10-722-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MAYOR and CITY COUNCIL OF BALTIMORE, MARYLAND
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

—against—

CITIGROUP, INC., CITIGROUP GLOBAL MARKETS, INC., UBS AG, UBS SECURITIES, LLC, UBS FINANCIAL SERVICES, INC., MERRILL LYNCH & CO., INC., MORGAN STANLEY, LEHMAN BROTHERS HOLDINGS, INC., BANK OF AMERICA CORP., WACHOVIA CORPORATION, WACHOVIA SECURITIES, LLC, WACHOVIA CAPITAL MARKETS, LLC, THE GOLDMAN SACHS GROUP, INC., JPMORGAN CHASE & CO., ROYAL BANK OF CANADA, DEUTSCHE BANK, AG,

Defendants-Appellees.

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

BRIEF AND SPECIAL APPENDIX OF PLAINTIFFS-APPELLANTS MAYOR AND CITY COUNCIL OF BALTIMORE, MARYLAND AND ALL OTHERS SIMILARLY SITUATED

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I. INTRODUCTION

On or about February 13, 2008, over a dozen broker-dealers that had marketed and touted auction rate securities ("ARS") to the public for years as safe, highly liquid and "cash-like," and who had artificially maintained the liquidity of the ARS market by buying and selling those securities at auction for their own accounts, abruptly and collectively withdrew from the ARS auctions market. As a result, thousands of investors were left stranded with suddenly illiquid assets totaling hundreds of billions of dollars, and hundreds of ARS issuers were forced to pay inflated interest rates. Believing the withdrawal *en masse* of the broker-dealers on virtually a single day was a coordinated and concerted act in violation of the federal antitrust laws, investors in ARS and issuers of ARS (plaintiffs/appellants herein) respectively filed separate complaints against the broker-dealers for violations of Section 1 of the Sherman Act. Upon motion by the broker-dealers to dismiss the complaints under Rule 12(b)(6) on various grounds, the District Court, applying the four factors articulated in *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264 (2007) ("*Billing*"), dismissed both antitrust Complaints as impliedly precluded by the federal securities laws.

That decision was in error. The District Court misapplied three *Billing* factors, improperly stripping Plaintiffs of one of the most powerful weapons against anticompetitive conduct at their disposal, and effectively ignoring five decades of Supreme Court precedent that limits implied preclusion to situations in which there is a "clear repugnancy" or "clear[] incompatibility" between the two statutory schemes at issue. Here, there is no repugnancy or incompatibility between the antitrust and securities laws, because antitrust scrutiny into whether competing broker-dealers unlawfully conspired to boycott the ARS market does not interfere in any way with the

SEC's regulation of the registration, disclosure or marketing of ARS under the federal securities laws.

Supreme Court precedent requires courts first to reconcile the operation of both statutory schemes whenever possible, and avoid preclusion of the antitrust laws except when "necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." *Billing*, 551 U.S. at 271, quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963) (*"Silver"*). Here, the District Court made no attempt to reconcile the antitrust laws and federal securities laws with respect to the ARS market, and misconstrued the allegations on which Plaintiffs' Complaints focused.

In particular, the District Court improperly concluded that the fourth *Billing* factor was met because the antitrust laws and securities laws in the context of ARS were purportedly "in serious conflict." JA 413.[1] The Court mistakenly reasoned that because the SEC permits an issuer to have more than one broker-dealer manage the auction of its particular security, a jury would be forced to engage in the same "fine line-drawing" between communications that were permissible under the securities laws and communications that were impermissible under the antitrust laws that *Billing* and this Circuit's recent decision in *Electronic Trading Group, LLC v. Banc of America Securities LLC*, 588 F.3d 128 (2d Cir. 2009) (*"Electronic Trading"*), prohibit. This is the most glaring of the District Court's errors.

In both the initial public offerings market in *Billing*, and the short sales market in *Electronic Trading*, ongoing communications among competing brokers were found to be necessary for the operation of those markets. Here,

[1] "JA" refers to the Joint Appendix, filed contemporaneously with this memorandum.

in contrast, not only are communications among the ARS broker-dealers neither mandatory nor necessary to the efficient functioning or success of ARS auctions, there is no indication that any joint broker-dealer activity ever even occurred**,** and none is alleged. Even if some limited joint activity did occur, it would not give rise to the "unusually serious legal line-drawing problem" *Billing* requires before preclusion is warranted. *Billing*, 551 U.S. at 279. That is because any such joint activity necessarily would be limited by the SEC to the auction of a particular security, and involve only the broker-dealers hired by the issuer of that security. The activity would be otherwise unnecessary to the efficient operation of the ARS market generally, and, more importantly, would be unrelated to, and readily distinguishable from, the alleged collusion by all the Defendants to boycott all the auctions *en masse*. As a result, proceeding against Defendants here under the antitrust laws will not conflict with any SEC regulatory regime, result in erroneous or conflicting rulings by "non-expert" juries, or otherwise threaten serious harm to the efficient functioning of the ARS market.

The District Court also erred in concluding that the second *Billing* factor was met because the SEC had authority to regulate "registration, reporting and disclosures" of ARS and to prohibit any "manipulative" or "fraudulent" device. Plaintiffs' antitrust claims, however, do not challenge fraudulent statements or violations of disclosure or registration requirements governing ARS, which arguably are the province of the SEC. Rather, Plaintiffs' antitrust claims challenge the alleged unlawful agreement by the defendant broker-dealers to collectively pull out of the ARS market nearly simultaneously, to the detriment of their clients. Such concerted action is precisely what the antitrust laws were enacted to prevent.

Finally, the District Court erred in finding that the third *Billing* factor was satisfied. That factor requires that the SEC "exercise [its] authority" to investigate and regulate the ARS market, including the alleged conspiracy. The District Court relied on a statement to Congress by the SEC's Director of Enforcement, Linda Thomsen, which the Court mistakenly believed showed that the SEC itself was investigating "the antitrust law violation alleged by Plaintiffs in this case." JA 412. To the contrary, other portions of Ms. Thomsen's testimony overlooked by the District Court clearly show that the SEC investigation focused on whether individual broker-dealers committed fraud in the *marketing* of ARS, *not* their joint conspiracy to suddenly withdraw from the market:

> The current investigations and examinations, unlike the prior Commission investigation, focus not on the auction process but rather on the marketing of the securities.

JA 252.

For these reasons, the District Court's order should be reversed.

II. STATEMENT OF JURIDICTION

Jurisdiction was conferred upon the District Court pursuant to 28 U.S.C. §§ 1331, 1337 and 15 U.S.C. § 15. This Court has appellate jurisdiction under 28 U.S.C. § 1291 over the final decision by the District Court on January 26, 2010 in *Mayfield, et al. v Citigroup, Inc., et al.*, No. 08 IV -07747, and in *Mayor and City Council of Baltimore, Maryland, et al. v. Citigroup, Inc., et al.*, No. 08 CIV -07746, to dismiss Plaintiffs' complaints without leave to amend, and to order the Clerk of the Court to close both of the aforementioned cases. A Notice of Appeal was duly filed in the District Court in both of the aforementioned cases on March 1, 2010. JA 424-426, 427-429.

III. STATEMENT OF ISSUES PRESENTED

Whether the District Court erred in dismissing Plaintiffs' class action complaints for violations of Section 1 of Sherman Act, 15 U.S.C. § 1, on the ground that Plaintiffs' antitrust lawsuit concerning publicly-traded auction rate securities was impliedly precluded by the federal securities laws.

IV. STANDARD OF REVIEW

A district court's decision granting a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is reviewed de novo, "drawing all reasonable inferences in plaintiff['s] favor, and accepting as true all the factual allegations in the complaint." *Electronic Trading*, 588 F.3d at 133, quoting *In re Elevator Antitrust Litig*., 502 F.3d 47, 50 (2d Cir. 2007); *see Chambers v. TimeWarner, Inc*., 282 F.3d 147, 152 (2d Cir. 2002).

V. STATEMENT OF THE CASE

A. The Allegations Against Defendants

1. The Nature of Auction Rate Securities

ARS are municipal and corporate bonds, as well as preferred stocks, with interest rates or dividend yields that are periodically reset through auctions, typically every 7, 14, 28 or 35 days. JA 35: ¶¶2, 49; JA 69: ¶¶2, 47. ARS were an attractive financing vehicle for issuers because they are essentially long-term obligations that re-price frequently using short-term interest rates, which are typically lower than long-term interest rates. JA 69: ¶67. For investors, ARS offered slightly higher returns than cash products, such as money market funds or certificates of deposit. JA 35: ¶68. Historically, ARS investors generally were large institutions, but several years ago many retail customers entered the market when financial services firms reduced the minimum investment to $25,000. JA 35: ¶50; JA 69: ¶48.

2. The Role of the Broker-Dealers

One or more broker-dealers are chosen by the issuer of a particular ARS to manage the auction for that security. JA 35: ¶58; JA 69: ¶57. An investor can submit a bid only through an authorized broker-dealer. JA 35: ¶58; JA 69: ¶57. In addition to the bids from investors, each broker-dealer managing the auction also can submit bids of its own to purchase ARS for its own account. JA 35: ¶¶54, 59; JA 69: ¶¶52, 58.

If sufficient bids are received (from investors or from the broker-dealer's own accounts) to purchase all ARS available for sale in that auction, a "clearing" interest rate payable to investors by the ARS issuer (until the next auction is held) is determined based on the winning bids, and the ARS are distributed to the winning bidders. JA 35: ¶¶52-53, 55, 60; JA 69: ¶¶50-51, 53, 59. If insufficient bids are received to purchase all ARS offered in the auction, that auction "fails."[2] In that event, the issuer of the ARS pays a prospectus-defined interest rate (sometimes called the "maximum rate") on the ARS for the succeeding period, and the ARS holders must hold their ARS until the next auction. JA 35: ¶¶56-57; JA 69: ¶¶54-56. An auction failure injures ARS holders by rendering their investments illiquid, and injures ARS issuers by forcing them to pay the maximum interest rate. JA 35: ¶¶3, 56; JA 69: ¶¶3, 54-55.

[2] Bids are submitted to the broker-dealer, who then submits them to an auction agent. After receiving the bids, but before submitting them to the auction agent, the broker-dealer can assess the extent of any shortfall in bids which could lead to auction failure. In order to prevent auction failure, the broker-dealer can elect to submit bids for its own account to make up the shortfall. JA 35: ¶59; JA 69: ¶58.

3. The Underlying Circumstances Leading To The Alleged Conspiracy

The approximately two dozen broker-dealers running the ARS market realized huge fees from the auctions – in fact, they collectively received more than $600 million annually. JA 35: ¶65; JA 69: ¶64. In order to entice investors to buy ARS, Defendants represented to purchasers that auction rate securities were highly liquid, safe investments for short-term investing. Defendants also maintained the perception of ARS liquidity by buying securities for which there was insufficient demand. JA 35: ¶¶66-67, 70; JA:69: ¶¶65-66, 69. Defendants propped up the ARS market in this manner for years.[3] JA 35: ¶74; JA 69: ¶73.

In 2004, the U.S. Securities and Exchange Commission ("SEC") investigated broker-dealers' practices, and in May 2006, determined that many of them had misrepresented that the auctions were legitimate and successful. The SEC found that the broker-dealers had collectively intervened in the market by preventing failed auctions and setting artificial "market" rates at levels they had chosen. JA 35: ¶74; JA 69: ¶73. The SEC, however, did not focus its investigation on, or purport to regulate, any possible antitrust collusion by the broker-dealers. JA 35: ¶76; JA 69: ¶75.

[3] While Plaintiffs' Complaints allege in detail how Defendants intervened to prevent auction failures and failed to disclose and misrepresented the true nature of ARS to investors, these allegations are set forth simply to explain the context of Defendants' collective actions to unload their ARS inventories on unsuspecting purchasers and exit the market *en masse* on or about February 13, 2008. The antitrust violation alleged in the Complaints is confined to the broker-dealers' collusion to simultaneously exit the ARS market. As Plaintiffs confirmed to the District Court at oral argument on November 24, 2009, the other allegations "are background to [Defendants'] withdrawal from the market." JA 448 (p. 19, line 22)-JA 449 (p. 20, line 17).

4. Defendants' Conspiracy To Withdraw From The ARS Market

By the fall and winter of 2007, investor demand for ARS virtually had disappeared as the credit crisis worsened, and Defendants' efforts to prop up the market were becoming an expensive proposition as they accumulated inventory. JA 35: ¶¶82, 93; JA 69: ¶¶81, 92. Recognizing that the ARS market was in danger of failing, Defendants decided to limit the amount of inventory they would take on, and to cease artificially supporting the ARS auctions. JA 35: ¶¶82, 90; JA 69: ¶¶81, 89. Defendants realized that withdrawing from the market would have to be undertaken jointly, so that no Defendant suddenly would be left with illiquid inventory. JA 35: ¶¶80, 90-92; JA 69: ¶¶79, 89-91. In early 2008, faced with mounting inventory, Defendants agreed on a plan to escape the ARS market with as little harm to themselves as possible, and with no consideration of the harm that would befall Plaintiffs. In violation of the antitrust laws, Defendants collectively agreed to withdraw from the ARS market altogether as soon as they could sufficiently reduce their ARS inventory. JA 35: ¶¶8, 80, 95, 112; JA 69: ¶¶8, 79,112. The bulk of the collusive withdrawal occurred on a single day. JA 35: ¶¶94-95; JA 69: ¶¶93-94.

During the myriad auctions of various ARS held on or about February 13, 2008, Defendants collectively, and virtually simultaneously, withdrew their support for the ARS market. Eighty-seven percent (87%) of all ARS auctions failed that day because there were not enough buyers without Defendants' participation. JA 35: ¶¶8, 94-95; JA 69: ¶¶7, 93-94. As a result of Defendants' coordinated action, ARS holders were left with more than $300 billion in illiquid securities, and have little prospect of selling these investments except at a substantial discount to their par value. JA 35: ¶8; JA 69: ¶8. In addition, the auction failures forced many issuers to pay interest rates approaching 20 percent. Many issuers called their bankers looking to refinance, and Defendants saw and exploited the opportunity to make more underwriting fees off the disaster they had wrought. JA 69: ¶97.

After the collapse of the ARS market on February 13, 2008, the SEC, New York Attorney General Cuomo, authorities in other states, and the Financial Industry Regulatory Authority ("FINRA") investigated Defendants. The SEC investigation, in particular, as well as the various state investigations, focused on fraud on the part of the individual broker-dealers in the marketing of ARS, but ***not*** collusion. Virtually all of the Defendants have entered into settlements with the SEC, Attorney General Cuomo, and other state regulators. JA 35: ¶¶98-109; JA 69: ¶¶98-109. These settlements, however, address liability for different conduct than the conspiracy alleged here, and recovered only a portion of the losses incurred by ARS purchasers. JA 35: ¶107; JA 69: ¶107; JA 338-398.

B. The Proceedings Below

On September 4, 2008, individual investors Russell Mayfield, Paul Walton and John Abbott filed a class action against Defendants on behalf of all persons or entities who acquired various investment instruments collectively known as “auction rate securities,” or “ARS,” from Defendants at auction, and held those securities as of February 13, 2008 (the *“Investor Complaint”*). On the same day, plaintiffs Mayor and City Council of Baltimore, Maryland, as an issuer of ARS, filed a similar class action complaint against the same Defendants alleging antitrust violations on behalf of all person or entities that issued ARS underwritten by Defendants between May 12, 2003 and February 13, 2008 (the *"Issuer Complaint"*). Both complaints allege a single claim for violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

On January 15, 2009, Defendants moved to dismiss both complaints under Fed.R.Civ.P. 12(b)(6) based on three principal grounds: (1) Plaintiffs' antitrust claims were supposedly impliedly precluded by the federal securities laws; (2) the complaints each allegedly failed to adequately plead an antitrust claim under of Section 1 of the Sherman Act, as required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); and (3) the complaints purportedly failed to adequately plead antitrust injury or other legally cognizable injury.

On January 26, 2010, the District Court granted Defendants' motion to dismiss solely on the ground that Plaintiffs' antitrust claims were impliedly precluded under the federal securities laws.[4] Applying the four factors needed to establish preclusion cited in *Billing*, the District Court concluded that all four factors were met, and that the SEC's continuing regulation of ARS was "clearly incompatible" with the antitrust laws.

With respect to the first *Billing* factor, the District Court held that the ARS market "lies squarely within an area of market activity that the securities laws seek to regulate," as Billing requires. JA 409. The Court reasoned that, like the initial public offerings *("IPOs"*) in *Billing*, ARS serve to raise capital for municipalities and corporations. In addition, a SEC no-action letter stated that the Commission's mission to protect investors "extends to the market for auction rate municipal securities." JA 409.

[4] The District Court did not reach or otherwise decide the other grounds of Defendants' motion to dismiss, and ordered the Clerk of the Court to close both cases. JA 417, 418. Accordingly, they are not addressed as part of this appeal.

With respect to the second factor, the District Court found that the SEC had "clear and adequate" authority to regulate the ARS market, "including the alleged practices challenged by Plaintiffs." JA 409. Citing 15 U.S.C. §§78o(c) and 78j(b), the Court noted that the SEC had authority to regulate "registration, reporting and disclosures" concerning ARS, and "to prohibit the full range of ingenious devices that might be used to manipulate securities prices," particularly "any manipulative, deceptive, or other fraudulent device or contrivance" in connection with the purchase or sale of a security. JA 409-410.

As to the third *Billing* factor, the District Court determined that the SEC "has actively exercised its authority to investigate and regulate the ARS market, including the alleged practices challenged by the Plaintiffs." JA 410. The District Court cited the SEC's 2004 investigation into practices "by which broker-dealers could influence the auction markets," which in turn led to a May 2006 consent decree directing broker-dealers (including most of the Defendants in this case, or their related entities[5]) "to disclose certain practices and to cease engaging in other practices," and which showed that the SEC "had explored collective conduct related to preventing market failure and setting of artificial market rates." JA 410-411. In addition, the District Court cited the SEC's ongoing investigation into the freezing of the ARS market in mid-February 2008, and the settlements the

[5] The May 2006 consent decree involved the following Defendants or related entities, among others: Citigroup Global Markets, Inc.; Wachovia Capital Markets, LLC; Merrill Lynch, Pierce, Fenner & Smith, Incorporated (a subsidiary of defendant Merrill Lynch & Company, Inc.); Lehman Brothers Inc. (a subsidiary of defendant Lehman Brothers Holdings Inc.); J.P. Morgan Securities, Inc. (a subsidiary of defendant JP Morgan Chase & Co.) Goldman, Sachs & Co. (the former name of defendant The Goldman Sachs Group, Inc.); Banc of America Securities LLC (a subsidiary of defendant Bank of America Corporation); and Morgan Stanley & Co. Incorporated, formerly known as Morgan Stanley DW Inc. (a subsidiary of defendant Morgan Stanley). *See* JA 219.

SEC reached with a number of broker-dealers. JA 411-413. In particular, the District Court noted the statement to Congress of the SEC's Director of Enforcement, Linda Thomsen, on September 8, 2008, that the SEC was investigating "the reasons why the [broker-dealer] firms stopped supporting the auctions in mid-February [2008]." JA 411. This investigation, the District Court believed, is "statutorily required 'to take account of competitive considerations,' such as the antitrust law violation alleged by Plaintiffs in this case." JA 411-412.

With respect to the fourth and final factor, the District Court held that the antitrust laws and securities laws in the context of ARS were "in serious conflict," because, in the Court's view, the same "fine line-drawing" that prompted the Supreme Court to preclude application of the antitrust laws in *Billing* was present here. JA 413. The District Court found that the SEC "permitted or encouraged interactions amongst [ARS] broker-dealers under certain circumstances." *Id.* In particular, ARS issuers "may retain multiple broker-dealers to jointly underwrite ARS offerings and jointly manage ARS auctions." *Id*. In addition, a broker-dealer "'may submit orders in auctions for its own accounts,' including jointly underwritten or managed auctions." JA 413-414. The District Court reasoned that "such joint behavior would inherently require some level of communication amongst broker-dealers," subject to SEC disclosure requirements; and that "it was reasonable to expect that the SEC may permit further collective action or joint bidding by broker-dealers to restore liquidity to the ARS market." JA 414.

Citing this Circuit's recent decision in *Electronic Trading*, the District Court held that, as with the brokers in the securities short-selling market at issue there, "it is unreasonable to expect broker-dealers in the ARS market to determine the fine line between permissible communications under securities law and impermissible communications under antitrust law." JA 415. Moreover, evidence of the two types of communications would overlap, creating a risk that non-expert juries would reach inconsistent results. *Id*. Furthermore, there was an "unusually small" need for antitrust enforcement in the ARS market in light of the SEC investigation into the collapse of that market in February 2008, and the numerous civil complaints filed against Defendants and others under the federal securities laws. JA 416.

VI. SUMMARY OF THE ARGUMENT

The District Court's dismissal of the Complaints should be reversed. In ruling that the antitrust laws were impliedly precluded by the federal securities laws with respect to the market for auction rate securities, the District Court misapplied three of the four *Billing* factors, and essentially disregarded five decades of Supreme Court precedent that requires "clear[] incompatibility" between the two statutory schemes at issue before implied preclusion may be found.

The fourth *Billing* factor is not met because application of the antitrust laws and securities laws to the ARS market would not result in conflicting "guidance, requirements, duties, privileges, or standards of conduct," as *Billing* requires. Although the SEC may "permit" two or more ARS broker-dealers to interact concerning the auction of a particular security they were hired to manage, that will not result in the "unusually serious legal line-drawing problem" that troubled the Supreme Court in *Billing* with respect to the IPO markets or this Circuit in *Electronic Trading* with respect to the short sales market. Unlike those markets, which required frequent communications among competing brokers for the success of those transactions, joint activity among the ARS broker-dealers is neither mandatory nor necessary to the efficient functioning or success of the auctions. There is, in fact, no indication that such joint activity even occurred**,** and none is alleged. Moreover, the jury would have no difficulty distinguishing between communications among the broker-dealers concerning the particular auction they were specifically hired by an issuer to manage, and those concerning auctions they were not hired to manage, including those evidencing the alleged conspiracy to withdraw from and boycott all the auctions *en masse*. Thus, a jury would not need any particular regulatory expertise to distinguish between communications that are permissible under the securities laws and those that are impermissible under the antitrust laws.

In addition, the second *Billing* factor is not met because the SEC lacks "regulatory authority to supervise" the specific anticompetitive conduct alleged by Plaintiffs – namely, the concerted decision and action by the major broker-dealers handling the ARS auctions to collectively pull out of the ARS market simultaneously. Finally, the third *Billing* factor is not met because the SEC has not exercised its authority to investigate and regulate the alleged conspiracy. To the extent the SEC has investigated the collapse of the ARS market, its investigation focused only on the fraud of the individual broker-dealers that marketed ARS to investors, not their joint agreement to withdraw from the ARS market at the same time.

VII. THE ANTITRUST LAWS ARE NOT IMPLIEDLY PRECLUDED BY THE FEDERAL SECURITIES LAWS WITH RESPECT TO THE ALLEGED COLLUSION IN THE ARS MARKET

It is not the law, and never has been, that the mere fact that a publicly-traded security is subject to securities regulations justifies preclusion of the federal antitrust laws in connection with misconduct in that industry.

Indeed, rather than expressly exempt the securities industry from scrutiny under the federal antitrust statutes (as it did, for example, in the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq., with respect to the "business of insurance"), Congress specifically stated that, with narrow exceptions not applicable here, "the rights and remedies provided [by securities laws] . . . shall be in addition to any and all other rights and remedies that may exist at law or in equity." 15 U.S.C. § 77p(a) (emphasis added). *See also* 15 U.S.C. § 78bb(a) (same).

Thus, Congress did not intend that Plaintiffs' antitrust claims here be precluded merely because Defendants' alleged conspiracy involves securities that are also subject, to one degree or another, to SEC disclosure requirements and anti-fraud enforcement procedures. Even after *Billing*, various courts in comparable contexts have held that private enforcement of the federal antitrust laws, and the unique remedies under those laws (including treble damages), remain available to an appropriate class of aggrieved investors victimized by such a conspiracy. Plaintiffs' antitrust remedies are unavailable only if the limited, and disfavored, court doctrine of implied preclusion applies. As discussed herein, it does not apply in this case.

A. Implied Preclusion Of The Antitrust Laws Requires "Clear Repugnancy" With Securities Regulations

It is well-settled that "[t]he antitrust laws represent a 'fundamental national economic policy,'" *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross*, 452 U.S. 378, 388 (1981) (*"Nat'l Gerimedical"*), and "are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *Associated Gen. Contractors of California, Inc. v. Cal. State Council Carpenters*, 459 U.S. 519, 538 n.38 (1983). Accordingly, the

Supreme Court repeatedly has emphasized the strong public interest in the vigorous private enforcement of the antitrust laws, and the importance of private treble damage actions as an aid to government enforcement proceedings. *See American Society of Mechanical Engineers v. Hydrolevel, Inc*., 456 U.S. 556, 572-73 n.10 (1982) ("private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."); *Reiter v. Sonotone Corp*., 442 U.S. 330, 344 (1979); *Zenith Radio Corp. v. Hazeltine Research, Inc*., 395 U.S. 100, 130-31 (1969) (private antitrust actions are part of the Congressional scheme to further "the high purpose of enforcing the antitrust laws"); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat[.]").

Because of the importance of antitrust enforcement in federal jurisprudence, "[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and [a] regulatory system." *Nat'l Gerimedical*, 452 U.S. at 388 (quoting *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719-20 (1975)). As the Supreme Court made clear:

> [W]e cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry.

Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218 (1966). *See also Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975) (implied repeal of antitrust laws should be found only "where there is a plain repugnancy between the antitrust and regulatory provisions").

Billing "follows [the] long line of cases" dealing with implied preclusion, and confirms that, even with respect to the federal securities laws, preclusion of the antitrust laws "is met with caution" and "should be used minimally in order to allow simultaneous operation of the securities and antitrust laws as much as possible." *Dahl v. Bain Capital Partners, LLC*, 589 F.Supp.2d 112, 115 (D. Mass. 2008) (*"Dahl"*). *See Churchill Downs Inc. v. Thoroughbred Horsemen's Group, LLC,* 605 F.Supp.2d 870, 886 (W.D. Ky. 2009) ("Mere incompatibility, as opposed to clear repugnancy, seems insufficient to find implied immunity. Immunity is only appropriate where the legislature's subsequent legislation would be so contradictory to antitrust legislation, or where attempting to follow both sets of legislation would be so confusing, that the legislature must have intended to repeal the antitrust laws in certain circumstances despite having failed to explicitly say so.") (citing *Billing*).

In fact, *Billing* explicitly emphasized the "standard" established almost fifty years ago in *Silver*:

> [W]here possible, courts should 'reconcil[e] the operation of both [*i.e.*, antitrust and securities] statutory schemes . . . rather than holding one completely ousted. . . . '[R]epeal of the antitrust laws is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary.'

Billing, 551 U.S. at 271, quoting *Silver*, 373 U.S. at 357.

Under *Billing*, implied preclusion of the antitrust laws by the securities laws can only be found when each of the following four factors is present:

(i) "the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law[s] seek[] to regulate";

(ii) "the existence of regulatory authority under the securities law to supervise the activities in question";

(iii) "evidence that the responsible regulatory entities exercise that authority"; and

(iv) the "risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct."[6]

Billing, 551 U.S. at 275-276.

In reaching its decision to dismiss Plaintiffs' antitrust Complaints, the District Court relied heavily on the Supreme Court's decision in *Billing*, and on this Circuit's decision in *Electronic Trading*. As explained below, however, both decisions are readily distinguishable from the case at bar.

B. Both *Billing* And *Electronic Trading* Are Distinguishable From The Case At Bar

Billing concerned an antitrust action against underwriting firms that marketed and distributed shares in initial public offerings ("IPO"). Plaintiffs alleged that, to boost share prices and underwriting commissions, the underwriting firms had unlawfully agreed with each other to refrain from selling shares in desirable offerings unless the purchasers agreed to buy additional shares of that company in the aftermarket at prices above the IPO price (a practice called "laddering"); pay unusually high commissions on subsequent purchases from the underwriters; or purchase less desirable securities from them (a practice called "tying"). 551 U.S. at 267.

[6] This Circuit recently described the four *Billing* factors as: "(1) whether the underlying market activity lies squarely within the heartland of the implicated regulations; (2) the existence of authority to regulate the 'activities in question'; (3) ongoing regulation of those activities; and (4) conflict between the two regulatory regimes." *In re Municipal Derivatives Antitrust Litig. (Hinds County, Miss. v. Wachovia Bank N.A.)*, 2010 WL 1244765, *17 (S.D.N.Y. March 25, 2010) ("*Municipal Derivatives*"), citing *Electronic Trading*, 588 F.3d at 133-37.

Although *Billing* held that the antitrust action was precluded, the rationale for that holding was based on facts particular to the IPO process. First, the Court found that the underwriters' efforts to jointly promote and sell newly issued securities in connection with IPOs were not just financial activities that the securities laws sought to regulate, but were "essential to the successful marketing of an IPO." 551 U.S. at 276; *see also id*. at 278 (referring to the "undisputed need for joint IPO underwriter activity"). Second, specific provisions of the Securities Exchange Act of 1934 gave the SEC authority to supervise virtually every aspect of the underwriters' practices.[7] *Id*. at 275-277. Third, the Court found that the SEC had continuously regulated the IPO process by passing its own regulations "defin[ing] in detail . . . what underwriters may and may not do," and bringing actions against parties for violating those regulations. *Id*. at 277.

Fourth, and most importantly, the Court found that a conflict would exist if both the securities and antitrust laws applied. In an IPO, the Court noted, a group of underwriters "will typically form a syndicate to help market the shares," determine initial share prices and conduct road shows to generate and assess investor interest (a process known as "book building"). *Billing*, 551 U.S. 268. Such joint underwriting activity, as mentioned, was "essential to the successful marketing of an IPO." *Id*. at 276. As a result, the Court concluded that "an unusually serious legal line-drawing problem"

[7] The Court cited: 15 U.S.C. §§ 77(b)(a)(3), 77j, 77z-2 (granting SEC power to regulate the process of book-building, solicitations of "indications of interest," and communications between underwriting participants and their customers, including those that occur during road shows); 78o(c)(2)(D) (granting SEC power to define and prevent through rules and regulations acts and practices that are fraudulent, deceptive or manipulative; § 78(i)(a)(6) (similar); § 78j(b) (similar). *Billing*, 551 U.S. at 276-277. The Court added that "[p]rivate individuals who suffer harm as a result of a violation of pertinent statutes and regulations may also recover damages." *Id*., citing §§ 78bb, 78u-4, 77k.

would occur in trying to separate joint activity the SEC permits or encourages in the IPO process from activity the antitrust laws forbid, and that the SEC also forbids (and likely would continue to forbid).[8] *Id*. at 279. As a result, a "nuanced" evaluation of the evidence would be necessary to separate what is lawful from what is unlawful – a determination better left to the expertise of the SEC so that conflicting results and "unusually serious mistakes" by "different nonexpert judges and different nonexpert juries" might be avoided. *Id*. at 281-282.

In *Electronic Trading*, another case involving joint broker activity that was deemed necessary and integral to the securities trading at issue, this Circuit applied the *Billing* factors to find that the federal securities laws implicitly precluded antitrust claims against various "prime brokers" that allegedly fixed prices in short sale transactions. *Electronic Trading*, 588 F.3d at 138. There, plaintiffs alleged that the brokers arbitrarily designated certain securities as "hard-to-borrow," and fixed the fees for borrowing the securities in connection with short selling. The Court found that short selling was within the heartland of the securities business, as the first *Billing* factor requires, since short selling provides the securities markets with "liquidity and pricing benefits," and is "central to the proper functioning" of the capital markets. *Id*. at 134. As to the second factor, specific securities laws gave the SEC authority to regulate the role of the prime brokers in short

[8] For example, the Court opined that it would be difficult for someone unfamiliar with accepted syndicate practices to determine with confidence whether an underwriter had insisted that an investor buy more shares in the immediate aftermarket (which is forbidden) or simply allocated more shares to an investor willing to purchase additional shares in the future (which is permitted). Similarly, it would be difficult to distinguish forbidden efforts at tying with permitted efforts to allocate IP shares to a preferred customer who has engaged the underwriter for other services. *See Billing*, 551 U.S. at 279-280.

selling and the borrowing fees those brokers charged. *Id*. at 135, citing Sections 6 and 10(a) of the Securities Exchange Act of 1934, and 15 U.S.C. §§78o(c)(2)(D) and 78j(b).[9] The third factor was met by the SEC's adoption in 2004 of Regulation SHO, which expressly imposes a "locate" and "delivery" requirement on brokers involved in short selling; its hosting of a recent roundtable discussion concerning short sales; and its investigation (along with federal prosecutors and the NYSE) into complaints concerning misconduct in the industry, all of which established that the SEC "exercises its authority to regulate the role of the prime brokers in short selling." *Electronic Trading*, 588 F.3d at 135.

With respect to the fourth *Billing* factor, the Court concluded that "antitrust liability would create actual and potential conflicts with the securities regime," because it would inhibit the prime brokers from engaging in necessary communications with each other about the availability and price of securities that Regulation SHO permits. *Id*. at 137. In particular, the Court noted that communications among the brokers were necessary because regulations required each broker either to borrow the securities that would be sold short, or have "reasonable grounds to believe" they could be borrowed, before accepting an order from a short seller (the "locate" requirement). *Id*., citing *In re Short Sale Antitrust Litig*., 527 F.Supp.2d 253, 260 (S.D.N.Y. 2007) ("[t]he Defendants' transactions necessarily involve the exchange of

[9] Section 10(a) of the Securities Exchange Act provides that it is unlawful "[t]o effect a short sale . . . in contravention of [SEC] rules." *Electronic Trading*, 588 F.3d at 134. Section 6 of the Securities Exchange Act provides that the SEC may "permit a national securities exchange . . . to . . . fix rates of commissions . . . or other fees," thus giving the SEC "indirect authority" to regulate the rates charged by the prime brokers in short selling." *Id*. at 135. 15 U.S.C. §§78o(c)(2)(D) and 78j(b), evidenced the SEC's broad power in *Billing* to define and prevent fraudulent, deceptive and manipulative conduct by brokers and dealers, and applied "with equal force to the role of the prime brokers in short selling and the borrowing fees they charge." *Id*. at 135.

information regarding the availability and price of securities[.]"); 17 C.F.R. § 242.203(b)(1). *See also In re Municipal Derivatives Antitrust Litig. (Hinds County, Miss. v. Wachovia Bank N.A.)*, 2010 WL 1244765, *21 (S.D.N.Y. March 25, 2010) ("*Municipal Derivatives*") ("[t]he short sale transactions at issue [in *Electronic Trading*] necessarily involved the exchange of information regarding the availability and price of securities."). Thus, the Court reasoned: "It is a lot to expect a broker 'to distinguish what is forbidden from what is allowed,' so that the broker collects just so much information *as required to satisfy the locate requirement* and for the efficient functioning of the short selling market – but not an iota more – or suffer treble damages." *Electronic Trading*, 588 F.3d at 137 (emphasis added).[10]

Billing and *Electronic Trading* both involve statutory and regulatory schemes that specifically targeted the securities markets at issue. Just as importantly, in each of those cases, direct communication among otherwise competing brokers was explicitly authorized by the SEC, and indeed was deemed required and necessary to the successful functioning of the complex markets there. Because the routine and ongoing communications among brokers could not reasonably be parsed into comments permissible under the securities laws and impermissible under the antitrust laws, the courts understandably were concerned that non-expert juries would be forced into making potentially erroneous or conflicting rulings.

But that is not case with every type of publicly-traded security, and it is not the case here. Unlike *Billing* and *Electronic Trading*, there is no comprehensive SEC regulatory regime that specifically governs ARS, or

[10] The Court also opined that a potential conflict existed because the SEC may decide in the future to regulate the borrowing fees charged by brokers on the "hard-to-borrow" lists. *Electronic Trading*, 588 F.3d at 138.

defines in detail what ARS broker-dealers "may or may not do." Nor are ARS broker-dealers required to communicate or otherwise act jointly in order for the ARS market to operate efficiently, or to enable the broker-dealers to comply with certain regulatory requirements, such that imposition of the antitrust laws would seriously impede an important aspect of the way the auctions function. Indeed, assuming joint activity among ARS broker-dealers actually occurs, the only joint communications the SEC arguably permits are those between the broker-dealers hired by an issuer to jointly manage the auction of the issuer's particular security, and that concern only that auction -- not the communications and other joint activity alleged in the Complaints that involved all the broker-dealers and their collective withdrawal from all the auctions. Thus, there is no basis to conclude that Plaintiffs' antitrust claims based on Defendants' group abandonment of the auctions are "clearly incompatible" with the federal securities laws, as *Billing* requires. Therefore, implied preclusion does not lie.

C. Three *Billing* Factors Weigh Against Preclusion Of Plaintiffs' Antitrust Claims[11]

1. There Is No "Serious Conflict" Between The Antitrust Laws And The Securities Laws

a. Plaintiffs' Complaints Do Not Challenge Activity That Is Permitted By The SEC

The fourth *Billing* factor ascertains the "risk that the securities and

[11] The District Court's determination concerning the first *Billing* factor is not at issue here. The District Court held that the ARS market "lies squarely within an area of market activity that the securities laws seek to regulate," as the first *Billing* factor requires. JA 409; *see Billing*, 551 U.S. at 276. As this Circuit recently explained, the proper inquiry under this factor requires consideration of the "underlying market activity," not the alleged anticompetitive conduct; and that the alleged anticompetitive conduct is more appropriately considered under the second *Billing* factor. *Electronic Trading*, 588 F.3d at 134; *Municipal Derivatives*, 2010 WL 1244765 at *18. In light of that standard, Plaintiffs do not dispute the District Court's decision regarding the first *Billing* factor.

antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct." *Electronic Trading*, 588 F.3d at 136, quoting *Billing*, 551 U.S. at 275-76. The relevant inquiry therefore is whether "allowing antitrust liability for the conduct alleged to have the anticompetitive effect would inhibit permissible (and even beneficial) market behavior." *Id.* In evaluating this factor, "the proper focus is on the alleged anticompetitive conduct," as opposed to the broader underlying market activity. *Id*.. at 137.

In concluding erroneously that the securities laws were "in serious conflict with the antitrust laws within the ARS context at issue in this case," the District Court emphasized that "the SEC has permitted or encouraged interactions amongst broker-dealers under certain circumstances." JA 413. As the District Court explained:

> [T]he SEC has recognized that ARS issuers may retain multiple broker-dealers to jointly underwrite ARS offering and jointly manage ARS auctions. . . . Furthermore, the SEC has determined that a "broker-dealer may submit orders in auctions for its own accounts," including jointly underwritten or managed auctions. Such joint behavior would inherently require some level of communication amongst broker-dealers.
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> * * *
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> As in Electronic Trading Group, it is unreasonable to expect broker-dealers in the ARS market to determine the fine line between permissible communications under securities law and impermissible communications under antitrust law. . . . Therefore, the required fine line-drawing is best left to the "securities-related expertise" of the SEC to implement in a more universal fashion.

JA 413-415.

The District Court's conclusory assertion, however, lacks any factual foundation. Unlike the detailed statutory schemes in *Billing* and *Electronic Trading* that explicitly authorized communications among competitors in the

IPO and short sales markets because they were considered necessary to the efficient functioning of those markets, *see* Part VII.B, above, there is no evidence that any joint activity "permitted" here by the SEC has ever even occurred, or more fundamentally, that it is vital or necessary to the efficient functioning of the ARS auctions.[12] No such joint activity is even alleged. Moreover, there is no evidence to support the District Court's bald conclusion that such communications were "inherently require[d]." Simply put, the mere possibility of joint broker activity, without more, is not enough to equate this case with *Billing* or *Electronic Trading*, or otherwise suggest that a jury would be forced to engage in "fine line-drawing" to separate the impermissible from the permissible. *See, e.g., Pennsylvania Avenue Funds v. Borey*, 569 F. Supp. 2d 1126, 1130-31 (W.D. Wash. 2008) (*"Borey"*) ("Although the [Williams] Act [governing tender offers] recognizes that bidders *might* join forces, the best indication of a power to regulate their conduct is an authorization to issue rules proscribing 'fraudulent, deceptive, or manipulative acts or practices' in connection with tender offers. 15 U.S.C. § 78n(e). This provision, however, has been interpreted to authorize only disclosure regulations. . . . *Anticompetitive conduct in the marketplace is the realm of antitrust*.") (emphasis added)). Indeed, in reaching its unsupported conclusion, the District Court essentially ignored fifty years of Supreme Court precedent that specifically requires a very cautious approach to eliminating regulatory regimes. *See* Part VII.A, above.

[12] Although the District Court stated that the SEC "encouraged" interactions amongst broker-dealers under certain circumstances, JA 413, the record is devoid of any explicit expression of encouragement of such activity, or any use of the term. In describing the broker-dealer's role in auctions, the SEC simply has stated: "The issuer of each security selects one or more broker-dealers to underwrite the offering and/or manage the auction process." JA 222.

Municipal Derivatives is on point. There, defendants, much like Defendants below, asserted that the "sort of difficult legal line-drawing" prohibited by *Billing* would result absent preclusion because the relevant IRS regulations only required that municipal derivatives be priced at fair market value, while plaintiffs' antitrust claims required defendants to get "the best possible price" for those instruments. 2010 WL 1244765 at *20. Judge Marrero, however, held that because the municipal derivative market did not require the brokers to interact, the complex and detailed line-drawing that troubled the courts in *Billing* and *Electronic Trading* would not arise:

> [U]nlike *Billing*, where the Underwriters were required to work in concert to promote and sell IPOs, here, there is no indication that [Defendants] had any lawful reason to engage in the collusive conduct alleged in the [Complaint]. . . . [T]he IRS regulations [do not] explicitly or implicitly suggest[] that brokers and providers are to collectively communicate about or decide what the fair market value is for a municipal derivative investment. [¶] The instant dispute is similarly distinguishable from the controversy involved in [*Electronic Trading*][.] . . . The short sale transactions at issue there necessarily involved the exchange of information regarding the availability and price of securities. A serious legal line-drawing problem thus existed because the SEC permitted or encouraged certain daily communications among defendant-brokers, but forbid others. [¶] By contrast, here, there is no "fine, complex, detailed line" that must be drawn to separate permissible or impermissible activity in the municipal derivatives market.

Id. at *21 (citations omitted).

Judge Pro's decision in *In re Western States Wholesale Natural Gas Antitrust Litig*., 661 F.Supp.2d 1172 (D. Nev. 2009) ("*Western States*"), is also instructive. There, consumers of wholesale natural gas sued providers for an alleged conspiracy to manipulate the price of natural gas in violation of the antitrust laws. Although the court found that the defendants' alleged collusion to manipulate natural gas prices through various "devices" already was prohibited under the Commodity Exchange Act, *id.* at 1181, Judge Pro nonetheless rejected defendants' contention that the antitrust claims were impliedly precluded by the regulations of the Commodity Futures Trading Commission ("CFTC") because the fourth *Billing* factor had not been met. Among other things, defendants' joint activity was not required:

> The allegations in the present Complaints do not raise the unusually serious legal line-drawing problems that were present in [*Billing*]. . . . [¶] Here, Defendants are independent natural gas companies who, unlike the syndicates in [*Billing*], need not form a joint enterprise to ensure the successful trading of natural gas or natural gas futures. Although price reporting is encouraged, the CFTC has not created fine rules delineating permissible price reporting from impermissible price reporting that would require a commodities expert to discern the lawful from the unlawful. Moreover, unlike in [*Billing*], there is no possibility that the CFTC will change its view that intentional price manipulation is unlawful given the statute's prohibition on any price manipulation or attempted price manipulation. Plaintiffs allege Defendants' false price reports, wash trades, and churning were done with the intent to manipulate the markets, and a jury is equally equipped to evaluate credibility and make determinations regarding intent as the CFTC. Consequently, no unusually serious legal line-drawing problem raises a conflict between the CEA, the antitrust laws, and the specific conduct alleged in these Complaints.

Id. at 1181-1182. Judge Pro added: "Intent and the existence and scope of a conspiracy are matters which judges and juries resolve every day. Antitrust courts are not likely to make 'unusually serious mistakes' regarding intent, knowledge, purpose, or agreement, such that permissible or encouraged conduct under the CEA would be deterred." *Id*. at 1179-80.

Here, there is no evidence that communications among ARS broker-dealers, even though permitted by the SEC, are required or otherwise necessary to the efficient functioning of the ARS market. There is virtually no specific mention of ARS in the SEC's rules and regulations – at most, the SEC simply declared in a no-action letter that "the mission of the Commission . . . extends to the market for auction rate municipal securities."

JA 115. The detailed regulatory structure that characterized the statutes and regulations governing the markets for IPOs and short sales in *Billing* and *Electronic Trading*, within which necessary communications among competing brokers were free to occur, is completely missing with respect to ARS. There is nothing in the District Court's decision or in Defendants' filings below to suggest otherwise.

Moreover, to the extent any communications among ARS broker-dealers could take place, there is no reason to believe the possibility of antitrust liability will hobble the conduct of the broker-dealers or render the ARS market inefficient, or that a jury or a court would have significant difficulty separating permitted communications from conspiratorial conduct. The "nuanced" evaluation of the evidence proscribed by *Billing* would not be necessary here, and no expertise by the SEC would be required to avoid "unusually serious mistakes" by a jury in making such determinations. *Billing*, 551 U.S. at 281-282. That is because, even under the evidence relied upon by the District Court, the SEC only permits an issuer to hire more than one broker-dealer to manage the auction of the issuer's particular security. It does not, however, authorize joint activity among broker-dealers, each of whom is managing a different auction for a different ARS, concerning the respective auctions they were not hired to manage. A jury could easily distinguish between joint activity of two or more defendant broker-dealers about the auction an issuer hired them to manage, and joint activity and communications among all the defendant broker-dealers concerning all the other auctions, most of which they had not been hired to manage. There is no lawful reason for the latter activity, and that is the activity that constitutes the antitrust violation set forth in the Complaints.[13]

Thus, even assuming, *arguendo*, that some line-drawing would have to occur in this case, it would not amount to the "unusually serious legal line-drawing problem" *Billing* requires. 551 U.S. at 279. That high standard is not met here merely because joint ARS broker-dealer activity in certain unrelated circumstances might be "permitted."

b. The District Court Erred In Holding There Was An "Unusually Small" Need For Antitrust Enforcement In The ARS Market

The District Court also erred in holding that there is an "unusually small" need for antitrust enforcement in the ARS market. JA 416. The Court reasoned (i) that the SEC has "thoroughly exercised its authority to regulate the ARS market, including an ongoing investigation into the collapse of the market in February 2008"; and (ii) investors and issuers could, and did, bring lawsuits and obtain damages under the securities laws. *Id*.

As discussed below, the SEC investigation in 2008 did not investigate collusive activity by the Defendant broker-dealers. *See* Part VII.C.3, below. Rather, as stated clearly and unequivocally by the SEC Enforcement Director, the investigation was directed at misrepresentations and omissions perpetrated by the broker-dealers on an *individual* basis: "The current investigations and examinations, . . ., focus not on the auction process but rather on the marketing of the securities." *Id*. Although the District Court,

[13] By way of illustration: Broker A and Broker B are hired by an issuer to manage the auction for Security 1. Even under the broadest interpretation of the conduct the SEC purportedly "permits," A and B only may jointly communicate and interact concerning the auction for Security 1. That joint activity is readily distinguishable by a jury from any joint activity between Brokers A and B (and any other broker-dealers) concerning the auctions for Securities 2, 3, 4, etc., that they were not hired to jointly manage. It is the latter joint activity that constitutes the collusive activity alleged in the Complaints.

citing *Billing*, noted that the SEC is "required to take account of competitive considerations when it creates securities-related policy," that authority did not translate in this case into enforcement of the antitrust laws with respect to an anticompetitive agreement by the broker-dealers as a group. *See, e.g.*, *Western States*, 661 F.Supp.2d at 1182, 1183 (finding the enforcement-related need for antitrust lawsuits was not so "unusually small" as to favor implied antitrust immunity, and explaining "[n]either the [Commodity Futures Trading Commission] enforcements actions nor the criminal prosecutions addressed the antitrust concerns raised in Plaintiffs' Complaints, nor provided any redress for competitive harms. The CFTC enforcement actions were directed at each company's individual conduct, even when the CFTC alleged collusive pre-arranged wash trades.").

As for the private securities lawsuits filed against Defendants and others on the heels of the SEC investigation, those actions were filed pursuant to Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, not the antitrust laws, and focus on the broker-dealers' undisclosed intervention in the auctions to prevent auction failures and their failure to disclose the unsafe nature of ARS. They do not seek redress for the collusion alleged in the Complaints as issue here, nor are they eligible to recover treble damages or other remedies that are unique to the antitrust laws.[14]

[14] Of the nearly 30 private securities law class actions initially brought against Defendants and others under the federal securities laws in the aftermath of the mid-February 2008 collapse of the ARS market, most were consolidated into approximately a dozen actions, which have either been dismissed or remain subject to pending motions to dismiss under Fed.R.Civ.P. 12(b)(6): *Burton v. Merrill Lynch*, 08-CV-03037 (SDNY) (dismissed with prejudice); *Pivot Point Capital Master LP v. Deutsche Bank*, 08-CV-02788 (dismissed without prejudice, third amended complaint filed April 23, 2010); *O'Gara v. JPMorgan Chase*, 09-CV-06199 (SDNY) (motion to dismiss taken off calendar pending transfer of case to another jurisdiction); *In re UBS ARS Litig.*, 08-CV-

Moreover, the existence of other enforcement mechanisms -- whether in the form of SEC or other government agency investigations, or private lawsuits brought under the federal securities laws – does not make implied antitrust immunity necessary to make the securities laws or the ARS market work. A finding that Defendants did in fact conspire to summarily withdraw from the ARS market in February 2008 would not upset or conflict with the SEC's enforcement regime, or the Securities Exchange Act in any respect. Collusive conduct that harms the investing public is "an evil that is always forbidden under every circumstance" by both the securities laws and the antitrust laws. *Cf. Strobl v. N.Y. Mercantile Exch.*, 768 F.2d 22, 27-28 (2d Cir. 1985) (construing the CEA with respect to allegations of price manipulation). Indeed, as Judge Pro found in the analogous context of the Commodities Exchange Act, permitting an antitrust action "compliments [sic], rather than conflicts with" the Securities Exchange Act. *Western States*, 661 F.Supp.2d at 1183.

Here, too, the antitrust laws and the securities laws implicated by Plaintiffs' Complaints are reconcilable. Nothing in the securities laws that arguably affect ARS suggests that anticompetitive conduct is acceptable or tolerable, now or in the future. The two statutory regimes thus complement each other with respect to the ARS market and the conduct of the broker-

02967 (SDNY) (dismissed with prejudice); *Waldman v. Wachovia*, 08-CV-02913 (SDNY) (voluntarily dismissed without prejudice); *In re Citigroup Auction Rate Sec.(ARS) Mktg. Litig*. (No. II), 08-CV-03095 (SDNY) (filing of amended complaint pending); *Finn v. Citigroup*, 08-CV-02975 (SDNY) (stayed pending consolidation); *In re Bank of America Corp. Auction Rate Sec. Mktg. Litig.*, 09-CV-02014 (ND Cal.) (motion to dismiss due June 21, 2010); *Van Dyke v. Wells Fargo*, 08-CV-01962 (ND Cal.) (dismissed pending settlement); *Oughtred v. E*Trade, et al.*, 08-CV-03295 (SDNY) (dismissed with leave to amend; second amended class action complaint filed April 22, 2010); *Vining v. Oppenheimer Holdings*, 08-CV-04435 (SDNY) (hearing on motion to dismiss pending); *Defer LP v. Raymond James*, 08-CV-03449 (SDNY) (hearing on motion to dismiss pending).

dealers who operate within it. Preclusion, therefore, is not only baseless as a matter of law, but serves no practical purpose.

Thus, the fourth *Billing* factor weighs against implied preclusion.[15]

2. The SEC Has No Regulatory Authority Over The Collusion Of The Broker-Dealers To Mass-Exit the ARS Market

The second *Billing* factor is the "existence of regulatory authority under the securities law to supervise the activities in question." *Billing*, 551 U.S. at 275. Inquiry into this factor involves consideration of whether the regulatory scheme covers activity "that is more particular than . . . the underlying market activity . . . and more general than . . . the alleged

[15] In evaluating the fourth *Billing* factor, this Circuit, citing *Billing's* discussion of *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 690-91 (1975), focused not only on the SEC's current regulatory position concerning short sales, but on the "potential conflict" posed by the SEC's authority to permit certain joint conduct in the future that the antitrust laws otherwise prohibit. *Electronic Trading*, 588 F.3d at 138. The concern over "potential conflicts," however, is not applicable here. Both *Gordon* and *Electronic Trading* involved specific statutory schemes that the SEC had applied at some point in the history of the market in question, so that the likelihood of subsequent specific regulation of that market was not entirely speculative. *Gordon*, for example, involved the SEC's express regulation of fixed stockbroker commissions, which the SEC initially approved, then disapproved, and therefore "later might approve." *See Billing*, 551 U.S. at 278. *Electronic Trading* involved the SEC's Regulation SHO, which permitted joint broker communication concerning hard-to-borrow securities. In addition to the actual conflict between Regulation SHO and the antitrust laws, the Court was concerned that if lists of "hard-to-borrow" securities came into broader use by brokers, the SEC would further regulate borrowing fees charged by brokers for securities appearing on the lists, compounding the conflict. *Electronic Trading*, 588 F.3d at 138. Here, however, the SEC has no history of regulating joint activity in the ARS markets. There is no evidence of joint activity in any event, and little likelihood the SEC will ever condone the coordinated withdrawal of broker-dealers from the ARS market. Concern with potential conflicts based on what the SEC might do, when there is no history to support that concern, would be entirely speculative in this context. Indeed, inevitably, if such wholesale speculation were enough, antitrust enforcement of any market involving publicly traded securities over which the SEC has some general regulatory authority would be precluded. That could not have been the intent of the Supreme Court's repeated warning that implied antitrust immunity is disfavored, and lies only when there is "clear repugnancy" between the two statutory schemes based on the "given context and *likely* consequences." *Billing*, 551 U.S. at 275 (emphasis added).

anticompetitive conduct." *Electronic Trading*, 588 F.3d at 134; *Municipal Derivatives*, 2010 WL 1244765 at *19.

Here, the District Court erroneously found that the SEC had "clear and adequate" authority to regulate the ARS market, "including the alleged practices challenged by Plaintiffs." JA 409. In particular, the SEC had the authority to regulate "registration, reporting and disclosures" of ARS. *Id.* In addition, citing *Santa Fe Indus. v. Green*, 430 U.S. 462, 477 (1977), 15 U.S.C. § 78o(c) and 15 U.S.C. § 78j(b), the District Court held that the SEC had authority to "prohibit the full range of ingenious devices that might be used to manipulate securities prices," as well as the power to "'regulate virtually every aspect' of the ARS market." JA 409-410. Specifically, the SEC may prohibit broker-dealers from inducing a purchase or sale of a security "by means of any manipulative, deceptive, or other fraudulent device or contrivance." JA 410.

To the contrary, the statutes relied upon by the District Court only address the bidding activities and nondisclosures that form the backdrop of the Defendants' conspiracy to withdraw from the ARS market on or about February 13, 2008, not the conspiracy itself -- and it is the conspiracy that is the "activity in question." Both 15 U.S.C. § 78o(c) and 15 U.S.C. § 78j(b) prohibit brokers and dealers from using a "manipulative, deceptive, or other fraudulent device or contrivance" in inducing or attempting to induce the purchase or sale of any security. A conspiracy to drop out of a market altogether is not a "manipulative device." *See Santa Fe Indus., Inc. v. Green*, 430 U.S. at 476-77 (manipulative or deceptive device "refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity"); *Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 341 F. Supp. 2d 258, 270 (S.D.N.Y. 2004) (same)

Other statutes and regulations upon which Defendants relied below (though not cited by the District Court) are equally off the mark. Several required the SEC to consider the effect of its proposed rules on competition.[16] Those statutes, however, are intended to ensure only that the rules the SEC creates do not thwart or inhibit competition; or, conversely, unintentionally create an antitrust immunity among competitors in the securities markets that Congress never intended. *Cf. Western States* 661 F.Supp.2d at 1182 (claims of price-fixing of natural gas not impliedly precluded, even though the Commodity Exchange Act requires the CFTC to "take into account competitive considerations when creating its rules and regulations"). That is quite different from empowering the SEC to recover damages for the broad-based conspiracy alleged here, or otherwise supplanting private enforcement of the antitrust laws. Defendants' other authorities address the SEC's power to regulate registration, *see* 15 U.S.C. §§ 78o, 78s; attempts to fix the price of a security, *see* 15 U.S.C. § 78i(a)(6); and fraud, *see* 15 U.S.C. § 77q(a); 17 C.F.R. § 242.104 (conduct in connection with public offerings of securities) – which, again, have no relevance to the alleged conspiracy to withdraw *en masse* from a particular securities market.

None of these provisions are specific to ARS or the relevant auction procedures. More importantly, however, none provides the SEC with direct

[16] Defendants below cited 15 U.S.C. § 77b(b) (requiring the SEC to consider whether its proposed action "will promote efficiency, competition, and capital formation"); and 15 U.S.C. § 78w(a)(2) (requiring the SEC to consider the impact its rules and regulations have on competition, and prohibiting any rule or regulation that would "impose a burden on competition not necessary or appropriate in furtherance of the purposes of this chapter").

authority to regulate the singular collusion at issue in this case. Unlike the specific statutory regimes governing IPOs and short sales that contributed to the decisions favoring preclusion in *Billing* or *Electronic Trading*, the generic statutes relied upon by the District Court concerning registration, reporting, and fraud do not apply to the agreement by the Defendants to withdraw simultaneously from participating in the ARS market. Were that not the case, then this factor would become a nullity with respect to any claim of collusion by brokers or dealers with respect to a publicly-traded security.

District Judge Marrero reached a similar conclusion in *Municipal Derivatives*. There, plaintiffs claimed that more than forty corporate defendants illegally rigged bids, limited competition and fixed prices in the municipal derivatives market, in violation of Section 1 of the Sherman Act. Defendants contended that plaintiffs' antitrust claim was precluded under *Billing* by "an extensive set of [IRS and Treasury Department] regulations governing the operation of the market for tax-exempt municipal debt." 2010 WL 1244765 at *16. In particular, much as Defendants here argued below with respect to the SEC, defendants in that case (some of whom are also Defendants here)[17] argued that the IRS had the power to levy penalties on anyone making a materially false statement in connection with the issuance of municipal bonds, and also required investment providers to certify that they had not colluded while preparing their bids. *Id*. at *19.

Although the Court acknowledged that the IRS "has authority to regulate the issuance of municipal derivatives[,]" it held that "its quasi-judicial authority does not extend to supervision of 'all the activities in

[17] For example, JP Morgan Chase & Co.; Merrill Lynch & Co., Inc.; Morgan Stanley; and UBS AG.

question,'" as *Billing* requires – particularly, to the conspiracy in question. *Id*.

> [T]he IRS Regulations do indeed regulate the conduct of municipal derivatives transactions. Nonetheless, this regulatory authority does not cover the full spectrum of conduct that the [plaintiffs' complaint] alleges culminated in Defendants' antitrust violations. While Defendants attempt to portray the conduct at issue as an "abusive arbitrage scheme" in order to bring the alleged conduct entirely within the ambit of the IRS's regulatory authority, the anticompetitive conduct alleged by Named Plaintiffs goes far beyond an attempt to avoid taxes. The Court is not persuaded that the IRS has the authority to regulate the activities in question, namely a conspiratorial agreement to rig bids and fix prices.

Id. at *19 (citations omitted)

Borey is to the same effect. There, a shareholder alleged that two companies conspired to rig tender offer bids for the acquired corporation's shares in violation of the federal antitrust laws. Although the parties conceded that the SEC had "sweeping power to regulate *disclosure* of bidding agreements [in connection with tender offers]" like the one at issue, 569 F. Supp.2d at 1130 (emphasis in original), the Court held the SEC did not have "authority to prevent bidders like [defendants] from joining forces." *Id*. (construing the Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78 n(d)-(f)). The Court made clear that regulatory authority over disclosure is not enough:

> If the SEC's power is limited to requiring disclosure, then the agency's exercise of that power does not conflict with antitrust law, under which disclosure is neither a remedy for anti-competitive conduct nor a defense to the imposition of liability.
>
> * * *
>
> Although nothing in [*Billing*] suggests a sea change in preclusion analysis, the Court emphasized that preclusion depends on showing SEC regulatory authority and enforcement over 'all of the activities' that a plaintiff challenges as anticompetitive . . . . Defendants have not convinced the court either that the SEC possesses authority over the anticompetitive conduct that Plaintiff alleges, or that it has exercised that authority.

569 F.Supp.2d at 1130, 1131-32. *See also Dahl*, 589 F.Supp.2d at 116-17

(holding that plaintiffs' antitrust claim that defendants illegally colluded in leveraged buyout of company was not impliedly precluded: "The SEC does not substantively regulate the [Defendants], it merely requires certain disclosures to be filed as part of [the subject] transaction. Requiring disclosures is not nearly as substantial and invasive as the regulations practiced in *Billing*. Indeed, *Billing* was decided as it was because of the breadth of the SEC's jurisdiction over the activities in question."). *Cf. Eagletech Communications v. Citigroup, Inc.*, No. 07-60668-CIV, 2008 WL 3166533, at *8 n.12 (S.D. Fla. June 27, 2008) (*Billing* would not apply to conduct alleged in complaint, even though short sales—which are regulated by the SEC—were at the base of that conduct, where conduct challenged involved more than alleged role in short sales).

As in *Municipal Derivatives* and *Borey*, nothing in the statutory scheme relied upon by the District Court gives the SEC the authority to regulate the collusive activity at issue here. While those statutes arguably give the SEC authority over registration, reporting and disclosures concerning ARS, that authority does not extend to the alleged conspiracy of the Defendants to withdraw from the ARS market.

Thus, the second *Billing* factor weighs against preclusion.

3. The SEC Has Not Exercised Regulatory Authority With Respect To The Alleged Conspiracy

The third *Billing* factor is whether "the responsible regulatory entities exercise [their] authority" over the type of antitrust activity alleged in the Complaint. *Billing*, 551 U.S. at 275. In evaluating this factor, the Court "looked to activity more particular than the IPO process (the underlying market activity) and more general than the laddering and tying arrangements (the alleged anticompetitive conduct)." *Electronic Trading*, 588 F.3d at 135, 136 (evaluating whether "the SEC's ongoing regulation is focused on *the role of the prime brokers in short selling*" (emphasis added)). Here, the relevant inquiry is whether there is ongoing SEC regulation of the role of the broker-dealers in summarily withdrawing their support of the ARS auctions.

Citing an investigation by the SEC in 2008 (and another in 2004) concerning alleged improprieties by ARS broker-dealers, the District Court opined that the "SEC has actively exercised its authority to investigate and regulate the ARS market, including the alleged practices challenged by the Plaintiffs." JA 410. In particular, the Court cited the September 2008 testimony before Congress of the SEC's Director of Enforcement, Linda Thomsen, as evidence that the SEC was investigating "the specific events at issue in this case: the collapse of the ARS market in February 2008." JA 411. The Court quoted Ms. Thomsen as stating "that the SEC was investigating 'the reasons why the firms stopped supporting the auctions in mid-February.'" *Id*.

The District Court, however, ignored portions of Ms. Thomsen's testimony that clearly showed that the focus of the SEC investigation was fraud on the part of the individual broker-dealers in the *marketing* of ARS, not collusion. In fact, Ms. Thomsen's explanation of the reasons the "ARS market froze," as she put it, never even mentions the possibility of coordinated conduct on the part of the broker-dealers:

> The ARS market encountered significant problems during early 2008. While it is difficult to identify every reason why the ARS market froze, we believe that there were several contributing factors. One factor is the significant increase in the size of the ARS market, which had grown to $330 billion by the time of the freeze. . . . An additional reason for the market seizure is the rating agencies' downgrades of the monoline insurers[.] . . . Another factor . . . is the sub-prime mortgage and credit crisis that unfolded throughout the second half of 2007[.] . . . In fact, firms stopped supporting the auctions in mid-February 2008, and the entire market froze in

> a matter of days. The securities became illiquid, leaving tens of thousands of customers unable to sell their ARS holdings.

JA 248. Rather than collusion, the SEC's investigation into the collapse of the ARS market in February 2008 focused on, and found, fraud: "Our investigative record confirms that both [Citigroup and UBS – "the two largest ARS market participants"] made material misrepresentations and omissions to their customers in connection with their marketing and selling of ARS." JA 250. Of particular importance here, Ms. Thomsen clearly testified that the SEC did not investigate collusion or the auction process at all:

> The current investigations and examinations, unlike the prior Commission investigation, focus not on the auction process but rather on the marketing of the securities.

JA 252.[18]

Thus, the District Court clearly erred in concluding that the SEC had investigated "the practices" alleged by the Plaintiffs. While fraud may have occurred when the broker-dealers touted ARS as "safe, highly liquid investments that were equivalent to cash or money market funds," as Ms. Thomsen states, JA 247, that has nothing to do with the alleged conspiracy to withdraw simultaneously from the ARS market for which Plaintiffs seek to hold Defendants responsible. The SEC investigations cited by the District Court all were aimed at determining whether adequate disclosures had been made and whether penalties should apply for violating disclosure

[18] Like the 2008 investigation, the "prior Commission investigation" to which Ms. Thomsen refers focused only on fraud, not collusion. "The Commission brought prior enforcement actions against numerous broker-dealer firms relating to their failure to disclose certain of their practices in conducting ARS auctions. In May 2006, the Commission brought a settled administrative action against 15 broker-dealers for failing to disclose, among other things, that they bid to prevent failed auctions, submitted or changed orders after auction deadlines, and favored certain preferred customers[.]" JA 252.

requirements. Those investigations never addressed the industry-wide collusion in violation of the Sherman Act that Plaintiffs here have alleged. *See, e.g.*, *Western States*, 661 F. Supp. 2d at 1182 (antitrust claims of a price-fixing conspiracy involving natural gas were not impliedly precluded by the Commodity Exchange Act, in part because "neither the [Commodity Futures Trading Commission] enforcement actions nor the criminal prosecutions [alleged in the Complaints] addressed the antitrust concerns raised in Plaintiffs' Complaints, nor provided any redress for competitive harms," but instead were "directed at each company's individual conduct").

Thus, the third *Billing* factor weighs against preclusion.

VIII. CONCLUSION

For all the reasons set forth above, Plaintiffs' antitrust claims concerning Defendants' alleged conspiracy to exit the ARS market on or about February 13, 2008 are not impliedly precluded by the federal securities laws. The District Court's order dismissing Plaintiffs' Complaints therefore should be reversed.

DATED: July 13, 2010

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MAYOR AND CITY COUNCIL OF BALTIMORE, MARYLAND, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

CITIGROUP, INC., ET. AL.,

Defendants.

---------------------------------------x

08 Cv. 7746 (BSJ)
Order

---------------------------------------x

RUSSELL MAYFIELD, PAUL WALTON, and JOHN ABBOTT, individually on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

CITIGROUP, INC., ET. AL.,

Defendants.

---------------------------------------x

08 Cv. 7747 (BSJ)
Order

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

On September 4, 2008, Plaintiff Mayor and City of Baltimore filed a class action suit against Defendants Citigroup, Inc., Citigroup Global Markets, Inc., UBS AG, UBS Securities, LLC, UBS Financial Services, Inc., Merrill Lynch & Co., Inc., Morgan Staley, Lehman Brothers Holdings, Inc., Bank of America Corp., Wachovia Corp., Wachovia Securities, LLC, Wachovia Capital

Markets, LLC, The Goldman Sachs Group, Inc., JP Morgan Chase & Co., Royal Bank of Canada, and Deutsche Bank, AG. (collectively "Defendants") alleging antitrust violations on behalf of issuers of auction rate securities (collectively "Issuers"). On September 4, 2008, Plaintiffs Russell Mayfield, Paul Walton, and John Abbott filed a class action suit against Defendants alleging antitrust violations on behalf of investors in auction rate securities (collectively "Investors"). On January 15, 2009, Defendants filed a Motion to Dismiss both complaints under Fed. R. Civ. P. 12(b)(6). For the reasons stated below, Defendants Motion to Dismiss is GRANTED.[1]

Background[2]

In their Complaint, Plaintiff Mayor and City of Baltimore, an issuer of auction rate securities ("ARS"), bring a class action on behalf of all persons or entities that issued ARS underwritten by Defendants between May 12, 2003 and February 13, 2008. (Issuer Compl. ¶ 38.) In their Complaint, Plaintiffs Russell Mayfield, Paul Walton, and John Abbott, investors in ARS, bring a class action on behalf of all persons or entities who acquired ARS from Defendants or their co-conspirators and held those securities as of February 13, 2008. (Investor Compl.

[1] Defendants' Motion to Dismiss as well as Plaintiffs' submissions addressed both the Investor and Issuer Complaints. This order shall likewise address both pending matters.

[2] The following facts are taken from the allegations in Plaintiffs' Complaints and are assumed to be true for the purposes of this decision only.

¶ 39.) Both Complaints allege a single claim for violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

ARS are municipal bonds, corporate bonds and preferred stocks with interest rates or dividend yields that are periodically reset through auctions. (Investor Compl. ¶ 49; Issuer Compl. ¶ 47.) The terms of each ARS, such as the frequency of the auctions and the debt maturity dates, vary from security to security, and are set forth in a unique prospectus for each ARS. (See Investor Compl. ¶ 51; Issuer Compl. ¶ 49.) Auctions for each ARS were managed by one or more broker-dealers selected by the issuer of that particular ARS. (Investor Compl. ¶ 58; Issuer Compl. ¶ 57.) There were "at a minimum, thousands" of issuers and purchasers of ARS during the class period, and each issuer may have engaged in multiple ARS offerings, each with its own separate auctions. (Investor Compl. ¶ 40; Issuer Compl. ¶ 39.)

In an ARS auction, each broker-dealer managing that auction would receive bids from investors and could submit bids to purchase ARS for that broker-dealer's own account. (Investor Compl. ¶¶ 54, 59; Issuer Compl. ¶¶ 52, 58.) If sufficient bids were received (from investors or from the broker-dealer's own accounts) to purchase all ARS available for sale in that auction, a "clearing" interest rate payable to investors by the ARS issuer during the succeeding period would be set based on the winning bids, and the ARS would be distributed to the winning bidders. (Investor Compl. ¶¶ 52-55, 60; Issuer Compl. ¶¶ 50-53, 59.) If insufficient bids were received to purchase all ARS offered in an auction, that auction would "fail" in whole or in part. The issuer then would pay a prospectus-defined interest rate (sometimes called the "maximum rate") on the ARS for the succeeding period, while the ARS holders would continue holding their ARS until the next auction. (Investor Compl. ¶¶ 56-57; Issuer Compl. ¶¶ 54-56.)

Investors were required to submit an order to the broker-dealer by a deadline set by the broker-dealer, which was usually set early enough for the broker-dealer to process and analyze the orders before the auction was finalized. This provided broker-dealers sufficient time to place orders from their own accounts and prevent auctions from failing where they otherwise would have failed due to insufficient demand. (Investor Compl. ¶ 59; Issuer Compl. ¶ 58.) Historically, broker-dealers placed orders to prevent auction failures and maintain liquidity in the ARS market. (See Investor Compl. ¶ 70; Issuer Compl. ¶ 69.)

In the summer of 2007, demand for ARS among corporate and institutional clients declined and Defendants began purchasing large numbers of ARS into their own inventories to prevent auction failures. (Investor Compl. ¶ 81; Issuer Compl. ¶ 80.) By fall and winter of 2007, demand continued to decline and

Defendants began limiting the amount of ARS inventory they would take on. (Investor Compl. ¶ 82; Issuer Compl. ¶ 81.)

On February 13, 2008, it was disclosed that Defendant UBS, the second largest underwriter of ARS would no longer support the auction market. Virtually every other major broker-dealer, including Defendants Goldman Sachs, Lehmann Brothers, Citigroup, and Merrill Lynch, adopted a similar policy. (Investor Compl. ¶ 95; Issuer Compl. ¶ 94.) Without broker-dealer support, 87% of all ARS auctions held that day failed. (Investor Compl. ¶ 94; Issuer Compl. ¶ 93.) As a result of this market failure, ARS became illiquid and the issuers of those securities were required to pay the prospectus-defined maximum interest rates. (Investor Compl. ¶ 94; Issuer Compl. ¶ 95.)

Plaintiffs allege that Defendants acted collectively to withdraw support for the ARS market, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. (Investor Compl. ¶ 110-113; Issuer Compl. ¶ 110-113.)

Legal Standard

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted," a district court must accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the non-moving party. Burnette v. Carothers, 192 F.3d 52, 56 (2d Cir. 1999). Under that standard, "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1969 (2007) (citing Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994) (once a claim for relief has been stated, a plaintiff "receives the benefit of imagination, so long as the hypotheses are consistent with the complaint")). However, a court need not defer to sweeping and unsupported allegations and conclusions of law in evaluating the sufficiency of a complaint. See Hirsch v. Arthur Anderson & Co., 72 F.3d 1085, 1092 (2d Cir. 1996); First Nat'l Bank v. Gelt Funding Corp., 27 F.3d 763, 771-72 (2d Cir. 1994).

In deciding a 12(b)(6) motion, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir. 1995) (quoting Scheuer v. Rhodes, 416 U.S. 232, 235-36 (1974)). Thus, "the office of a motion to dismiss is merely to assess the legal feasibility of a complaint, not to assay the weight of the evidence which might be offered in support thereof." Eternity Global Master Fund Ltd. V. Morgan Guar. Trust Co. of N.Y., 375 F.3d 168, 176 (2d Cir. 2004) (quoting Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980)).

Analysis

Defendants contend that "governing law makes plain that Plaintiffs' antitrust claim is precluded by the securities laws and must be dismissed." (Pl.'s Mem. At 2.) The Court agrees.

I. Credit Suisse Secs. (USA) LLC v. Billing

The United States Supreme Court addressed preclusion of securities antitrust lawsuits in Credit Suisse Secs. (USA) LLC v. Billing, 127 S. Ct. 2383 (2007). In Billing, a group of securities buyers ("Buyers") filed an antitrust lawsuit against underwriting firms ("Underwriters") that market and distribute newly-issued securities ("IPOs"). Buyers claimed that Underwriters unlawfully conspired to withhold shares of popular IPOs from Buyers unless Buyers agreed to purchase additional shares at escalating prices, pay Underwriters unusually high commissions on subsequent security purchases, and/or purchase other less desirable securities from underwriters, in violation of Section 1 of the Sherman Act, Section 2 (c) of the Clayton Act, and state antitrust laws. Underwriters moved to dismiss Buyers' antitrust claims, arguing that the federal securities laws implicitly precluded application of the antitrust laws to the Conduct at Issue.

According to Billing, "when a court decides whether securities law precludes antitrust law, it is deciding whether, given context and likely consequences, there is a 'clear repugnancy' between the securities law and the antitrust complaint. . . [or] whether the two are 'clearly incompatible.'" Id. At 2392. Such clear repugnancy or incompatibility is determined if four critical factors exist:

> "(1) an area of conduct squarely within the heartland of securities regulations;
> (2) clear and adequate SEC authority to regulate;
> (3) active and ongoing agency regulation; and
> (4) a serious conflict between the antitrust and regulatory regimes."

Id. at 2397.

After applying these factors, the Billing Court concluded that the federal securities laws implicitly precluded application of the antitrust laws to the conduct at issue. Under the first factor, the Court found that Underwriters' efforts to promote and sell IPOs were "central to the proper functioning of a well-regulated capital market" and "lie at the very heart of the securities marketing enterprise." Id. at 2392. Under the second factor, the Court found that the securities laws granted the United States Securities and Exchange Commission (the "SEC") authority to supervise the conduct at issue, including the power to "forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage." Id. at 2392-93 (citing 15 U.S.C. §§ 77b(a)(3), 77j, 77z-2, 78o(c)(2)(D), 78i(a)(6), and 78j (b)). Under the third factor, the Court found that the SEC has continuously exercised its authority to regulate the IPO transaction process, such as regulating IPO communications and bringing actions against underwriters who violate IPO regulations.

The fourth factor was the pivotal consideration before the Court. The Court found that there was a serious conflict between the securities laws and antitrust laws citing: (1) the fine line separating the activity that the SEC permits from the activity that the SEC forbids (2) "the need for securities-related expertise"; (3) "the overlapping evidence from which reasonable but contradictory inferences may be drawn"; and (4) the risk of inconsistent court results in factually similar circumstances. Id. at 2394-96. The Court stated that "antitrust courts are likely to make unusually serious mistakes," and the threat of such mistakes may cause Underwriters to act in ways that will avoid "a wide range of joint conduct that the securities law permits or encourages (but which [Underwriters] fear could lead to an antitrust lawsuit and the risk of treble damages)." Id. at 2395-96.

Furthermore, the Court determined that "any enforcement-related need for an antitrust lawsuit is unusually small." Id. at 2396. First, the Court pointed to the ongoing SEC regulation of the IPO market outlined under the third factor, noting that the "SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations." Id. (citing 15 U.S.C. § 77b(b) (instructing the SEC to consider, "in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation"); 15 U.S.C. § 78w(a)(2) (the SEC "shall consider among other matters the impact any such rule or regulation would have on competition")). Second, the Court found that Buyers had the opportunity to challenge Underwriter practices by bringing lawsuits under the securities law, which has distinct procedural requirements. "To permit an antitrust lawsuit risks circumventing these requirements by permitting plaintiffs to dress what is essentially a securities complaint in antitrust clothing." Id.

After determining that the four factors were satisfied, the Court concluded that, within the IPO context at issue, the securities laws were clearly incompatible with the application of the antitrust laws.

II. Implied immunity in the ARS market

In this case, Defendants argue that "Plaintiff's antitrust claim. . . is barred by this doctrine of implied immunity because it concerns alleged conduct. . . that has been closely monitored, investigated and regulated by the SEC for years, and the SEC's continuing regulation of ARS is 'clearly incompatible' with the antitrust laws. . . . All four Billing factors are met here." (Pl. Mem. at 6-7.) The Court agrees.

A. Heartland of Securities Regulation

The auction rate securities market lies squarely within an area of market activity that the securities laws seek to regulate. ARS comprise $330 billion of debt securities involving a variety of financial market participants including individual, fund and corporate investors; municipal and corporate issuers; and broker-dealers. (See Investor Compl. ¶ 50; Issuer Compl. ¶ 48.) As with the IPO process at issue in Billing, ARS raise capital for municipalities and corporations and provide a means to spread ownership and diversify risk. See Billing, 127 S. Ct. at 2392. As the SEC stated in a recent no-action letter, the "mission of the Commission[] to protect investors, maintain fair and orderly securities markets, and facilitate capital formation. . . extends to the market for auction rate municipal securities." Municipal Auction Rate Securities, 2008 SEC No-Act. LEXIS 396, at *1.

B. Clear and adequate authority

There is "clear and adequate SEC authority to regulate" the ARS market, including the alleged practices challenged by the Plaintiffs. Plaintiffs concede that the SEC has the authority to regulate "registration, reporting and disclosures" of ARS. (Opp'n Mem. at 16.) The SEC also has authority "to prohibit the full range of ingenious devices that might be used to manipulate securities prices." Santa Fe Indus. v. Green, 430 U.S. 462, 477 (U.S. 1977). Specifically, the SEC may prohibit broker-dealers from effecting a transaction in a security or attempting to induce the purchase or sale of a security "by means of any manipulative, deceptive, or other fraudulent device or contrivance" under 15 U.S.C. § 78o(c) and may prohibit manipulation in connection with the purchase or sale of any security under 15 U.S.C. § 78j(b). These provisions were also cited in Billing to establish the Second Factor. See Billing, 127 S. Ct. at 2393. As in Billing, "the SEC possesses considerable power to forbid, permit, encourage, discourage, tolerate, limit or otherwise regulate virtually every aspect" of the ARS market. Id. at 2392.

C. Exercise of SEC Authority

The SEC has actively exercised its authority to investigate and regulate the ARS market, including the alleged practices challenged by the Plaintiffs. Plaintiffs do not dispute that the SEC has actively regulated "registration, reporting, and disclosures" in the ARS market. In fact, in the Investor and Issuer Complaints, Plaintiffs describe a 2004 SEC investigation into the "practices by which broker-dealers could influence the auction markets." (Investor Compl. ¶ 73; Issuer Compl. ¶ 74.) As part of this investigation, the SEC also probed prioritization of auction bids, internal broker-dealer bidding deadlines, compensation paid to investors, and communications between broker-dealers and investors. (Investor Compl. ¶ 74; Issuer Compl. ¶ 75.) This led to a May 31, 2006 administrative proceeding regarding auction practices and a consent decree directing broker-dealers, including most of the Defendants in this case, "to disclose certain practices and to cease engaging in other practices." The decree also indicated that the SEC had explored collective conduct related to preventing market failure and setting of artificial market rates. (Investor Compl. ¶ 73; Issuer Compl. ¶ 74.)

Furthermore, the SEC has undertaken an ongoing investigation into the specific events at issue in this case: the collapse of the ARS market in February 2008. On September 8, 2008, the SEC's Director of Enforcement Linda Thomsen testified before Congress regarding the SEC's "efforts in response to the freezing of the [ARS] market in mid-February 2008." Specifically, Ms. Thomsen explained that the SEC was investigating "the reasons why the firms stopped supporting the auctions in mid-February." Hearing Before the H. Comm. on Fin. Servs., 110th Cong., at 3 (Sept. 18, 2008) (Youngwood Decl., Ex. N.) As Billing explains, this investigation is statutorily required "to take account of competitive considerations," such as the antitrust law violation alleged by Plaintiffs in this case. Billing, 127 S. Ct. at 2396.

The SEC subsequently proposed new rules for ARS broker-dealers and reached settlements requiring a number of broker-dealers to purchase ARS held by clients at par value, including a nearly $30 billion settlement with Defendants Citigroup and UBS described by SEC Chairman Christopher Cox as "the largest in SEC history, and represent[ing] the largest return of customer money in the agency's 75 years." SEC Press Release 2008-290 (Dec. 11, 2008) (announcing SEC settlement with Citigroup Global Markets, Inc. and UBS Financial Services, Inc.) (Youngwood Decl., Ex. U); Proposed Rule Change to MSRB Rule G-8, Exchange Act Release No. 34-59873 (May 6, 2009) (requiring broker-dealers to maintain certain records relating to ARS) (Youngwood Dec. 4, 2009 Letter, Ex. A).[3] The SEC also filed civil complaints against various broker-dealers alleging, among other charges, manipulative conduct under 15 U.S.C. § 78o(c) relating to the collapse of the ARS market in February 2008. See SEC v. Banc of America Securities LLC, No. 09 Civ. 5170 (S.D.N.Y. filed June 3, 2009); SEC v. RBC Capital Markets Corp., No. 09 Civ. 5172 (S.D.N.Y. filed June 3, 2009); SEC v. Deutsche Bank Securities Inc., No. 09 Civ. 5174 (S.D.N.Y. filed June 3, 2009); SEC v.

[3] See also SEC Press Release 2008-246 (Oct. 8, 2008) (announcing SEC settlement with RBC Capital Markets Corp.) (Youngwood Decl., Ex. S); SEC Press Release 2008-247 (Oct. 8, 2008) (announcing SEC settlement with Bank of America) (Youngwood Decl., Ex. T).

Morgan Keegan & Co. Inc, No. 09 Civ. 1965 (N.D. Ga. filed July 21, 2009).

Given such extensive SEC investigation and regulation, it is clear that the agency has actively exercised its authority in this area.

D. Conflict between securities and antitrust law

The securities laws are in serious conflict with the antitrust laws within the ARS context at issue in this case. In Billing, the antitrust claims were not allowed to proceed because "a fine, complex, detailed line separates activity that the SEC permits or encourages," which cannot be the subject of the antitrust suit, "from activity that the SEC must (and inevitably will) forbid." Billing, 127 S. Ct. at 2394. Such fine line-drawing exists in this case as well.

In the ARS market, the SEC has permitted or encouraged interactions amongst broker-dealers under certain circumstances. For example, the SEC has recognized that ARS issuers may retain multiple broker-dealers to jointly underwrite ARS offerings and jointly manage ARS auctions. See In re Bear, Stearns & Co. Inc., 2006 SEC LEXIS 1246, at *9 (Youngwood Decl., Ex. J) (SEC settlement acknowledging that issuers of ARS may select "one or more broker-dealers to underwrite the offering and/or manage the auction process"). Furthermore, the SEC has determined that a "broker-dealer may submit orders in auctions for its own accounts," including jointly underwritten or managed auctions. Id. at *11. Such joint behavior would inherently require some level of communication amongst broker-dealers. By explicitly allowing this conduct, the SEC must have considered the possibility of prohibiting it as well. Yet, the SEC has allowed such interactions amongst broker-dealers to continue, subject to imposed disclosure requirements. Id. As Defendants suggest, in light of this permissible joint underwriting and management, it is reasonable to expect that the SEC may permit further collective action or joint bidding by broker-dealers to restore liquidity to the ARS market. (Def.'s Mem. At 18.) Therefore, joint behavior, which has antitrust implications, has been regulated by the SEC in the past and may be regulated further in the future.

A recent Second Circuit case, Elec. Trading Group, LLC v. Banc of Am. Sec. LLC, 588 F.3d 128 (2d Cir. 2009), is analogous. In that case, Plaintiffs alleged that brokers in the securities short-selling market communicated with one another to designate hard-to-borrow securities and to fix inflated borrowing fees for those securities. However, the SEC permitted brokers to communicate about the availability and price of securities. The Court determined that it would be nearly impossible for a broker to determine the level of communication allowed under securities law but prohibited under antitrust law. Id. Accordingly, the

Court held that antitrust claims must be precluded because "antitrust liability, with the prospect of treble damages, would be an incentive for the prime brokers to curb their permissible exchange of information and thereby harm the efficient functioning of the short-selling market." Id.

As in Electronic Trading Group, it is unreasonable to expect broker-dealers in the ARS market to determine the fine line between permissible communications under securities law and impermissible communications under antitrust law. In these cases, as in Billing, "evidence tending to show unlawful antitrust activity and evidence tending to show lawful securities marketing activity may overlap, or prove identical." Billing, 127 S. Ct. at 2395. Such overlapping evidence presented to "nonexpert judges" and "nonexpert juries" in different courts in antitrust actions across the country creates a distinct risk of inconsistent results. Id. At 2395-96. Faced with such uncertainty, broker-dealers would have an incentive to refrain from "a wide range of joint conduct that the securities law permits or encourages (but which [broker-dealers] fear could lead to an antitrust lawsuit and the risk of treble damages)." Id. Therefore, the required fine line-drawing is best left to the "securities-related expertise" of the SEC to implement in a more universal fashion.

Furthermore, there is an "unusually small" need for antitrust enforcement in the ARS market. First, as discussed above, the SEC has thoroughly exercised its authority to regulate the ARS market, including an ongoing investigation into the collapse of the market in February 2008. As Billing points out, the "SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations." Id. at 2396. Second, as Investors and Issuers "may bring lawsuits and obtain damages under the securities laws," there is a "diminished need for antitrust enforcement." Id. at 2396-2397. In fact, dozens of securities lawsuits regarding ARS broker-dealer conduct were filed against virtually all Defendants before these antitrust actions were filed.[4] These antitrust claims resemble the very

[4] See, e.g., Al-Thani v. Wells Fargo & Co., No. 4:08-1745 (N.D. Cal. Filed Apr. 1, 2008); Bondar v. Bank of America Corp., No. 3:08-2599 (N.D. Cal. filed May 22, 2008); Bonnist v. UBS AG, No. 1:08-4352 (S.D.N.Y. filed May 8, 2008); Brigham v. Royal Bank of Canada, No. 1:08-4431 (S.D.N.Y. filed May 12, 2008); Burton v. Merrill Lynch & Co., Inc., No. 1:08-3037 (S.D.N.Y. filed May 25, 2008); Ciplet v. JPMorgan Chase & Co., No. 1:08-4580 (S.D.N.Y. filed May 16, 2008); Defer LP v. Raymond James Financial, Inc., No. 1:08-3449 (S.D.N.Y. filed Apr. 8, 2008); Finn v. Citi Smith Barney, No. 1:08-2975 (S.D.N.Y. filed Mar. 21, 2008); Ghalayini v. Citigroup, Inc., No. 1:08-5016 (S.D.N.Y. filed May 30, 2008); Grossman v. Oppenheimer & Co., Inc., No. 1:08-3528 (S.D.N.Y. filed Apr. 11, 2008); Humphrys v. TD Ameritrade Holding Corp., No. 1:08-2912 (S.D.N.Y. filed Mar. 19, 2008); In re UBS Auction Rate Securities Litigation, No. 1:08-2967 (S.D.N.Y. filed Mar. 21, 2008); Jamail v. Morgan Stanley, No. 1:08-3178 (S.D.N.Y. filed Mar. 31, 2008); Kassover v. UBS AG, No. 1:08-2753 (S.D.N.Y. filed Mar. 14, 2008); Kraemer v. Deutsche Bank AG, No. 1:08-2788 (S.D.N.Y. filed Mar. 17, 2008); LHB Insurance Brokerage, Inc. v. Citigroup, Inc., No. 1:08-3095 (S.D.N.Y. filed Mar. 26, 2008); Miller v. Morgan Stanley & Co., Inc., No. 1:08-3012 (S.D.N.Y. filed Mar. 25, 2008); Oughtred v. E*Trade Financial Corp., No. 1:08-3295 (S.D.N.Y. filed Apr. 2, 2008); Sanchez v. UBS AG, No. 1:08-3082 (S.D.N.Y. filed Mar. 26, 2008); Silverstein v. TD Ameritrade Holding Corp., No. 1:08-5467 (S.D.N.Y. filed June 17, 2008); Stanton v. Merrill Lynch & Co., Inc., No. 1:08-3054 (S.D.N.Y. filed Mar. 26,

"securities complaint[s] in antitrust clothing" contemplated by the Supreme Court in Billing. As such, both complaints must be dismissed.

Conclusion

For the reasons set forth above, Defendants Motion to Dismiss both the Investor Complaint and the Issuer Complaint is GRANTED. Because no further issues remain to be decided, the Clerk of the Court is directed to close both of the above-captioned cases.

SO ORDERED:

Barbara S. J
BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
January 26, 2010

2008); Stockhamer v. Citigroup, Inc., No. 1:08-3904 (S.D.N.Y. filed Apr. 25, 2008); Swanson v. Citigroup, Inc., No. 1:08-3139 (S.D.N.Y. filed Mar. 27, 2008); Van Dyke v. Wells Fargo & Co., No. 3:08-1962 (N.D. Cal. filed Apr. 14, 2008); Vining v. Oppenheimer Holdings, Inc., No. 1:08-4435 (S.D.N.Y. filed May 12, 2008); Waldman v. Wachovia Corp., No. 1:08-2913 (S.D.N.Y. filed Mar. 19, 2008); Wedgewood Tacoma LLC v. Citigroup, Inc., No. 1:08-4360 (S.D.N.Y. filed May 8, 2008); Zisholtz v. SunTrust Banks, Inc., No. 1:08-1287 (N.D. Ga. filed Apr. 2, 2008).

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MAYOR AND CITY COUNCIL OF BALTIMORE, MARYLAND, on behalf of themselves and all others similarly situated,

Plaintiffs,

08 **CIVIL** 7746 (BSJ)

-against-

JUDGMENT

CITIGROUP, INC., ET AL.,

Defendants.

---X

RUSSELL MAYFIELD, PAUL WALTON, and JOHN ABBOTT, individually on behalf of themselves and all others similarly situated,

Plaintiffs,

08 **CIVIL** 7747 (BSJ)

-against-

CITIGROUP, INC., ET AL.,

Defendants.

---X

Defendants having moved to dismiss both complaints pursuant to Fed. R. Civ. P. 12(b)(6), and the matter having come before the Honorable Barbara S. Jones, United States District Judge, and the Court, on January 26, 2010, having rendered its Order granting defendants' motion to dismiss both the Investor Complaint and the Issuer Complaint, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated January 26, 2010, defendants' motion to dismiss both the Investor Complaint and the Issuer Complaint is granted; accordingly, both of the above-captioned cases are closed.

Dated: New York, New York
January 30, 2010

J. MICHAEL McMAHON

Clerk of Court

BY: ______________________

Deputy Clerk

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Dear Litigant,

Enclosed is a copy of the judgment entered in your case.

Your attention is directed to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, which requires that if you wish to appeal the judgment in your case, you must file a notice of appeal within 30 days of the date of entry of the judgment (60 days if the United States or an officer or agency of the United States is a party).

If you wish to appeal the judgment but for any reason you are unable to file your notice of appeal within the required time, you may make a motion for an extension of time in accordance with the provision of Fed. R. App. P. 4(a)(5). That rule requires you to show "excusable neglect" or "good cause" for your failure to file your notice of appeal within the time allowed. Any such motion must first be served upon the other parties and then filed with the Pro Se Office no later than 60 days from the date of entry of the judgment (90 days if the United States or an officer or agency of the United States is a party).

The enclosed Forms 1, 2 and 3 cover some common situations, and you may choose to use one of them if appropriate to your circumstances.

The Filing fee for a notice of appeal is $5.00 and the appellate docketing fee is $450.00 payable to the "Clerk of the Court, USDC, SDNY" by certified check, money order or cash. **No personal checks are accepted.**

J. Michael McMahon, Clerk of Court

by: ______________________________

, Deputy Clerk

CERTIFICATE OF SERVICE & CM/ECF FILING

10-722-cv Mayor v. Citigroup, Inc.

I hereby certify that I caused the foregoing Brief and Special Appendix of Plaintiffs-Appellants Mayor and City Council of Baltimore, Maryland, on behalf of themselves and all others similarly situated to be served on counsel for Defendants-Appellees via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1:

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on this 13th day of July 2010.

Notary Public:

/s/ Ramiro A. Honeywell
Sworn to me this

July 13, 2010

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Notary Public, State of New York
No. 01HO6118731
Qualified in Kings County
Commission Expires November 15, 2012

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