Citigroup that arise, in part, out of the same facts alleged in the Commission's Complaint. *See e.g.*, *In Re Citigroup Inc. Securities Litigation*, Master File No. 07 Civ. 990 1 (S.D.N.Y.) (SHS); *In Re Citigroup Inc. Bond Litigation*, Civil Action No. 08 Civ. 9522 (S.D.N.Y) (SHS). The Commission may seek to utilize any distribution mechanisms that are established in the related private litigations that would assist in the efficient and effective identification of harmed shareholders, the verification of claims and the distribution of funds.

The Commission expects that the fair fund beneficiaries in its proposed plan will include those shareholders who purchased Citigroup securities from July 20, 2007 through November 4, 2007 – the time period of the misleading disclosures alleged in the Complaint. The distribution of the contemplated fair fund is expected to exclude any officers, directors and employees of Citigroup who, based on information in the investigative record, knew, or had access to, undisclosed information concerning Citigroup's sub-prime exposure during the relevant time period.

As described above, the proposed consent judgment provides that the costs associated with distribution of the fair fund, including the costs of the distribution agent, shall be paid

separately by Citigroup, and shall not be paid out of the monies Citigroup has agreed to pay pursuant to the judgment. Additionally, the Commission understands that Citigroup has repaid the funds it received under the Troubled Asset Relief Program ("TARP") and therefore no TARP funds will be used to fund the proposed settlement.[10] In any event, a company's status as a TARP recipient should not preclude the imposition of monetary relief under the governing statutory provisions. Several courts have recently approved judgments in enforcement actions providing for substantial monetary relief against recipients of TARP funds.[11]

E. <u>THE ADDITIONAL RELIEF PROPOSED BY MR. LERNER.</u>

In its August 17, 2010 Order, the Court asked whether the Commission had any "response to the forms of non-monetary relief proposed by Stanley Lerner" in his memorandum seeking to appear as *amicus curiae*.[12] *See* Dkt. #11. The additional relief proposed by Mr. Lerner appears to be based primarily on unique aspects of the Bank of America consent judgment and is not applicable to the present action.

For example, Mr. Lerner proposes that the proposed settlement include a requirement that Citigroup hire a compensation consultant. *See* Dkt. #11 at 12. Unlike *Bank of America Corp.*,

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[10] Citigroup has received $45 billion in taxpayer support, $25 billion of which was converted to a government-ownership stake, which was converted into Citigroup common stock in the summer of 2009. The United States Department of Treasury ("Treasury") has begun selling shares of Citigroup stock. Thus far, Treasury has sold at least 2.6 billion shares of Citigroup stock for approximately $10.5 billion. *See* http://www.financialstability.gov./latest/pr_723b2010.html.

[11] *See e.g.*, *Bank of America Corp.*, 2010 WL 624581, at *6 (approving consent judgment requiring recipient of TARP funds to pay $150 million penalty), *SEC v. Banc of America Securities LLC*, Civ. A. No. 09-5170, SEC Rel. No. 21066 (S.D.N.Y. June 9, 2009) (consent decree entered requiring recipient of TARP funds to redeem billions of dollars worth of auction rate securities from investors); *SEC v. Wachovia Securities LLC*, Civ. A. No. 09-CV-743, SEC Rel. No. 20885 (N.D. Ill. Feb. 17, 2009) (same); *SEC v. Citigroup Global Markets, Inc.*, Civ. A. No. 08-10753, SEC Rel. No. 2824 (S.D.N.Y. Dec. 12, 2008) (same).

[12] Mr. Lerner is the plaintiff in a shareholder derivative action against current and former directors and employees of Citigroup in New York state court. On August 26, 2010, the Commission filed an opposition to his motion to appear as *amicus curiae*. *See* Dkt. # 14.

however, this case does not involve claims concerning the non-disclosure of compensation. Similarly, because this case does not involve disclosures concerning compensation, Mr. Lerner's suggestion that the proposed consent judgment include a "say on pay" provision is also misplaced. *See* Dkt. # 11 at 11-12.

The independent disclosure counsel and independent audit requirements proposed by Mr. Lerner also are not warranted here. *See* Dkt # 11 at 11-12. Section 404 of the Sarbanes Oxley Act of 2002, 135 U.S.C. § 7262 and Section 13a-15 of the Exchange Act require Citigroup to establish and maintain sufficient internal controls for financial reporting that must be reviewed by an outside auditor and adequate disclosure controls. Mr. Lerner's suggestion that the Citigroup be required to re-constitute its Audit and Risk Management Committee is also misplaced. *See* Dkt. # 11 at 12. The Commission understands that since November 2007 Citigroup has completely re-constituted its Audit and Risk Management Committee.

Mr. Lerner also proposes that the consent judgment include a provision requiring that Citigroup's former Chief Executive Officer, Charles Prince, and former Chief Financial Officer, Gary Crittenden, surrender their compensation and bonuses for the time period covered by the Complaint. *See* Dkt. # 11 at 13. The Commission does not believe there is a proper legal basis for such relief in this action. The Commission asserted the claims and sought the relief that it believed was appropriate based on the investigative record and the applicable law.[13]

Finally, Mr. Lerner suggests that the proposed consent judgment include a provision that requires the Commission to submit a plan to the Court for its approval concerning the distribution of the contemplated fair fund. *See* Dkt. # 11 at 13. The proposed consent judgment

[13] In his pending shareholder derivative action, Mr. Lerner has named both Mr. Prince and Mr. Crittenden as defendants and has asserted claims against them for various breaches of fiduciary duties. Among other relief, the derivative action seeks to recover the compensation and bonuses that Messrs. Prince and Crittenden received for a period of several years.

already includes a provision that distribution of the contemplated fair fund is subject to the Court's approval. *See* Dkt. # 2, Exh. A at 3-4.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court enter the proposed final consent judgment.

Respectfully submitted,

/s/ Erica Y. Williams______________
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Dated: September 8, 2010

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2010, I sent a copy of the forgoing Memorandum Of Plaintiff Securities and Exchange Commission in Response to the Court's Order of August 17, 2010, the supporting Declaration of Raymond Wolff, Ph.D. and an Appendix of Exhibits, which was filed through the ECF system, to the following counsel via electronic mail and overnight courier:

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