# 10-722-cv

# 10-867-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

## REPLY BRIEF FOR PLAINTIFFS-APPELLANTS MAYOR AND CITY COUNCIL OF BALTIMORE, MARYLAND AND ALL OTHERS SIMILARLY SITUATED

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## INTRODUCTION

In their opposition brief, Defendants have not only responded to Plaintiffs' arguments that the lower court erred in finding their antitrust claims preempted, but have also argued that the decision below can be sustained on the alternative ground that Plaintiffs' complaints failed to plead a plausible antitrust conspiracy. For the reasons expressed herein, both arguments lack merit.

## I. The *Billing* Factors Establish that Preclusion is Unwarranted

### A. The Fourth *Billing* Factor Weighs Against Preclusion

Defendants fail to discuss, much less cure, the principal infirmity in the District Court's decision. As described below, the operative complaints allege that broker-dealers managing *separate* auctions colluded to withdraw *en masse* from hundreds of independent auction rate securities ("ARS") auctions. In applying the fourth factor of *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007) ("*Billing*"), the District Court reasoned that, because the SEC permits several broker-dealers to jointly manage an *individual* auction, no "fine line" can be drawn between permissible communications among joint broker-dealers and the anticompetitive communications alleged in this case. JA 413-415. But once *intra*-auction communications (which the Securities & Exchange Commission ("SEC") permits) are distinguished from the *inter*-auction communications alleged in this case (which the SEC does not permit), the line-drawing problem disappears: in determining whether Defendants engaged in the alleged anticompetitive conduct,

the jury here can disregard *all* broker-dealer communications regarding a single auction that they co-managed and consider *only* broker-dealer communications regarding separate auctions that they did not co-manage. It does not require expertise in the securities laws to draw that line. Indeed, it could be accomplished by a simple ruling *in limine* by the Court. With that simple distinction, the conflict between what the SEC permits (limited joint-broker communications about a single auction) and what the antitrust laws forbid (collusive inter-auction communications) entirely disappears.

Every other court to reach a similar issue – where no communications between the co-conspirators was explicitly or implicitly permitted – has concluded that there is no conflict. In the *Municipal Derivatives Antitrust Litigation*, where defendants allegedly fixed auctions for municipal derivatives, Judge Marrero found no conflict because "the 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." *Hinds County v. Wachovia Nat'l Bank*, 700 F.Supp.2d 378, 405 (S.D.N.Y. 2010). Judge Marrero contrasted that with *Electronic Trading*, where the transactions "necessarily involved the *exchange of information* regarding the availability and price of securities" and with *Billing*, "where the Underwriters were required to work *in concert* to promote and sell IPOs." *Id.* (emphasis added). Similarly, in *In re Western States Wholesale*

*Natural Gas Antitrust Litig.*, 661 F.Supp.2d 1172 (D. Nev. 2009) ("*Western States*") where defendants allegedly colluded to manipulate natural gas prices, the court found no conflict because "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." (Emphasis added).

Here, as in *Municipal Derivatives*, there is no indication that broker-dealers had any lawful reason to communicate about separate auctions that they did not co-manage. And the SEC regulations do not explicitly or implicitly suggest that broker-dealers are to communicate about *separately run* auctions. Similarly, like *Western States* and unlike *Billing*, there is no need for independent broker-dealers to form a joint enterprise. There is no evidence in the record, and the District Court did not suggest, that the SEC permits *inter*-auction communications, much less requires them.[1] As a result, there is no line-drawing problem, given that the complaint alleges a conspiracy solely with respect to *inter*-auction communications.

Nor is there a concern about potential conflict. The District Court noted that the SEC may allow "further collective action or joint bidding" by broker-dealers to restore liquidity to the ARS market. JA 414. Defendants speculate that the SEC

[1] Defendant's relegate their discussion of *Municipal Derivatives and Western State* to two footnotes and simply distinguish them on the ground that they do not arise under the securities laws. (Opp. at 22 n. 6, 32 n. 9). That distinction is unavailing: both cases discussed *Billing* at length and *Billing* never suggested that its principles apply with greater force in the securities context.

may decide to offer temporary lending solutions to holders of illiquid securities, create a secondary market for ARS or "otherwise restructure these securities." Opp. at 33. Defendants maintain that conversations about whether or not to participate in these speculative, ill-defined "arrangements" would be "nearly indistinguishable" from the anticompetitive conduct alleged in the complaint. *Id.* Even in their imagined future scenarios, the Defendants fail to locate a conflict with the anticompetitive conduct alleged here: neither the District Court nor Defendants have speculated that the SEC may allow broker-dealers to communicate about their support, or withdrawal of support, for auctions that they do not jointly run. Further, even if such a conflict were conceived, it is far removed from the concrete, foreseeable potential conflicts discussed in *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975) and *Electronic Trading Group, LLC v. Banc of America Securities, LLC,* 588 F.3d 128 (2nd Cir. 2009) ("*Electronic Trading*"). *See* Opening Br. 32 n. 15 (noting that the potential conflicts in both *Gordon* and *Electronic Trading* involved specific statutory schemes that the SEC had previously applied).

For these reasons alone, the District Court's decision should be reversed. *See, e.g.*, *Western States*, 661 F.Supp.2d at 1179, 1183 (finding no preemption because the fourth *Billing* factor was not met even where the other three factors were met); JA 407 (noting that the fourth factor was the "pivotal consideration" for

the *Billing* Court). Defendants do not cite a single case that found implied preemption where, as here, the fourth factor is not met. Indeed, the *Billing* Court suggested that the fourth factor is a necessary condition for finding preemption when it stated that the question presented by the fourth factor is whether "there a conflict that rises to the level of incompatibility." 551 U.S. at 277.

B. The Third *Billing* Factor Weighs Against Preemption

In discussing the third *Billing* factor, the District Court first concluded that the "SEC actively exercised its authority to investigate and regulate the *ARS Market*." JA 410 (emphasis added). Under *Electronic Trading*, this conclusion is irrelevant because the third *Billing* factor is analyzed at a level of "activity more particular than . . . the underlying market activity," such as, here, the auction rate securities market. 588 F.3d at 135.[2]

The District Court next concluded that the SEC actively exercised its authority to investigate and regulate "the alleged practices challenged by Plaintiffs." JA 410. In reaching this conclusion, the District Court and Defendants relied on a single statement to Congress by SEC Director of Enforcement Linda Thompson. Thompson, however, explicitly emphasized that her "investigations and examinations, unlike the prior Commission investigation, focus[ed] *not on the*

[2] Further, the sporadic examples of ARS regulations outlined by the District Court and the Defendants are a far cry from the active and extensive regulations discussed in *Billing*, where the SEC "defined in *detail* . . . what underwriters may and may not do and say during their road shows," and *Electronic Trading*, where Regulation SHO and a SEC roundtable extensively addressed the prime brokers' role in the short selling market. 588 F.3d at 136.

*auction process* but rather on the marketing of the securities." JA 252 (emphasis added). Like the District Court, Defendants ignore this unequivocal statement that the SEC did not investigate the auction process or, *a fortiori*, any joint activity by Defendants relating to the auction process. Rather, Defendants point to a single sentence in her testimony noting that the SEC sought voluntary cooperation from broker-dealers regarding "the reasons why the firms stopped supporting the auctions in mid-February." JA 249; Opp. at 27. A single request for voluntary cooperation does not establish that an investigation was conducted, nor is there any indication that the investigation related to any suspected *collusive* behavior by Defendants.

At the very least, there is an inadequate factual record to make any determination regarding the scope of the SEC's investigation into the reasons for the market withdrawal and the District Court's decision should be reversed insofar as it rested on a determination of that scope on a motion to dismiss. *See In re Delta/AirTran Baggage Fee Antitrust Litigation*, 09-md-2089, 2010 WL 3290433, *14 (N.D.Ga. Aug. 2, 2010) ("[A]t least at this early stage of the case, Defendants have failed to demonstrate that implied preclusion applies.").

C. The Second *Billing* Factor Weighs Against Preemption

The Defendants misstate the proper level of analysis for the second factor. Defendants argue that it is irrelevant whether the SEC has regulatory authority

over "the alleged conspiracy to jointly withdraw from the marketplace" because this Court "clarified that the relevant question for the second factor was whether the SEC had regulatory authority over the general 'role of the prime brokers in short selling and . . . the borrowing fees charged by prime brokers,' not over the particular anticompetitive conspiracy alleged." Opp. at 21-22. This is incorrect. In *Electronic Trading*, this Court stated that, in analyzing the second factor, the *Billing* Court "gauged the regulation of the *specific alleged anticompetitive conduct*" and looked to SEC's power to supervise the "alleged laddering and tying arrangements." 588 F.3d at 134.

Unlike *Electronic Trading*, where this Court relied on a statute that specifically grants the SEC broad regulatory power to oversee "short sale[s]," *id.*, the generic statutes upon which the District Court relied do not empower the SEC to regulate a conspiracy to withdraw from the ARS market *en masse*. Defendants nonetheless argue that the joint decision by broker-dealers not to bid on ARS contracts "*could* have price effects," which the SEC may deem to be manipulative, Opposition Br. at 22, but that is two leaps of inference away from establishing that the SEC has the authority to regulate such conduct. Indeed, a decision to withdraw *en masse* from the ARS market is not a manipulative device "such as wash sales, matched orders, or rigged prices . . . intended to mislead investors by artificially affecting market activity," *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476-77

(1977), but is a decision to leave the market altogether and to cease misleading investors. If Defendants' generic arguments were correct, the second factor would become a nullity in every antitrust case involving a publically traded security.

## II. Plaintiffs Have Adequately Alleged Violations of Section 1 of The Sherman Act

Defendants rely on *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) ("*Twombly*") to contend that the decision of the district court should be affirmed on the ground that plaintiffs did not adequately allege an antitrust conspiracy. Opp. at 37-47. The Supreme Court in *Twombly* retired the standard that had existed under *Conley v. Gibson*, 355 U.S. 41 (1957), whereby a court could only dismiss a claim if it appeared, beyond a doubt, that the plaintiff would be able to prove no set of facts in support of the claim that would entitle it to relief. The Court in *Twombly* adopted instead a plausibility-based approach, *i.e.*, the plaintiff must allege "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." 550 U.S. at 556. However, a *probability* requirement was not imposed. *Id.* The Court made it clear that plausibility could still be satisfied by certain allegations of parallel conduct, saying that "[t]he parties in this case agree that 'complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason' would support a plausible inference of conspiracy." *Id*. at

556 n.4.[3] The Court even said that "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id*.

The Second Circuit recently explained *Twombly* in the case of *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314, 324 (2d Cir. 2010) ("*Starr*"), a case that Defendants unsuccessfully attempt to distinguish (Opp. at 46-47). There, the Second Circuit cited footnote 4 of *Twombly* and said allegations of parallel conduct could be relied on in defeating a motion to dismiss under Rule 12(b)(6). 592 F.3d at 322. It also found---contrary to what defendants now argue (Opp. at 44-45)---that a plaintiff need not plead facts excluding each defendant's independent self-interest as an explanation for the parallel conduct at issue. 592 F.3d at 325. And the Second Circuit made it clear---again, contrary to what Defendants now argue (Opp. at 39)---that a plaintiff does not have to "identify the specific time, place, or person related to each conspiracy allegation." 592 F.3d at 325. And the Second Circuit continued to follow the principle that the allegations of an antitrust

[3] Courts have relied on this language from *Twombly* to uphold numerous antitrust complaints alleging parallel conduct that represents a sharp break from past industry practices. *In re Potash Antitrust Litig*., 667 F.Supp.2d 907, 933-34 (N.D. Ill. 2009), *appeal pending*; *Standard Iron Works v. ArcelorMittal*, 639 F.Supp.2d 877, 900 (N.D. Ill. 2009); *In re Rail Freight Fuel Surcharge Antitrust Litig*., 587 F. Supp. 2d 27, 34 (D.D.C. 2008); *In re TFT-LCD (Flat Panel) Antitrust Litig*., 586 F. Supp. 2d 1109, 1115-16 (N.D. Cal. 2008); *In re Graphics Processing Units Antitrust Litig*, 540 F. Supp. 2d 1085, 1096 (N.D. Cal. 2007); *In re Blood Reagents Antitrust Litig*., No. 09-2081, 2010 WL 3364218 at *7 (E.D. Pa. Aug. 23, 2010); *In re Flat Glass Antitrust Litig. (II),* No. 08-mc-180, 2009 WL 331361 at *2 (W.D. Pa. 2009); *In re Western States Wholesale Natural Gas Antitrust Litig.*, MDL 1566, No. 2:03-cv-01431-PMP-PAL, at 6 (D. Nev. Feb. 19, 2008).

complaint must be "taken together" and not compartmentalized, as Defendants here attempt to do. *Id*. at 323. Based on *Starr*'s reading of *Twombly*, the Complaints here more than adequately plead a violation of the antitrust laws.

The present Complaints make detailed and supported allegations about the historically unprecedented nature of Defendants' actions. The Complaints describe a years-long pattern of Defendants propping up the ARS market with support bids. The Complaints further describe the sudden, dramatic reversal on one particular day, February 13, 2008, when Defendants collectively withdrew their support from the market, thereby freezing billions of dollars in ARS. This sudden, across-the-board market closure was historically unprecedented in the ARS industry. Specifically, the Complaints allege:

- Wall Street firms in charge of the auctions—including Defendants—smothered any competitive bidding process by bidding with their own capital rather than securing thousands of buyers to meet up with sellers every week or so.[4]

- For example, for the period from January 3, 2006 through May 27, 2008, approximately 5,892 auctions for which Merrill Lynch was the broker-dealer would have failed but for Merrill Lynch's support bid.[5]

- On February 13, 2008, 87% of all auctions of auction rate securities failed when Defendants and all other major-broker dealers, in a virtually simultaneous manner, refused to continue to support the auctions.[6]

[4] Purchaser Complaint at ¶ 8; Issuer Complaint at ¶ 8.
[5] Purchaser Complaint at ¶ 59; Issuer Complaint at ¶ 58.
[6] Purchaser Complaint at ¶ 61, 94; Issuer Complaint at ¶¶ 60, 93.

- It was disclosed that UBS, the second largest underwriter of auction rate securities had decided no longer to support the market. Virtually every other major broker-dealer, including Goldman Sachs, Lehmann Brothers, Citigroup and Merrill Lynch, among others, had also decided at the same time to withdraw their support for the auction market. As a result of this withdrawal of support by all major broker-dealers simultaneously, the market for auction rate securities failed. [7]

- As Professor John C. Coffee stated publicly: "[i]t was anomalous that the market suddenly dried up. The question is, was there any collusion that led to people suddenly moving out of the market? What would be most suspicious is if you see any kind of discussions between banks." [8]

- As a result of the coordinated boycott withdrawal of support by Defendants and all other major broker-dealers, the market for auction rate securities failed, leaving the holders of more than $300 billion in such securities with no means of liquidating investments that Defendants offered and sold as a suitable alternative to money market funds and other short term cash management vehicles.[9]

In addition to detailing specific communications between the Defendants, Plaintiffs have also alleged the reasons why Defendants needed concerted, coordinated action with respect to their departure from the ARS market. These reasons help explain the historically unprecedented nature of Defendants' actions. For example, Plaintiffs allege that prior to the market shutdown "[e]ach Defendant was aware that all were in active competition and that without substantially

[7] Purchaser Complaint at ¶ 95; Issuer Complaint at ¶ 94.
[8] Purchaser Complaint at ¶ 97; Issuer Complaint at ¶ 96.
[9] Purchaser Complaint at ¶ 8; Issuer Complaint at ¶ 8.

unanimous action, there was risk of a substantial loss of business and good will, but that with substantially unanimous action, there was the prospect of continuing to artificially maintain the market and preserve increased profits."[10] These facts are equally applicable to understanding the need for collective action regarding the ARS market shutdown. Without unanimous, simultaneous action, any defendant pulling out of the market would have incurred the "risk of a substantial loss of business and good will." With collective action by Defendants, however, there would be no particular customer ill-will, and attendant financial repercussions, focused only on a subset of Defendants.

Indeed, as the Complaints allege, the Defendants expressly recognized this "business reality." For example, the Complaints allege that "in December of 2007, the Chief Risk Officer at UBS sent an email to its CEO, recognizing the need for collective action: "'Watch our competitors closely; if they stop supporting auctions, we have much better freedom to stop [supporting auctions].'"[11] The Complaints further allege that another "purpose of such collective action concerning the auction rate securities market was to allow the Defendants to coordinate the reduction of their holdings of such securities before they jointly

[10] Purchaser Complaint at ¶ 66; Issuer Complaint at ¶ 65.
[11] Purchaser Complaint at ¶ 91; Issuer Complaint at ¶ 90.

'pulled the plug' on the market."[12] The Complaints also provide specific examples of Defendants reducing their holdings.[13]

Additionally, the Issuer Complaint alleges that collective action in destroying the ARS market allowed Defendants to effect a seamless, industry-wide transition into a massive, brand-new "money making opportunity." Specifically, Plaintiffs allege the following:

> The collapse of the auction rate securities market did not stop defendants from seeing a further opportunity. When the market failed, many municipalities and other issuers were forced to pay interest rates approaching 20 percent, and they called their bankers looking to refinance the debt, which would generate new underwriting fees. "*We have a money making opportunity*," Seema Mohanty, an investment banker at UBS, wrote to David Shulman [UBS' Global Head of the Municipal Securities Group and Head of Fixed Income Americas] on February 14. "They are desperate." Mr. Shulman in an email sent that day called the refinancing of the bonds "*the single greatest opportunity in decades for us to leverage our banking relationships. This is a bankers dream market.*"[14]

Defendants' coordinated boycott withdrawal is similar to factual circumstances recognized by the United States Supreme Court in boycott cases (albeit on a much larger scale), further supporting the plausibility of Plaintiffs' allegations. These cases, and many others, demonstrate sharp departures from past practices such as those alleged in Plaintiffs' Complaints here. In *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), for example, "a group of lawyers

[12] Purchaser Complaint at ¶ 80 (emphasis added); Issuer Complaint at ¶ 79 (emphasis added).
[13] *Id.*
[14] Issuer Complaint at ¶ 97; Purchaser Complaint at ¶ 97 (emphasis added).

agreed not to represent indigent criminal defendants in the District of Columbia Superior Court until the District of Columbia government increased the lawyers' compensation." The Court stated that "[t]he agreement . . . was implemented by a concerted refusal to serve an important customer in the market for legal services and, indeed, the only customer in the market for the particular services that [the lawyers] offered." 493 U.S. at 422-23. *Accord St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 533 (1978). In the present case, Plaintiffs allege the Defendants engaged in a concerted refusal to service *all* customers in the ARS market.

Defendants also argue that Plaintiffs have not alleged the particulars of the conspiracy or their respective involvement. Opp. at 39-40. These points, as noted above, are contrary to the Second Circuit's decision in *Starr*,[15] but, in any event, Plaintiffs have offered some detail that fleshes out their Complaints.

- On December 15, 2007, UBS executive David Shulman wrote an email about creating liquidity backstops for the market and said "I do believe this is being pursued as an option by BOA, CITI, JPM will let you know what we find out as well."[16]

[15] Numerous post-*Twombly* decisions have said that there is no need to plead in detail each Defendant's actions in furtherance of the alleged conspiracy. *In re Flash Memory Antitrust Litig.*, 643 F.Supp.2d 1133, 1143 n.7 (N.D. Cal. 2009); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F.Supp.2d 1179, 1184-85 (N.D. Cal. 2009); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F.Supp.2d 896, 904 (N.D. Cal. 2008) ("*SRAM*"); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. CV 07-5944 SC, 2010 WL 3632775 at *4 (N.D. Cal. March 30, 2010); *In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253419 at *5 (E.D. Pa., Aug. 3, 2007); "Report And Recommendation," pp. 15-18 (Sept. 22, 2010, adopted November 1, 2010) in *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MDL-1775 (JG) (VVP) (E.D.N.Y.).

[16] Purchaser Complaint at ¶ 92; Issuer Complaint at ¶ 91.

- On January 9, 2008, UBS' Chief Risk Officer sent an email referring to "discussions with citi" relative to the student loan segment of the ARS market.[17]

- On January 23, 2008, a Merrill Lynch executive notified his boss that auctions at Lehman were failing: "Fyi, new crisis brewing on the auction side. We've had 3 parties confirm that Lehman is dropping out of the auction business. Nothing like adding further illiquidity to an already illiquid market."[18]

- On February 9, 2008, a UBS executive sent an e-mail in which he related a conversation he had with a Citigroup employee who described Citigroup's problems in the ARS market and the steps being taken by Citigroup and Merrill Lynch.[19]

- On February 12, 2008---the eve of the market collapse---UBS executive David Shulman was confidently noting how "our peers are working feverishly to restructure and to unload paper to institutions" and how UBS also needed to do its own unloading.[20]

- Also on February 12, 2008, UBS' Group Executive Board held an "Extraordinary Audio Conference" in which the CEO and Group Risk Officer participated. The group discussed whether UBS should "join the competitors . . . in failing auctions of student ARCs [auction rate certificates]."[21]

Defendants argue about the inferences to be drawn from these documents and how those inferences ought to be drawn in their favor, but that is simply not

[17] Purchaser Complaint at ¶ 92; Issuer Complaint at ¶ 91.
[18] Purchaser Complaint at ¶ 90; Issuer Complaint at ¶ 89.
[19] Purchaser Complaint at ¶ 92; Issuer Complaint at ¶ 91.
[20] Purchaser Complaint at ¶ 92; Issuer Complaint at ¶ 91.
[21] Purchaser Complaint at ¶ 92; Issuer Complaint at ¶ 91. Plaintiffs also alleged widespread destruction of relevant documents that have hampered the New York Attorney General's ARS investigation, from which adverse inferences may be drawn. Purchaser Complaint at ¶121; Issuer Complaint at ¶ 121.

appropriate on a motion to dismiss, where courts are "also required to read a complaint generously, drawing all reasonable inferences from its allegations in favor of the plaintiff." *Lee v. Sony BMG Music Entertainment, Inc.*, 557 F. Supp. 2d 418, 423 (S.D.N.Y. 2008). *Accord Thomas v. City of New York*, 143 F.3d 31, 37 (2d Cir. 1998).[22]

## III. Plaintiffs Have Adequately Alleged Antitrust Injury

Defendants also argue that Plaintiffs have not pled antitrust injury adequately. Opp. at 48-53. This argument is also unavailing.

The Second Circuit has provided a two-pronged test for determining whether a plaintiff has antitrust standing. First, the Court determines whether the plaintiff suffered an antitrust injury. *A.I.B. Express, Inc. v. Fedex Corp.*, 358 F. Supp. 2d 239, 245 (S.D.N.Y. 2004). Second, the Court considers whether any factors would prevent the plaintiff from being an efficient enforcer of the antitrust laws. *Id*. at 245-46. For example, the Court can consider "the directness or indirectness of the asserted injury." *Id.* at 246. Defendants do not dispute that plaintiffs were direct victims of the alleged conspiracy, or that plaintiffs would be efficient enforcers of the antitrust laws. Defendants question only whether the alleged injuries are antitrust injuries.

[22] *See SRAM*, 580 F.Supp.2d at 901-02 (in assessing on a motion to dismiss e-mails quoted in a complaint, the court viewed all inferences in plaintiffs' favor); *Flying J Inc. v. TA Operating Corp.*, No. 1:06CV00030, 2007 WL 3254765 at *1 (D. Utah Nov. 2, 2007), *interlocutory appeal denied*, 2007 WL 4165749 at *3(D. Utah Nov. 20, 2007) (same).

Antitrust injury does not have to be pled with particularity. *Id.* at 248. Federal courts "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress" in the antitrust laws. *Radovich v. National Football League*, 352 U.S. 445, 454 (1957). Plaintiffs need only plead "(1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury contemplated by the statute." *Blue Tree Hotels Investment (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 220 (2d Cir. 2004).

"The class of persons who may maintain a private damage action under the antitrust laws is broadly defined in § 4 of the Clayton Act." *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 529 (1983). Section 4 provides

> *Any person* who shall be injured in his business or property *by reason of anything forbidden in the antitrust laws* may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (emphasis added). "On its face, § 4 contains little in the way of restrictive language." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). "And the lack of restrictive language reflects Congress' 'expansive remedial purpose' in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and

would provide ample compensation to the victims of antitrust violations." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982). Therefore, the Supreme Court has "refused to engraft artificial limitations on the § 4 remedy." *Id.* at 472. The Court has stated that "the unrestrictive language of the section, and the avowed breadth of the congressional purpose, cautions us not to cabin § 4 in ways that will defeat its broad remedial objective." *Id.* at 477.

Plaintiffs adequately allege that their injuries were caused by Defendants' antitrust violations. The Purchaser Plaintiffs allege that they were injured by purchasing overvalued securities, which became illiquid once Defendants collectively destroyed the ARS market. Absent Defendants' collusion, the purchaser plaintiffs would not have purchased these securities, and the securities would not have become illiquid after February 13, 2008. And the Issuer Plaintiffs allege that they were injured by issuing securities, which would carry much higher interest obligations than alternative securities once Defendants collectively destroyed the ARS market. Absent Defendants' collusion, the Issuer Plaintiffs would not have issued these securities, and they would not have been stuck paying default interest rates after the market was destroyed.

## CONCLUSION

For all the reasons expressed in this submission and Plaintiffs' opening brief, the decision of the lower court should be reversed and the case remanded for further proceedings.

DATED: December 23, 2010

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DATED: December 23, 2010

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 5,471 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14-point font.

Dated: December 23, 2010 Respectfully submitted,

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**CERTIFICATE OF SERVICE & CM/ECF FILING**

10-722-cv, 10-867-cv Mayor v. Citigroup, Inc.

I hereby certify that I caused the foregoing Reply Brief 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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I certify that an electronic copy was uploaded to the Court's electronic filing system. One original and five hard copies of the foregoing Reply Brief of Plaintiffs-Appellants Mayor and City Council of Baltimore, Maryland, on behalf of themselves and all others similarly situated were sent to the Clerk's Office By Hand Delivery to:

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on this 23rd day of December 2010.

Notary Public:

/s/ Ramiro A. Honeywell

**Sworn to me this**

December 23, 2010

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/s/ Renee Anderson

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