IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PRESTON HOLLOW CAPITAL LLC, Plaintiff, v. NUVEEN LLC, NUVEEN INVESTMENTS, INC., NUVEEN SECURITIES LLC, and NUVEEN ASSET MANAGEMENT, LLC, Defendants.	)	C.A. No. 2019-0169-SG PUBLIC VERSION FILED: September 9, 2019

DEFENDANTS' WRITTEN CLOSING ARGUMENT

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Dated: August 30, 2019

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Defendants Nuveen Asset Management, LLC ("Nuveen"), Nuveen LLC, Nuveen Investments, Inc., and Nuveen Securities LLC respectfully submit this post-trial written argument opposing Plaintiff Preston Hollow Capital LLC's ("PHC") claims.

I. INTRODUCTION

PHC's "proof" boils down to a few recorded phone calls between Nuveen and a handful of market participants. During those calls, Nuveen personnel expressed concerns about PHC's business, shared opinions about certain PHC deals, and made hyperbolic statements. PHC hopes these colorful recordings obscure the holes in its case. But Nuveen's posturing was unremarkable in the context of a municipal bond trading desk, and even a cursory review of the full record shows that PHC's tortious interference and Donnelly Act claims cannot prevail.

As an initial matter, the evidence shows that Nuveen acted lawfully for proper, competitive purposes. It is not unlawful to exercise the right to free speech to explain to a supplier why it should choose to do business with you over someone else—or even to demand that it make such a choice. Moreover, that Nuveen's posturing was merely a blip on the radar for a few of its counterparties is proven by the absence of any demonstrable impact on PHC's business. PHC's financing from Deutsche Bank ("DB") remains secure and, in DB's words, "was never really at risk."[1] DB told

[1] JX509; Defendants' Proposed Findings of Fact ("FOF") ¶118.

PHC as much in January 2019, months before PHC informed this Court that the supposed threat to its financing was a matter of "life-and-death."[2]

As for the broker-dealers, the best that PHC can muster are vague, unsupported assertions from its own executives that "its phone [is] ringing less often"[3] and its 2019 projections are down. The few specific instances of claimed interference are bogus and rely on transactions which have been (or will be) completed, or that did not close for reasons unrelated to Nuveen. PHC's conclusory, self-serving testimony fails to establish any causal link between its supposed harm and Nuveen's conduct. It is also flatly contradicted by the evidence from the broker-dealers, which established that (i) nearly all the firms who did any "100% placements" with PHC before the discussions still do, or are willing to; (ii) several firms who never did 100% placements with PHC still have not, but are not unwilling to do so; and (iii) one firm has made an independent business decision to limit its participation in 100% placements with anyone, not just PHC.

[2] 4/30/19 Tr., 27:4-6.

[3] Albarran/30(b)(6) 30:14-17, 31:21-32:7. Citations to depositions in this matter are in the form "Name Page:Line." Citations to the trial transcript are in the form "Tr. Page:Line (Witness)." *See infra,* Section II.A.4.

As for the antitrust claim, the evidence overwhelmingly demonstrates that no broker-dealers reached agreements with each other or Nuveen to boycott PHC. Moreover, the legally required market definition and harm have been a moving target that neither PHC nor its experts have properly identified, let alone analyzed. In fact, the only empirical evidence comes from Nuveen's economic expert, Dr. Snyder, and demonstrates that PHC's offerings are neither unique, nor necessarily advantageous to issuers.

Separately, PHC cannot prevail because the sole relief it seeks—a permanent injunction insulating PHC from lawful competition from Nuveen—is improper and unavailable. First, PHC has not shown irreparable harm arising from a few phone calls that occurred *eight months ago,* and its speculation that Nuveen's conduct could recur is inadequate. Second, PHC's proposed injunction is not tailored to address the supposed harm in question and is too vague to pass muster. Third, the injunction would unconstitutionally infringe on Nuveen's free speech rights, would require this Court to undertake an extraordinary role in monitoring Nuveen's corporate governance, and is mooted by Nuveen's repeated disavowals of the complained-of conduct. Nor has PHC even attempted to explain how the balance of equities favors an injunction—a black-letter requirement. While the proposed injunction would provide no benefit to PHC, it could have significant anti-competitive and regulatory consequences for Nuveen.

PHC has failed to meet its burden of proof and its request that the Court enter an injunction to sequester it from Nuveen's lawful competition must be rejected.

II. PHC FAILED TO PROVE TORTIOUS INTERFERENCE

PHC asserts that Nuveen tortiously interfered with PHC's prospective business relations with both (i) DB, a financing source for PHC, and (ii) broker-dealers who underwrite bond issuances. To prevail, PHC was required to establish "[1] the reasonable probability of a business opportunity, [2] intentional interference…with that opportunity, [3] proximate causation, and [4] damages, all of which must be considered in light of [Nuveen]'s privilege to compete or protect [its] business interest in a fair and lawful matter."[4] PHC has failed to meet its burden of proof.[5]

[4] *Kable Prods. Servs., Inc. v. TNG GP*, 2017 WL 2558270, at *10 (Del. Super. Ct. June 13, 2017).

[5] A plaintiff must "rely on evidence presented at trial to demonstrate [its claims] by a preponderance of the evidence." *Ryan v. Gifford*, 918 A.2d 341, 358 n.49 (Del. Ch. 2007). "Plaintiffs have the burden of proving *each element* … of *each of their causes* of action against *each [d]efendant* by a preponderance of the evidence." *2009 Caiola Family Tr. v. PWA, LLC*, 2015 WL 6007596, at *12 (Del. Ch. Oct. 14, 2015). PHC has not met its burden of proof with respect to any Nuveen Defendant. As to Defendants Nuveen, LLC, Nuveen Investments, Inc. or Nuveen Securities, LLC there has been no evidence even presented.

A. PHC Failed to Prove the Elements of Tortious Interference as to Any of Its Asserted Business Relationships

PHC's insistence on maintaining its claim as to DB is improper given the uncontroverted evidence that PHC's relationship with DB has been secure all along—*as DB's* [redacted] *made clear to PHC before this action was filed*.[6]

PHC's contention that Nuveen interfered with its prospective business relations with broker-dealers is equally specious: PHC has not proven any meaningful change to its broker-dealer relationships. A majority of those alleged to have joined the "boycott" continue to work on 100% placements with PHC, and those that do not either never did, stopped for reasons unrelated to Nuveen, or were never contacted by Nuveen about PHC at all. PHC's general claims of a reasonable expectancy in 100% placement business is also insufficient as a matter of law.[7]

Of the two specific deals PHC claims Nuveen interfered with, one (Howard Quad) successfully closed as a 100% PHC placement in June 2019, and the second (Napa Pipe) closed 18 months before the alleged interference occurred. The 12 "Goldman deals" that PHC claims it lost because of Nuveen, meanwhile, were never

[6] FOF ¶¶137-38.

[7] *Kable*, 2017 WL 2558270, at *10 n.84 (a mere perception that there will be a prospective business opportunity is not enough; plaintiff must show a "*bona fide* expectancy" that the opportunity will be realized).

more than preliminary projects. Finally, PHC's claim that it has received fewer "inquiries" from broker-dealers is not a form of cognizable harm at all.

1. No Proof of Interference as to DB

PHC claims that Nuveen "interfered with PHC's prospective business relations" with DB "by pressuring" DB "to stop financing PHC in the future."[8] The evidence adduced at trial, however, establishes that PHC's relationship with DB remains secure. PHC has *admitted*, as it must, that DB has not breached (or threatened to breach) any contract with PHC or otherwise terminated (or threatened to terminate) its financing relationship.[9] On the contrary, DB has assured PHC that "under no circumstances" would it cut off PHC's financing.[10] Indeed, DB recently *renewed* its financing agreement with PHC.[11] PHC's failure to demonstrate any cognizable present or future harm, let alone causation, with respect to its DB relationship dooms its claim.

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[8] Plaintiff's Written Closing Argument ("WCA"), Dkt. 372, 11-12.

[9] WCA, 12; FOF ¶¶137-40.

[10] [redacted] DB 130:12-131:12. *See also* JX-108 at 2:16-23; 3:9-17. Yet weeks after DB delivered that message, PHC filed its complaint alleging that Nuveen's actions threatened its financing from DB. PHC's counsel subsequently told this Court that the threat to its financing was a "life-and-death struggle." 4/30/19 Tr., 27:5-6. PHC knew at the time that it made those assertions that they were not true.

[11] FOF ¶139.

2. No Proof of Interference as to Napa Pipe and Howard Quad

In its written closing argument, PHC identifies only two deals on which it claims to have suffered harm from Nuveen's conduct. The first is Napa Pipe. There, PHC claims that Nuveen caused RBC to proceed with the transaction as a public offering instead of a 100% placement with PHC.[12] But Napa Pipe closed in the spring of 2017—18 months ***before*** Nuveen's alleged interference. Unsurprisingly, the uncontroverted evidence shows that RBC's decision-making on Napa Pipe was unrelated to Nuveen.[13] PHC has failed to prove any intentional interference or proximate causation with respect to Napa Pipe.

PHC's theory of supposed harm with respect to Howard Quad is equally specious, since that deal *closed in June 2019 as a PHC 100% placement*. PHC thus argues that it was harmed because the borrower was forced to use a lesser-known underwriter.[14] But because the terms of the deal were unchanged, PHC has not proven that it suffered any harm from that substitution.[15] PHC's claim that the bonds

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[12] FOF ¶166.

[13] FOF ¶167. Moreover, changes in the Napa Pipe deal reflected a [redacted], not a newly-adopted policy specific to Nuveen. *Compare* Hummel/RBC 44:1-24 *with* Plaintiff's Proposed Findings of Fact ("PHC FOF"), Dkt. 373, at ¶160.

[14] WCA, 23. PHC never alleged this form of harm in its complaints or interrogatory responses.

[15] FOF ¶154.

someday may prove less valuable on the secondary market without the imprimatur of a "bulge-bracket" underwriter is unsupported by reliable evidence or analysis.[16] The only expert opinion PHC offered on this came from Metzold, who testified that he "like[s] to say when you have a top-tier [] name on the documents, it's sort of that good housekeeping seal of approval," which supposedly makes it easier to sell the bonds in the secondary market "because people assume that the necessary diligence has been performed."[17] Yet, this hunch was not backed by any analysis, and, no conceivable injunction could "protect" PHC from this supposed future harm.[18]

3. No Proof of Interference as to the Goldman "Opportunities"

PHC also claims harm from the "termination of discussions" with Goldman Sachs ("Goldman") "regarding twelve different specific opportunities."[19] The Court should decline to consider the evidence relating to the Goldman "opportunities,"

[16] Moreover, PHC admits that its secondary market business is small. Tr. 79:18-80:3 (Albarran).

[17] Tr. 52:4-6 (Metzold). Defendants renew their motions to strike Metzold's and Rosenblum's opinions as inadmissible, Dkts. 318; 319.

[18] *See infra*, V.

[19] WCA, 23.

which was the subject of serious discovery misconduct by PHC.[20] But, even if considered, the evidence falls short.

First, PHC had no "reasonable probability of a business opportunity" in any of the so-called Goldman "deals."[21] None of those "deals" ever appeared on PHC's deal "pipeline," which PHC witnesses themselves described as a living document that identifies and tracks all deals that have "a reasonable opportunity of moving forward."[22]

Second, there is no evidence of causation. Goldman had never previously completed a 100% placement with PHC, and not for PHC's lack of trying.[23] PHC asks the Court to conclude that its four-plus years of failure to close a 100%

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[20] None of these transactions were identified in PHC's complaints or interrogatory responses, JX496; JX530; JX964. Moreover, PHC blocked deposition inquiry into deals in development, arguing that "we can't identify any interference on [such deals], so they're off the table." 7/11/19 Tr., 47. Delaware courts will not consider evidence that a party did not produce in a timely manner, let alone where the party intentionally obscured the basis for one of its claims. *Terramar Retail Ctrs., LLC v. Marion #2-Seaport Tr. U/A/D June 21, 2002*, 2018 WL 6331622, at *12 (Del. Ch. Dec. 4, 2018).

[21] *Kable*, 2017 WL 2558270, at *10 n.84.

[22] Albarran/30(b)(6) 75:11; 13:21-23 (PHC's pipeline includes all "opportunities that we have and—and or believe will come… throughout the year"). Goldman [redacted] GS 55:9-23; FOF ¶165.

[23] Albarran 43:20-44:3 (identifying preliminary meetings with Goldman).

placement with Goldman before December 2018 was the result of an uncertain, highly competitive marketplace, but the eight months of continued failure since is Nuveen's fault. No evidence supports this assertion. Indeed, insofar as evidence of these projects even exists, it shows that they did not proceed for wholly independent reasons.[24]

Specifically, while PHC claims that PHC and Goldman were actively "working" on these deals, [redacted].[25] [redacted].[26] As Weiner testified: "[Nuveen] can take no credit for the blame on that one."[27] For the remaining deals, PHC failed to adduce any evidence showing that they were anything more than ideas, let alone that Goldman did not move forward with them because of Nuveen.[28] Because PHC has failed to prove reasonable probability of a business opportunity, let alone proximate causation, it has also failed to show harm.

[24] Scruggs/GS 28:24-29:6 [redacted]

[25] PHC FOF ¶243; FOF ¶124.

[26] Weiner 138:22-139:11.

[27] Weiner 139:8-11.

[28] Scruggs/GS 114:20-115:15.

4. No Proof of Interference as to Mere "Inquiries"

PHC's final "category" of purported harm claims that Nuveen caused "inquiries from broker-dealers about potential deals" to "trail[] off drastically."[29] This also fails.

First, PHC has not identified a probable business opportunity. "[T]o plead a reasonable probability of a business opportunity, [a plaintiff] must identify a specific party who was prepared to enter into a business relationship" but for the alleged interference.[30] While PHC claims that it "has not received an inquiry or contact from Morgan Stanley, BAML, or Mesirow with respect to a 100% placement since Miller's threats,"[31] it is well-settled that a mere "inquiry" from a counterparty does not *as a matter of law* rise to the level of a "*bona fide* expectancy" of a business opportunity.[32] PHC further overreaches when it asserts that "each" of these three broker-dealers "had a business relationship with PHC involving … prior engagement in 100% placements," with which Nuveen interfered.[33] Morgan Stanley ("MS") had

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[29] WCA, 23.

[30] *Organovo Holdings, Inc. v. Dimitrov*, 162 A.3d 102, 122 (Del. Ch. 2017).

[31] WCA, 23.

[32] *Dionisi v. DeCampli*, 1995 WL 398536, at *13 (Del. Ch. June 28, 1995). For the same reason, PHC's generic claims that it had a reasonable expectancy to enter into 100% placements generally also fails. WCA, 19-20.

[33] WCA, 19.

already slowed 100% placements with PHC in 2018 because it had moved those deals in-house.[34] PHC [redacted], which were the first deals they had worked on together.[35] The Howard Center deal that closed in December 2018 was similarly the first 100% placement that Bank of America Merrill Lynch ("BAML") did with PHC, and the evidence shows that both parties were unhappy with it.[36]

Second, PHC failed to prove that Nuveen was the "but for"[37] cause of the supposed decrease in broker-dealer inquiries. To the contrary, other factors—such as the false allegations PHC has leveled against these same broker-dealers in this litigation, those broker-dealers' own independent business considerations, and their own prior dealings with PHC—more likely explain any chill in these relationships.[38] For instance:

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[34] FOF ¶126.

[35] FOF ¶143.

[36] FOF ¶¶123, 151.

[37] *Empire Fin. Servs., Inc. v. Bank of N.Y. (Del.)*, 900 A.2d 92, 98 (Del. 2006) (tortious interference plaintiff must show defendant's interference was "but for" causation of lost opportunity); *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 217 F. Supp. 2d 423, 441 (S.D.N.Y. 2002) (same).

[38] *OptimisCorp v. Waite*, 2015 WL 5147038, at *77 (Del. Ch. Aug. 26, 2015), *aff'd*, 137 A.3d 970 (Del. 2016); *Wayman Fire Protection, Inc. v. Premium Fire & Sec., LLC*, 2014 WL 897223, at *11 (Del. Ch. Mar. 5, 2014).

Goldman: Weiner testified that PHC's relationship with Goldman had "soured" based on a prior transaction unrelated to Nuveen.[39] Goldman's [redacted]

[redacted][40]

JPMorgan: [redacted]

[redacted][42]

BAML: [redacted][43] [redacted]

[redacted][44]

[39] Weiner 163:8-22.

[40] [redacted]GS 17:15-23:19, 88:21-17.

[41] JX180.

[42] JX217, JX484.

[43] [redacted]BAML 70:24-71:7.

[44] [redacted]/BAML 72:22-73:12, 74:13-15.

Morgan Stanley: [redacted].[45]

Mesirow: Mesirow raised credit committee concerns about the Hutto deals that had nothing to do with Nuveen and was, as a result, fired by PHC.[46] PHC failed, in any event, to introduce any evidence that Nuveen ever even spoke with Mesirow regarding PHC.

Third, PHC's focus on its performance against its budget/deal pipeline does not demonstrate harm. PHC failed to identify a single deal removed from its pipeline due to Nuveen. Moreover, PHC has previously told the Court that it "can't identify any interference" with its pipeline deals.[47] The pipeline is not a reliable predictor of actual performance because, *inter alia*, PHC has significantly missed its budget in

[45] FOF ¶126; [redacted] 107:11-23 ([redacted]).

[46] FOF ¶143. PHC impermissibly relies on hearsay statements regarding Mesirow. *See* PHC FOF ¶245. To the extent PHC is claiming such statements are admissible as statements by co-conspirators under DRE 801, they are not. PHC has not established the existence of a conspiracy or that these statements were made in furtherance of it. 2 Wharton's Criminal Evidence § 6:18 (15th ed.)

[47] 7/11/19 Tr., 47. Nuveen renews its motion to have the Court exclude evidence regarding PHC's pipeline. Dkt. 268. Finally, this entire theory is inconsistent with PHC's claim that it is unique because of its ability to originate deals directly with issuers.

the past and Albarran admitted that the 2019 budget was "a reach."[48] Moreover, PHC's Weiner admitted that inquiries are down from many broker-dealers Nuveen never contacted.[49]

For all these reasons, PHC's claims relating to the "trailing off" of inquiries from broker-dealers fails.

B. Nuveen's Actions Fall Within Its Privilege to Compete

PHC's tortious interference claim also fails because of Nuveen's privilege to compete.[50] Like any competitor in the marketplace, Nuveen "[has] a privilege to interfere … with prospective business opportunities," so long as it does so "within the limits of fair competition."[51] If: "(a) the relation concerns a matter involved in the competition between the actor and the other and (b) the actor does not employ wrongful means and (c) his action does not create or continue an unlawful restraint of trade and (d) his purpose is at least in part to advance his interest in competing with the other," then the conduct falls within the actor's privilege to compete and

[48] Albarran/30(b)(6) 18:4-13.

[49] Weiner at 112-114, 124, 132, 134-135, 140-141, 143-144

[50] *Beard Research, Inc. v. Kates*, 8 A.3d 573, 608 (Del. Ch.), *aff'd sub nom. ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749 (Del. 2010).

[51] *DeBonaventura v. Nationwide Mut. Ins. Co.*, 419 A.2d 942, 947 (Del. Ch. 1980), *aff'd*, 428 A.2d 1151 (Del. 1981).

cannot sustain a claim for tortious interference.[52] The evidence shows that each of these elements has been satisfied.

1. Nuveen Acted with a Lawful Competitive Purpose, Satisfying Sections (a) and (d) of the Restatement Test

There is no evidence that Nuveen's "sole motive" was "to interfere" with PHC's prospective contractual relationships.[53] Rather, the evidence shows that Nuveen's purpose was "to advance [its] interest… in competing with [PHC]." Accordingly, its conduct falls within its privilege to compete.[54]

First, the evidence shows that Nuveen's communications with DB focused on Nuveen's concerns with DB's deteriorating risk profile as a tender option bond ("TOB") counterparty.[55] DB's provision of liquidity to PHC for risky transactions increased DB's counterparty risk which, in turn, exposed Nuveen to increased risk.

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[52] Restatement (Second) of Torts § 768 (1979).

[53] *WaveDivision Holdings, LLC v. Highland Capital Mgmt., L.P.*, 49 A.3d 1168, 1174 (Del. 2012).

[54] Restatement (Second) of Torts § 768 cmt. g (1979).

[55] The complete factual basis for Nuveen's concerns with DB is at FOF ¶¶82-86, 128-135.

There is no improper interference when a defendant's motives include a desire to protect its clients' own investments.[56]

PHC's contention that Nuveen and PHC do not compete for DB's financing services misses the mark.[57] As an initial matter, the Restatement recognizes that the "[c]ompetition between actor and the person harmed" rule "applies whether the actor and the person harmed are competing as sellers or buyers or in any other way, and regardless of the plane on which they compete."[58] There can be no dispute that PHC and Nuveen compete for municipal bonds. PHC's conduct also directly affects DB's ability to sell Nuveen's floaters to money market funds—as Nuveen and PHC floaters comingle in the DB trust. Thus, Nuveen's proper motive was to protect its investments.[59]

With respect to Nuveen's communications with broker-dealers, the evidence shows that Nuveen was also properly motivated by concerns (1) relating to its access to opportunities, and (2) potential volatility in the high-yield municipal asset class,

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[56] Restatement (Second) of Torts § 768 (1979) ("If his conduct is directed, at least in part, to that end, the fact that he is also motivated by other impulses, as, for example, hatred or a desire for revenge is not alone sufficient to make his interference improper."); *see also WaveDivision*, 49 A.3d at 1174.

[57] WCA, 18.

[58] Restatement (Second) of Torts § 768 cmt. c (1979).

[59] FOF ¶¶82-86; 128-135. *See WaveDivision*, 49 A.3d at 1174.

a potential problem for Nuveen's investors.[60] These are legitimate business motives the law protects.[61] Broker-dealer testimony likewise confirms that they understood these to be Nuveen's motivations.[62] Indeed, Nuveen was not alone in its concerns.[63] And Nuveen's statements to broker-dealers that it expected to see every deal were consistent with years of communications to broker-dealers about Nuveen's key criteria for doing business with them.[64]

Because harming PHC's business was not Nuveen's sole motivation, its conduct was protected by the privilege to compete, and it cannot be held liable for tortious interference.[65]

2. Nuveen Used Lawful Means, Satisfying Section (b) of the Restatement Test

PHC contends that Nuveen acted wrongfully by (1) exerting "extreme" economic pressure, (2) making defamatory statements about PHC, and (3) engaging

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[60] FOF ¶¶104, 111, 113, 119-120; Davern 106:6-11.

[61] *DeBonaventura*, 419 A.2d at 947; *Beard Research*, 8 A.3d at 608; Restatement (Second) of Torts § 767 cmt. f (1979).

[62] FOF ¶¶123(b), 125(b); [redacted] ("[redacted]").

[63] FOF ¶106.

[64] FOF ¶119.

[65] *WaveDivision*, 49 A.3d at 1174.

in an "unlawful restraint of trade" (PHC's Donnelly Act claim). The evidence and caselaw establish otherwise.

a. Nuveen did not apply extreme economic pressure

For economic pressure to be wrongful for purposes of a tortious interference claim, it must be "extreme."[66] However, PHC has failed to identify a single case finding anything that qualifies as such extreme pressure. PHC's reliance on *Beard* is misplaced. Defendants' misappropriation and breach of fiduciary duty in *Beard* are a far cry from the circumstances here.[67] PHC's reliance on several "wrongfulness" factors from the Restatement to prove "extreme" pressure also falls short.[68] Indeed, the Restatement recognizes that an actor may use a refusal to deal as a form of economic persuasion.[69]

PHC argues that the "degree of coercion" was too great because Nuveen's purpose was to "driv[e] the plaintiff out of business."[70] As explained above, the evidence demonstrates that Nuveen's sole purpose was not to harm PHC, let alone

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[66] Restatement (Second) of Torts § 766(B) (1979); *Raytheon Co. v. BAE Sys. Tech. Solutions & Servs. Inc.*, 2017 WL 5075376, at *13 (Del. Super. Ct. Oct. 30, 2017).

[67] *Beard*, 8 A.3d at 600, 603.

[68] WCA, 30-32.

[69] Restatement (Second) of Torts § 768 cmt. e (1979). *See also Kable*, 2017 WL 2558270, at *7 n.65.

[70] WCA, 31.

drive it out of business. Moreover, the only instrument of "coercion" PHC has ever identified is Nuveen's use of "the box." But the evidence was undisputed that threats to use "the box" are a common tactic, used even by PHC, and not taken seriously by broker-dealers.[71]

Neither has PHC demonstrated wrongfulness based on its theory of harm to other "neutral third parties."[72] Regarding DB, the evidence was undisputed that Nuveen's reduction in business with DB was independent of any purported campaign to harm PHC. And there is no reason to believe that Goldman suffered harm from its *own* decision to implement a matrix of standards relating to 100% placements. Moreover, PHC identifies no evidence of any transaction that Goldman supposedly missed to its detriment.

Finally, PHC has not demonstrated wrongfulness through harm to competition.[73]

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[71] Moreover, while Nuveen told KeyBanc, MS, and Wells Fargo ("Wells") that they were "in the box," none were particularly troubled by it. [redacted]/MS 83:2-21; [redacted]/Wells 174:17-175:24. PHC's claim that Stifel was "in the box" (PHC FOF ¶57) is wrong. FOF ¶144(c). Furthermore, KeyBanc and Wells were "in the box" *before* the December 2018 contacts (KeyBanc in spring/summer 2018 and Wells in fall 2018). While Nuveen might have told BAML it was "in the box," [redacted]/BAML 46:8-19; [redacted] BAML 51:24-52:8.

[72] WCA, 31-32.

[73] *See infra*, III.

b. Nuveen did not make actionable fraudulent statements

PHC also claims that Nuveen used wrongful means by making defamatory statements to DB and broker-dealers with fraudulent intent. As an initial matter, this Court has already held it cannot decide whether a statement is defamatory.[74] Thus, the Court can only consider whether the statements at issue were material misrepresentations made with fraudulent intent, which may give rise to a tortious interference claim.[75] PHC has not proven this claim.[76]

First, the challenged statements constitute opinions, which are not tortious under Delaware law.[77] For example, Nuveen's statements that PHC deals were "predatory" are not statements of verifiable fact. No witness could meaningfully

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[74] Dkt. 370.

[75] *Lechliter v. Del. Dep't of Nat. Res. & Envtl. Control*, 2015 WL 9591587, at *18 (Del. Ch. Dec. 31, 2015), *aff'd*, 146 A.3d 358 (Del. 2016) (describing requirements for fraudulent misrepresentation).

[76] *WaveDivision*, 49 A.3d at 1174-75 (no improper interference where plaintiff failed to show misrepresentations made with "fraudulent intent"); Restatement (Second) of Torts § 767 (1979).

[77] *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 775 (Del. Ch. 2014) ("[T]he misrepresentation forming the basis for the …negligent misrepresentation claim must be material, and the plaintiff generally cannot rely … on puffery [or] expressions of mere opinion[.]"); *Agar v. Judy*, 151 A.3d 456, 481, 485 (Del. Ch. 2017) (statement that former directors "looted" company was not defamatory because it was "not reasonably conceivable that a recipient of the [statement] would regard [it] as anything other than … opinion"); *Q-Tone Broad., Co. v. Musicradio of Md., Inc.*, 1994 WL 555391, at *4-5 (Del. Super. Ct. Aug. 22, 1994).

define "predatory,"[78] and PHC's attempted definition ("taking advantage of an unsophisticated borrower")[79] merely substitutes one vague phrase for another.

Similarly, statements that PHC "fleeced" borrowers express Nuveen's opinion that PHC charged too much for loans. And though opinions need not be correct, here, Nuveen's opinion is supported by empirical evidence.[80] Accordingly, even if a claim that borrowers were "fleeced" could be deemed fact, there is ample basis to conclude that it was true, and therefore neither reckless nor knowingly false. The same is true for Nuveen's statements that PHC's deals were "rushed" or "covenant light." PHC has conceded and, in fact, advertises that it tries to do deals quickly and is willing to waive or lighten covenants.[81] That PHC considers these positive features does not make Nuveen's statements false, let alone fraudulent.[82]

Second, PHC cannot demonstrate that Nuveen acted with the requisite fraudulent intent.[83] The Nuveen personnel who made the statements at issue testified

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[78] FOF ¶133.

[79] PHC FOF ¶187.

[80] FOF ¶¶107-08 (Snyder finding the "Preston Hollow effect," *e.g.*, spreads well above market comparables).

[81] [redacted] 45:5-9.

[82] Certain of Nuveen's statements were also exaggerated or hyperbolic. But that is not fraudulent. *Vichi*, 85 A.3d at 775.

[83] Restatement (Second) of Torts § 528 (1979) ("A representation that is believed to state the truth but, which because of negligent expression, states what is false is a negligent but not fraudulent misrepresentation."); *Merck & Co. v. SmithKline*

at trial that the statements reflected their honestly-held opinions and were based on information and analysis they considered reliable.[84] For example, Nuveen's statements regarding PHC's involvement in a deal with Lago Vista were partially based on a letter from the Lago Vista City Attorney.[85] While PHC suggests that Miller should have conducted an investigation before making any statements on the issue,[86] nothing in the law imposes such a requirement. Miller is entitled to form opinions and share them.

Finally, the evidence shows that allegedly fraudulent statements were made only to DB, Goldman, and Citi. But PHC has not shown any harm vis-à-vis those entities (indeed, PHC has abandoned its claim regarding Citi). PHC asks the Court

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Beecham Pharm. Co., 1999 WL 669354, at *53 (Del. Ch. Aug. 5, 1999), *aff'd*, 766 A.2d 442 (Del. 2000).

[84] Notwithstanding PHC's mischaracterization of his testimony (PHC FOF ¶183), Miller testified that it was his understanding that issuers such as Howard and Roosevelt were misled about financing options (Tr. 266:1-13 (Miller)), and that market information reflected that the Roosevelt transaction was a bad deal for the issuer (*id.* 284:4-21).

[85] FOF ¶¶89-91.

[86] Miller's statement regarding attorneys general investigating PHC was based on the Lago Vista's letter's reference to the state attorney general. Tr. 270:1-22 (Miller). There is no evidence that this reference was made recklessly or with fraudulent intent. *Merck*, 1999 WL 669354.

to *infer* that Nuveen also made these same statements to other broker-dealers. But there is no such evidence[87] or basis for the Court to do so.

3. Nuveen Did Not Engage in an Unlawful Restraint of Trade, Satisfying Part (c) of the Restatement Test

While PHC asserts that Nuveen's conduct was wrongful because it constituted an unlawful horizontal boycott,[88] the evidence shows the opposite. *See infra,* III.

III. PHC FAILED TO PROVE A VIOLATION OF THE DONNELLY ACT

To prevail on the Donnelly Act, PHC must prove: (i) a horizontal agreement among the broker-dealers, *i.e.*, the rim of the conspiracy; (ii) vertical agreements between Nuveen (the alleged hub) and each of the broker-dealers (the alleged spokes); (iii) the boycott occurred and caused harm to PHC; and (iv) the boycott harmed competition in a relevant market.[89] PHC has completely failed to prove these requirements.

[87] FOF ¶125(b); Jentis/BAML (60:9-18).

[88] WCA, 30.

[89] Defendants' Pre-Trial Brief ("NPTB"), Dkt. 337, 50.

A. No Proof of Hub-And-Spoke Conspiracy

PHC concedes that it must prove "a horizontal agreement among the various spokes [the broker-dealers] with each other," *and* "vertical agreements between the hub [Nuveen] and each spoke."[90] It has not proven either.

1. No Proof of a Horizontal Agreement Among the Broker-Dealers

It is PHC's burden to prove that the broker-dealers agreed *with each other* to achieve an unlawful objective using a common scheme.[91] The evidence conclusively shows that no such agreement was reached.

a. There is no direct evidence of horizontal agreement

First, there is no evidence of communications between or among the broker-dealers even purporting to discuss PHC, let alone agreeing to engage in a group

[90] WCA, 35; *In re Zinc Antitrust Litig*., 155 F. Supp. 3d 337, 376 (S.D.N.Y. 2016).

[91] *Intervest Fin. Servs., Inc. v. S.G. Cowen Secs. Corp.*, 206 F. Supp. 2d 702, 712, 715-16 (E.D. Pa. 2002), *aff'd*, 340 F.3d 144 (3d Cir. 2003).

boycott.[92] Second, the broker-dealers uniformly testified that there was no tacit or explicit agreement among the spokes making up the "rim."[93]

b. There is no circumstantial evidence of horizontal agreement

Recognizing the lack of direct evidence of a horizontal agreement, PHC claims that a conspiracy among the broker-dealers may be inferred based on circumstantial evidence of parallel conduct and "plus factors."[94] To prove an agreement circumstantially, PHC must also present evidence that "tends to exclude the possibility" that the broker-dealers acted independently.[95] And courts are wary

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[92] FOF ¶¶115-18, 123-46. PHC's suggestion that Davern "admitted unequivocally that, as a result of the calls made concerning PHC, Miller had secured agreements from five broker-dealers" is inaccurate and misleading. WCA, 46. So, too, is PHC's assertion that she was "unaware of a breach of [said] agreements." PHC FOF ¶100. Davern actually testified "there was no commitment" from broker-dealers. Tr. 372:15-17 (Davern). Furthermore, this testimony relates to Nuveen's legitimate ask that broker-dealers "show[] [Nuveen] every deal that they bring into the marketplace," *not* to boycott PHC. *Id.*, 372:3-14; 372:18-373:12. This testimony could not, in any event, support a horizontal agreement because it relates to vertical communications between Nuveen and individual broker-dealers.

[93] FOF ¶¶123-46. PHC's cites to a post-trial brief from another case and two decisions over sixty years old to downplay the import of this testimony. WCA, 45 n.80. None are instructive, as they merely explain that "denials" of conspiracy cannot overcome "quite compelling documentary evidence of a planned common course of action or understanding." *Advert. Specialty Nat'l Ass'n v. Fed. Trade Commission*, 238 F.2d 108, 117 (1st Cir. 1956). But, there is no compelling evidence here.

[94] WCA, 39-40.

[95] *Intervest*, 206 F. Supp. 2d at 712 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)).

of inferring agreements so as "not [to] punish unilateral, independent conduct"[96] that the "antitrust laws are designed to protect."[97] Thus, "no conspiracy should be inferred from ambiguous evidence or from mere parallelism when defendants' conduct can be explained by independent business reasons."[98]

Despite this heavy burden, PHC asks this Court to infer that nine broker-dealers "tacitly" agreed "not to engage in 100% placements with PHC" and "not to originate any 100% placements for PHC."[99] But, there is no basis to make such an inference here.

PHC principally relies on two decisions to support its claim that a horizontal agreement among the broker-dealers can be inferred: *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015) and *Toys "R" Us, Inc. v. Fed. Trade Commission*, 221

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[96] *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999).

[97] *Matsushita*, 475 U.S. at 594.

[98] *Baby Food*, 166 F.3d at 122.

[99] WCA, 39-40. PHC now claims that KeyBanc and Stifel would "not … originate any 100% placements for PHC" (WCA, 40) in an effort to circumvent the undisputed evidence that KeyBanc and Stifel have worked on 100% placements with PHC in 2019. FOF ¶¶142(d)-(e), 144 (d)-(e). This gets PHC nowhere, as (i) PHC's own representatives confirmed that PHC has "a good working relationship" with KeyBanc (Visconsi 22:12-18) and that KeyBanc has affirmatively "decided to do 100 percent placements with PHC" (Weiner 114:11-23); and (ii) [redacted] 30:17-33:3; 17:4-15.

F.3d 928 (7th Cir. 2000). But both cases involved compelling evidence of identical, coordinated conduct aimed at output restrictions and/or anticompetitive pricing that is wholly absent here.

In *Apple*, the Second Circuit inferred an agreement among competing e-book publishers based on "overwhelming" circumstantial evidence of common motive to conspire, identical parallel acts against the individual economic self-interest of the co-conspirators, and, critically, evidence of a high level of inter-firm communications.[100] Similarly, in *Toys*, the Seventh Circuit inferred a horizontal agreement among manufacturers to curb sales to retailers based on the type of record evidence that is completely missing here, including "substantial unanimity of action taken" at the horizontal level.[101] Compared to these cases, the circumstantial evidence of agreement here is trifling, at best. There is no credible evidence of parallel conduct or of the so-called "plus factors."

i. There is no evidence that any of the broker-dealers—let alone all nine of them—acted in parallel

At the threshold, PHC does not even identify what specific conduct it claims constitutes parallel action, if any. This is because the evidence confirms that each broker-dealer's conduct varied widely. There was no obvious, or even discernible,

[100] *Apple*, 791 F.3d at 315, 319.

[101] *Toys*, 221 F.3d at 935.

parallel move timed together. Nor is there evidence of unanimous conduct representing a "radical shift" from prior practice shown through economic analysis and data.[102] Moreover, the conduct that took place was largely *contrary to* the purported goal of the conspiracy to foreclose PHC from the market, or from 100% placements specifically, because the evidence shows that the broker-dealers substantially continued business as usual with PHC. Indeed, contrary to PHC's suggestion that 100% placements are its "lifeblood,"[103] PHC was doing very little (if any) 100% placements with many of the broker-dealers prior to December 2018, and for those that were doing such business, most have continued.[104] Specifically regarding BAML, MS, and Mesirow, there is no parallel conduct, let alone a "radical shift":

- BAML [redacted].[105]

[102] *Id.*

[103] WCA, 45.

[104] FOF ¶¶127, 142, 144-45.

[105] [redacted]/BAML 72:7-21; FOF ¶123(e).

- While MS [redacted] unrelated to Nuveen, PHC and MS continue to do primary and secondary business, including [redacted] million in new issuances in 2019.[106]
- Even after PHC fired Mesirow from certain deals (based on a disagreement unrelated to Nuveen), the parties continue to do secondary market transactions with one another (although they historically have not done much business together).[107]

PHC's own trade log and expert testimony support this conclusion.[108] Even if it is true that the log maintains only transactions originated in 2018, as PHC now claims, it continues to demonstrate that there was no sudden departure from PHC's existing

[106] FOF ¶126(e).

[107] FOF ¶143. While PHC claims that Hlavin (Nuveen) told DB that "Nuveen was responsible for Mesirow's about-face with respect to PHC" (WCA, 42-43), this is a complete mischaracterization. Hlavin testified that he was discussing Wells, not Mesirow, during that call with DB (Hlavin 319:10-321:10), and PHC admits that Mesirow was not mentioned by name during that call. PHC FOF ¶169. This misleading argument is emblematic of PHC's serial mischaracterizations, such as its attempts to transform statements made only once into language used with "all major broker-dealers." PHC FOF ¶81.

[108] FOF ¶¶18, 115 n.281, 147.

business, as it shows those transactions were continued and ultimately closed in 2019 after the purported boycott.[109]

In short, not only has PHC failed to show that independent business justifications were *not* at play, the record makes clear that the brokers-dealers' conduct was not parallel.

ii. There are no plus factors

PHC's own purported "plus factors" underscore that no horizontal agreement can be inferred.

a. No proof of assurances that other broker-dealers have also agreed

PHC claims that "each [broker-dealer] was advised that the others were asked to participate" and "each knew that cooperation was essential to successful operation of the plan."[110] But only four counterparties were told anything about any other counterparty (including DB, not even a claimed co-conspirator, and RBC and Goldman, who were told only generalities with no specific broker-dealers named).[111]

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[109] FOF ¶18. PHC suggests that the approval process conducted by Wells, any "matrix" adopted by Goldman, or "internal review" conducted by JPMorgan constitute "euphemism[s]" for similar decisions "not to do 100% placements with PHC." WCA, 44 n.77, 46. The evidence contradicts that claim. FOF ¶¶124-25, 145.

[110] WCA, 49.

[111] FOF ¶42.

There is no evidence—even circumstantial—that any broker-dealer "knew that cooperation" of other broker-dealers was "essential" to a common scheme.[112]

b. No proof of broker-dealers' supposed incentive to boycott based on Nuveen's "coercive power"

PHC claims that the broker-dealers were motivated to join the group boycott based on "Nuveen's threats" and Nuveen's size as "among the largest (if not the largest) customer" for municipal bonds.[113] PHC's description of this factor is contrary to the record.[114]

First, Nuveen's "threats" of being put "in the box" were not meaningful. Indeed, there is only evidence that two broker-dealers *may* have been "in the box" during or following December 2018—and even that is unclear.[115] Second, Nuveen is not the single largest investor-partner for many of the broker-dealers.[116] It is not

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[112] WCA, 49.

[113] WCA, 50-51.

[114] Moreover, the cited discussion in *Toys* regarding market power is about whether the arrangement in that case warranted *per se* treatment, not the consideration of "market power" as a plus factor to establish whether there had been an agreement. 221 F.3d at 936.

[115] FOF ¶¶126, 142-43, 145. Furthermore, i [redacted] /MS 83:12-21. *See, supra*, 20 n.71

[116] FOF ¶42.

only implausible that Nuveen could exercise any substantial power over firms like Goldman Sachs, but it would also be irrational for Nuveen to attempt to do so. As Dr. Snyder testified, "cut[ting] off entities within the rim" would not be a "costless punishment for Nuveen because they need to get the supply of municipal debt down to them and their investors."[117] Relatedly, it is undisputed that Dr. Verlinda did not measure Nuveen's market power in any relevant market.[118]

c. No proof of "sudden change" in behavior

There was no sudden change in behavior. To the extent certain broker-dealers enhanced their scrutiny of 100% placements in response to complaints from Nuveen and others, PHC has presented no evidence that those enhancements were the result of anything other than independent decisions.[119]

d. No proof of punishments and policing

Broker-dealers did not take Nuveen's "threats" seriously.[120] And, other than with regard to DB, who PHC has conceded was not part of the alleged boycott,[121]

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[117] Tr. 535:18-536:13 (Snyder).

[118] FOF ¶42. Defendants move to strike Dr. Verlinda's opinions as unreliable because they are not supported by analysis of facts or data, and include personal speculation and interpretative statements that add no expert value. *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1025-26 (10th Cir. 2002).

[119] *See*, *supra*, II.A.4.

[120] *See*, *supra,* II.B.2.a.

[121] PHC FOF ¶227.

the only instance of Nuveen representatives telling a counterparty that other broker-dealers were "put in the box" is with respect to MS, which was told that BAML and Wells were "put in the box" not for doing deals with PHC, but rather for failing to show Nuveen deals.[122]

As to policing, PHC's evidence is that: (i) someone from BAML told Davern that MS was doing a deal with PHC; and (ii) RBC sent Nuveen a one-off communication asserting that Stifel was involved in a 100% placement deal with PHC.[123] This bears no resemblance to the type of "across the board" evidence that one conspirator was charged with "monitoring the market to make sure" that all co-conspirators "stick to the rules."[124]

In sum, there is no evidence from which the Court could infer the existence of a horizontal group boycott.[125] This is especially true given the direct evidence

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[122] FOF ¶¶117, 126(b).

[123] PHC FOF ¶¶248-49. PHC also suggests that RBC "informed Nuveen about a deal RBC's bankers were trying to close with PHC" in February 2019 (WCA, 52) without explaining how or why informing Nuveen of potential deals in RBC's own pipeline could constitute policing. If anything, RBC's bankers' attempt to close a deal with PHC reinforces that there was *no boycott* of PHC.

[124] *Valspar Corp. v. E.I. Du Pont de Nemours & Co.*, 873 F.3d 185, 202 (3d Cir. 2017).

[125] *Baby Food*, 166 F.3d at 121-22; *Matsushita*, 475 U.S. at 594.

confirming that no agreements were reached among the broker-dealers to engage in a concerted foreclosure of PHC.[126]

B. No Proof of a Vertical Agreement Between Nuveen and Any Broker-Dealer

Every broker-dealer testified unequivocally that there was no agreement reached with Nuveen to cease 100% placements or to stop any other business with PHC.[127] Under these circumstances, an agreement cannot be inferred.[128] PHC nevertheless asks this Court to speculate that there were a series of vertical restraints based on purported evidence that "[c]ertain broker-dealers who were threatened by Nuveen—including BAML, Goldman, and Morgan Stanley—put Miller in touch with more senior members of firm management"; "received no punishment from Nuveen" thereafter; and "declined to do 100% placements with PHC," discontinuing all contacts with PHC period.[129] PHC claims that JPM, Stifel, Mesirow, Wells, and

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[126] FOF ¶¶115-16, 141. *See Hatfield v. Control Sys. Int'l*, 21 F. Supp. 2d 546, 550-51 (D.S.C. 1997) (where defendant "offers [] evidence" that "there was no …agreement," "a conspiracy will not be inferred because a manufacturer responds to a dealer's complaints"), *aff'd sub nom. Carolina Sec. & Fire Inc. v. Control Sys. Int'l*, 155 F.3d 558 (4th Cir. 1998).

[127] FOF ¶¶115-18, 123-27, 141-45.

[128] *See supra*, III.A.1.b.

[129] WCA, 39-41.

KeyBanc[130] are examples of other broker-dealers that somehow otherwise "succumbed to Nuveen's pressure."[131]

Leaving aside the wholly speculative nature of the above, the Court cannot "infer an agreement" based upon Nuveen's complaints about PHC.[132] Rather, PHC "must do more to connect the phone call[s] to concerted action[.]"[133]

Intervest is particularly instructive. There, a conspiracy in the municipal bonds industry was alleged among investment banks, broker-dealers and Bloomberg, based on complaints from broker-dealers/investment banks to Bloomberg, which allegedly resulted in the exclusion of plaintiff from Bloomberg's trading network. The Court found that "[a] business decision choosing to satisfy one

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[130] PHC's claim regarding RBC is limited to the February 2019 communication that Stifel was involved in a 100% placement deal with PHC and that RBC itself was engaged in a transaction with PHC (WCA, 52); as aforementioned, that does not rise to the level of policing. *See supra*, III.B.2.d. And RBC has continued doing 100% placements with PHC. FOF ¶127(e).

[131] WCA, 40-43. PHC also claims that Miller told DB that he had "firm commitments" from certain broker-dealers (WCA, 41-44); however, Miller testified that he never secured any agreements from counterparties not to do business with PHC. Moreover, any references to "commitments" on calls pertained to broker-dealers' willingness to consider their approach to 100% private placements, and were "exaggerations." Miller 325:9-327:18, 333:3-9, 355:10-14.

[132] *Intervest*, 206 F. Supp. 2d at 714; *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) ("inference of concerted action on the basis of receiving complaints alone . . . would . . . inhibit management's exercise of independent business judgment").

[133] *Intervest*, 206 F. Supp. 2d at 714-15.

client over another" is not a conspiracy, even if an adverse decision impacting plaintiff "came about in response to [a] phone call" from a client.[134]

Moreover, PHC has the burden to prove that the conduct at issue was inconsistent with permissible competition and also tends to exclude the possibility of independent action.[135] PHC has not met this high burden:

- ***BAML***: While a BAML [redacted].[136]
- ***Goldman***: There is no evidence that an opportunity for a 100% placement with PHC has been rejected by Goldman on account of Nuveen. Moreover, Goldman had independent reasons for changing

[134] *Intervest*, 206 F. Supp. 2d at 713-14, 716; *Du-Bro Foods, Inc. v. Aron Streit Inc.*, 1994 WL 874370, at *3 (N.Y. Sup. Ct. May 18, 1994) ("an agreement will not be inferred" in violation of the Donnelly Act where a distributor was "[t]erminat[ed] . . . in response to complaints by other distributors.").

[135] *Baby Food*, 166 F.3d at 124.

[136] [redacted]BAML 94:21-25; FOF ¶123(c). PHC's assertion that "Mike Jentis of BAML informed Cliff Weiner of PHC that BAML agreed not to do 100% placements because Nuveen threatened to pull its business" (WCA, 40) is both inadmissible hearsay and [redacted]/BAML 103:21-25.

its internal decision-making process for undertaking 100% placements.[137]

- ***MS***: Nuveen wanted to ensure that it saw all deals and expressed dismay with MS only because it had done a deal with "Preston Hollow *in that form*" (*i.e.*, a private placement) specifically. Despite its reservations about 100% placements, MS has not refused to do them, and it continues to do primary and secondary business with PHC.[138]
- ***JPMorgan***: PHC claims that because JPMorgan representatives spoke with Nuveen in December 2018, before JPMorgan turned down the Howard Quad deal, that "series of events" should lead to an inference that "JPM agreed with Nuveen not to do 100% placements with PHC."[139] Not so. JPMorgan's [redacted][140]
- ***Stifel***: The "premise of [Nuveen's] meeting [with Stifel in late 2018] was to talk about the fact that [Nuveen] needed to see every single one

[137] FOF ¶124.

[138] Costello/MS 40:12-41:4; FOF ¶126.

[139] WCA, 41.

[140] FOF ¶125(b).

of their deals," and it was Stifel, not Nuveen, who brought up PHC.[141]

[redacted].[142] [redacted]

[redacted][143]

- ***Mesirow***: There is no evidence that anyone from Nuveen even contacted anyone from Mesirow about PHC at any time in 2018.[144]
- ***Wells***: Wells indisputably continues to do 100% placements with PHC, [redacted]d [redacted][145]

[141] Davern 192:15-22.

[142] [redacted] 39:24-40:9.

[143] PHC claims that [redacted]" WCA, 42. This is mischaracterized. [redacted]/Stifel 66:8-67:23); rather, [redacted]. *Id*., 17:4-24. [redacted] *Id*., 14:6-21, 66:8-67:23.

[144] FOF ¶143.

[145] FOF ¶145(e). *Cable Line, Inc. v. Comcast Cable Commc'ns of Pa., Inc*., 2017 WL 4685359, at *4 (M.D. Pa. Oct. 18, 2017) (no antitrust injury where plaintiff "has had the clear opportunity to compete and did compete, sometimes successfully").

- ***KeyBanc***: While KeyBanc was "in the box" in spring/summer 2018[146], that was due to KeyBanc's failure to show Nuveen deals. KeyBanc indisputably continues to do 100% placements with PHC, and has not been put "in the box" again.[147]

C. Without Horizontal or Vertical Agreements, All That Is Left Is Unilateral Conduct That Is Perfectly Legal Under the Donnelly Act

Unilateral conduct is not actionable under the Donnelly Act. *Advanced Global Tech. LLC v. Sirius Satellite Radio Inc.*, 2008 WL 3996275 (N.Y. Sup. Ct. Aug. 20, 2008) ("[C]ourts have recognized the right of a company to select a person with whom it does business and to refuse to deal or continue to deal with anyone for reasons sufficient to itself."). Indeed, "[n]o matter how distasteful or unfair, a unilateral action undertaken by a solitary defendant does not give rise to" antitrust liability.[148]

Nuveen's discussions with broker-dealers were aimed at Nuveen's access to deal opportunities and are not tantamount to an antitrust violation, even where Nuveen representatives suggested that counterparties should do business with it over PHC. It is not an unlawful objective, or inherently anticompetitive, to ask a supplier

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[146] WCA, 43.

[147] FOF ¶142(d)-(e).

[148] *Intervest,* 206 F. Supp. 2d at 712.

to choose to do business with you over someone else, nor is it problematic for your supplier to choose you over your competitor.[149]

D. No Proof of Antitrust Injury Caused by a Concerted Group Boycott or Any Other Anticompetitive Agreement

PHC must prove antitrust injury no matter the standard applied (*per se* or rule of reason).[150]

The test for antitrust injury involves a "compar[ison]" of the "anticompetitive effect of the specific practice at issue" to "the actual injury the plaintiff alleges."[151] It is "not enough for the actual injury to be 'causally linked' to the asserted violation"; rather, plaintiff "must demonstrate that its injury is 'of the type the antitrust laws were intended to prevent and that flows from that which makes [or might make] defendants' acts unlawful.'"[152] PHC has done nothing to address—let alone meet its burden to prove—this textbook requirement.

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[149] *Id.; Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004) (competition for contracts—even exclusive contracts—is a "vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress").

[150] *Rubin v. Nine W. Grp., Inc.*, 1999 WL 1425364, at *6 (N.Y. Sup. Ct. Nov. 3, 1999) (a "plaintiff is . . . required to allege an antitrust injury" even in a *per se* Donnelly Act case).

[151] *Gatt Commc'ns, Inc. v. PMC Assocs., LLC*, 711 F.3d 68, 76 (2d Cir. 2013).

[152] *Id*.

While there is no basis to conclude that Nuveen attempted to organize a boycott, it cannot be disputed that Nuveen failed to do so. The uniform testimony is that no broker-dealer took any action to foreclose PHC in response to Nuveen, and that PHC was not precluded from participating in any market.[153] To the contrary, PHC continues to do business with all nine of the broker-dealers who it claims are part of the alleged conspiracy, including 100% placements with certain of them, all as before.[154]

PHC has also failed to prove a causal nexus between any decline in business and Nuveen's actions. PHC's own expert, Dr. Verlinda, conceded that he did no assessment of causation because he assumed—with no factual support—that Nuveen necessarily was the problem.[155]

Actual economic analysis, however, shows no harm has occurred. Dr. Snyder identified "many hundreds of underwriters" active in municipal bond issuances and 44 broker-dealers PHC has worked with since 2017, 34 of whom have participated in private placements of high-yield municipal bonds.[156] That includes the broker-dealers contacted by Nuveen, as well as 22 that are not alleged to have been

[153] FOF ¶117.

[154] *See supra,* III.B.

[155] FOF ¶147 n.508.

[156] Snyder 186:17-187:3, 204:3-13.

contacted by Nuveen.[157] Snyder's conclusion—uncontroverted in the record—is that "[PHC] has not been and will not be foreclosed from undertaking 100 percent placements" or facilitating the issuance of high yield municipal bonds more generally.[158]

E. This Is a Rule of Reason Case That Also Requires Harm to Competition in a Relevant Antitrust Market

PHC incorrectly asserts that its claim should be analyzed under the *per se* standard, but under applicable law, it should be reviewed under the rule of reason standard. Recognizing this problem, PHC now resorts to arguing that a "quick look" can be applied in the event the Court does not find evidence of a horizontal agreement. But there is no support for that, either.

1. The *Per Se* Rule Does Not Apply to Donnelly Act Group Boycott Claims

PHC contends that hub-and-spoke arrangements are automatically unlawful under the *per se* rule and require nothing more than proof of the existence of the conspiracy itself.[159] This is wrong. Hub-and-spoke arrangements are not

[157] JX541, 33, Ex. B.

[158] Snyder 175:24-176:20, 219:10-17, 221:9-21.

[159] WCA, 33-35. Even PHC does not dispute that the rule of reason applies to vertical conduct. *In re Se. Milk Antitrust Litig.*, 739 F.3d 262 (6th Cir. 2014).

automatically subject to the *per se* rule, and in Donnelly Act cases, New York courts have consistently applied the rule of reason.

The primary cases PHC relies on actually undermine PHC's argument. In *Apple*, the court applied a *per se* standard not because of the "structure[]" of the group boycott, as PHC contends,[160] but rather because defendants fixed prices—a type of restraint that triggers *per se* treatment.[161] *Interstate Circuit* is similarly inapposite: there, the Court focused on the fact that it was a price restriction case.[162] In *Toys*, the court did not use a true *per se* standard; while "it was clear that [the] boycott was having an effect," the court still conducted an economic inquiry to demonstrate price maintenance.[163] *Klor's* is distinguishable because there, defendants did not even dispute the existence of a horizontal conspiracy.[164] In any event, "the Supreme Court has pulled back from *Klor's* and has been wary about fixing the *per se* label to all boycotts."[165]

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[160] WCA, 36.

[161] *Apple*, 791 F.3d at 322.

[162] *Interstate Circuit v. U.S.*, 306 U.S. 208, 228-29, 231-32 (1939).

[163] *Toys*, 221 F.3d at 937.

[164] *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209-10 (1959).

[165] RICHARD A. POSNER, ANTITRUST LAW 238 (2d ed. 2001) (a boycott "used to be deemed a *per se* violation . . . [,] [but] [t]he Supreme Court has wisely abandoned that position, which anyway was never taken seriously"). For example, in *Northwest Stationers*, the Supreme Court declined to apply the *per se* rule to all group boycotts and recognized that "[e]xactly what types of [group boycott] activity fall within the

Cases focusing on the Donnelly Act show that New York courts usually apply the rule of reason to horizontal boycotts. The opinion in *Two Queens*, the primary Donnelly Act decision PHC relies on, is about subject matter jurisdiction and contains no discussion of *per se* treatment.[166] And, while PHC claims "[t]here is no authoritative pronouncement by the New York Court of Appeals or recent appellate authority as to the standard on horizontal group boycotts,"[167] other New York courts have "consistently applied the rule of reason."[168] PHC tries to distinguish those cases because they "pre-dat[e]" the New York Court of Appeals' decision in *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327 (N.Y. 1988).[169] But *Anheuser-Busch* merely clarified that New York courts "do not" necessarily "move in lockstep with the Federal courts in [their] interpretation of antitrust law," and also confirmed that the rule of reason is the proper standard for most Donnelly Act claims.[170]

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forbidden category is . . . far from certain." *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294-97 (1985).

[166] WCA, 35.

[167] WCA, 35.

[168] NPTB, 47.

[169] WCA, 35 n.58.

[170] 71 N.Y.2d at 334-35.

2. "Quick Look" Is Not the Proper Test for the Vertical Conduct at Issue That Was Procompetitive

PHC argues that, in the event the Court does not find a horizontal agreement, it may assess Nuveen's conduct using "quick look."[171] "[Q]uick look" may be applied only when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[172] It does not apply here.

First, PHC fails to provide a single case addressing whether "quick look" is even contemplated under the Donnelly Act.[173] And, under federal law, the "quick look" test is reserved for rare instances and has typically been limited to certain restraints – such as those that amount to "[h]orizontal price fixing and output limitation" – not at issue here.[174]

PHC also admits that "quick look" can only apply if there is no procompetitive justification.[175] Here, however, there are important procompetitive justifications,

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[171] WCA, 57.

[172] *Cal. Dental Ass'n v. Fed. Trade Commission*, 526 U.S. 756, 770 (1999).

[173] WCA, 57-62.

[174] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 99-100, 109-10 (1984); *Ogden v. Little Caesar Enters., Inc.*, 2019 WL 3425266, at *4 (E.D. Mich. July 29, 2019) (describing the "quick look" as a "special case" and declining to apply the "quick look" or *per se* standards to alleged agreements with horizontal and vertical elements).

[175] WCA, 58.

including that Nuveen's (and other investors') access to opportunities is eliminated in the private 100% placement context.[176] Indeed, even PHC agrees that being deprived of "the free opportunity to select among alternative offers" is an "evil" in the market.[177] Moreover, as both parties' experts have recognized, where 100% placements are done privately or through a limited public offering, "there is less market transparency" "potentially resulting in higher interest rates paid by issuers."[178] Finally, given the volatility of high yield bonds and the market's susceptibility to high-profile downgrades, defaults and other negative headlines, Nuveen's concerns regarding PHC deals were completely justified.[179] Uncontroverted testimony from Dr. Snyder confirmed the legitimate pro-competitive justifications for Miller to notify others in the industry regarding PHC's "predatory practices" and his "concern about harm to the industry."[180]

Moreover, PHC cites no case that could support the proposition that expressing concern about PHC to other broker-dealers somehow renders Nuveen's conduct "inherently anticompetitive." The two cases PHC cites—*Apple* and

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[176] NPTB, 60-61.

[177] WCA, 62-63.

[178] NPTB, 8.

[179] NPTB, 13-17, 61.

[180] Tr. 559:11-560:3 (Snyder).

Professional Engineers—are completely inapposite, as those cases simply say that price-fixing cannot be recognized as procompetitive conduct.[181]

Finally, even if "quick look" were appropriate here, the circumstances, details, and logic of Nuveen's vertical conduct do not give rise to any "intuitively obvious inference of anticompetitive effect."[182] To the contrary, Nuveen's discussions were facially aimed at *increasing* competition by allowing more competing investors to access deals and increasing market transparency.

F. No Proof of Harm to Competition in a Relevant Market

PHC has not seriously tried to prove harm to competition in a relevant antitrust market—a required element beyond antitrust injury to PHC itself.[183] Where "plaintiffs failed to present … evidence that the effect of the purported conspiracy was to restrain trade in the market in question," a violation of the Donnelly Act has not occurred.[184]

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[181] *Apple*, 791 F.3d at 298; *Nat'l Soc'y of Prof. Eng'rs v. U.S.*, 435 U.S. 679, 694-96 (1978).

[182] *Cal. Dental Ass'n*, 526 U.S. at 780-81.

[183] NPTB, 58-60; *Du-Bro*, 1994 WL 874370, at *3.

[184] *Long Island Pulmonary Assocs., P.C. v. Metro. Life Ins. Co.*, 756 N.Y.S.2d 788, 788 (N.Y. App. Div. 2003).

Undoubtedly, PHC has not met its burden on this score. Dr. Verlinda conceded he did no empirical analysis to define a relevant market.[185] At trial, he could not even define which of the various markets suggested was the right one to consider.[186] PHC's other experts likewise conceded that they have "no opinion on harm to competition or a relevant market."[187]

Nor is there evidence of the harm to competition that PHC speculates happened, *i.e.*, that certain borrowers have been deprived of the opportunity to choose PHC's purportedly "innovative" bespoke solution.[188] In fact, this theory has been undercut by PHC's own Dr. Verlinda.[189] Metzold testified the same.[190]

Tellingly, not a single borrower has come forward to complain that it has been deprived of options or disadvantaged, and PHC did not identify any borrower whose desires to do a 100% private placement with it have been frustrated by the purported

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[185] FOF ¶¶15, 70. *See Menasha*, 354 F.3d at 664 (plaintiff did not meet its burden where it offered only "a potpourri of survey research and armchair economics" in place of econometric analysis).

[186] FOF ¶¶15, 70.

[187] Rosenblum 32:11-33:15; Metzold 71:15-73:19, 220:16-20.

[188] WCA, 9-10.

[189] Verlinda 237:18-238:3 (Dr. Verlinda's "understanding" is that other "investors could try to mimic … Preston Hollow's innovative model," thereby providing borrowers the same services PHC purports to offer, and conceding that he has "not reviewed the collection of possible other folks out there" that follow similar business practices to PHC).

[190] Metzold 213:9-216:3.

"boycott." The absence of such evidence casts even greater doubt on the veracity of PHC's otherwise unsubstantiated theory. *Intervest*, 206 F. Supp. 2d at 717 ("Not a single customer has come forward as a participant in this litigation either to complain about the high spreads or to assert that the demise of [plaintiff] denied them something they wanted").

Finally, the only economic analysis available in the case is Dr. Snyder's. While PHC has criticized Dr. Snyder's work, it is a plaintiff's burden to prove harm to competition and a relevant market, not a defendant's burden to disprove it.[191] Moreover, following his in-depth economic study, Dr. Snyder concludes—with a number of specific examples—that "numerous firms that can and do arrange bond issuances for municipal entities, including customized solutions and private placements."[192] Beyond private placements, Dr. Snyder also identifies alternative means of financing available to issuers (*e.g.*, competitive bids, limited public offerings, direct lending) such that there could be "no anticompetitive harm because the issuers have numerous other means of raising capital, resulting in no reduction in output or increase in prices."[193]

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[191] *G.T. Acquisition I Corp. v. Bridgestone/Firestone N. Am. Tire, LLC*, 824 N.Y.S.2d 762 (N.Y. Sup. Ct. 2006).

[192] Snyder 253:18-255:13.

[193] Snyder 252:8-253:13, 255:15-21, 257:15-23.

IV. THE DONNELLY ACT CLAIM IS PREEMPTED

Finally, PHC's Donnelly Act claim is preempted by the Sherman Act because the alleged conduct principally affects interstate, rather than intrastate, commerce.[194]

V. THERE IS NO BASIS FOR EQUITABLE RELIEF

PHC's failure to show "actual success on the merits" of its tortious interference and antitrust claims is fatal to its request for permanent injunctive relief.[195] The request for a permanent injunction fails for at least four additional reasons as well. First, PHC cannot demonstrate irreparable harm.[196] Second, the injunction PHC seeks would not remedy any purported harm.[197] Third, PHC's

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There can be no liability as to defendants Nuveen, LLC, Nuveen Investments, Inc. or Nuveen Securities, LLC because there has been no evidence adduced (or even attempted) as to these defendants. *In re Aluminum Warehousing Antitrust Litig.*, 2015 WL 1344429, at *3 (S.D.N.Y. Mar. 23, 2015) (dismissing antitrust claims as to several defendants against whom there were no "specific facts that suggest[ed] any participation . . . in the allegedly unlawful conduct," other than their "corporate proximity" to other defendants); *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) ("[E]ach [defendant] . . . is only liable for his or her own misconduct.").

[194] NBTP, 61; FOF ¶¶36, 49 (both PHC and Nuveen finance projects all over the country). For similar reasons, a choice-of-law analysis could conclude that the laws of Delaware, Texas, or Illinois should instead apply to this claim. Indeed, were Delaware law to apply, PHC would be foreclosed from bringing this action, as the Delaware Antitrust Act does not include a private right of action. *Maddock v. Greenville Ret. Cmty., L.P.*, 1997 WL 89094, at *6 (Del. Ch. Feb. 26, 1997).

[195] *Sierra Club v. Del. Dep't of Nat'l Res. & Envtl. Control*, 2006 WL 1716913, at *3 (Del. Ch. June 19, 2006), *aff'd*, 919 A.2d 547 (Del. 2007).

[196] *Id.*

[197] *Id.*

proposed injunction is fatally flawed insofar as it would: (i) impose a prior restraint on speech and compel involuntary expression, thereby violating the federal and Delaware rights to freedom of speech;[198] and (ii) unlawfully interfere with Nuveen's internal corporate governance and impose significant and unjustified burdens on the Court. Fourth, the balance of equities disfavors an injunction. Indeed, the requested injunctive relief is superfluous given that Nuveen long ago sent letters to the broker-dealers to disavow any confusion caused by the challenged conduct and has indisputably not engaged in any similar conduct since.[199]

A. No Proof of Irreparable Harm

To merit a permanent injunction, PHC must prove that "irreparable harm will be suffered" without one.[200] *Calagione v. City of Lewes Planning Comm'n*, 2007 WL 4054668, at *3 (Del. Ch. Nov. 13, 2007) (denying injunction in part as unripe because no imminent threat existed, and other remedial channels existed); *Bethany W. Recreation Ass'n, Inc. v. ECR Props., Inc.*, 1995 WL 1791084, at *5 (Del. Ch. Apr. 28, 1995) (denying injunction when "defendant's *current* activities" do not

[198] U.S. Const., amend. I; Del. Const. art. I, § 5.

[199] FOF ¶¶174-76. PHC blatantly ignores the February 22 letters Nuveen sent the broker-dealers in its WCA and FOF.

[200] *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 384 n.65 (Del. 2014).

"threaten plaintiffs with *imminent, irreparable* injury"). Fear of future harm must be "reasonable" and is insufficient without a showing of "imminent threat."[201]

Faced with this requirement, PHC has almost nothing to say.[202] It does not—because it cannot—claim that it has been irreparably harmed by Nuveen's purported interference with PHC's relationship with DB.[203] Indeed, DB [redacted]"[204] PHC has thus not shown irreparable harm as to DB.

Nor has PHC proven irreparable harm from Nuveen's alleged interference with PHC's relationships with broker-dealers. Indeed, any injury resulting from the loss of transactional business with the broker-dealers would be *financial* harm, and thus presumptively remediable with money damages. *Perlman v. Vox Media, Inc.*,

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[201] *State v. Del. State Educ. Ass'n*, 326 A.2d 868, 876 (Del. Ch. 1974); *accord McMahon v. New Castle Assocs.*, 532 A.2d 601, 606 (Del. Ch. 1987). PHC's citations regarding ongoing harm are inapposite. WCA, 64-65 (citing *Agilent Techs., Inc.*, 2009 WL 119865, at *10 and *Tristate Courier & Carriage, Inc. v. Berryman*, 2004 WL 835886, at *12 (Del. Ch. Apr. 15, 2004)). *Agilent* involved Delaware Deceptive Trade Practices Act (DTPA) claims regarding "alleged misrepresentations [that] were ongoing to the point that they occurred *after* the filing of the Original Counterclaim." 2009 WL 119865, at *10. Here, there is no ongoing harm, and the DTPA has never been invoked. *Tristate Courier* involved the ongoing solicitation of employees, not an issue here. 2004 WL 835886, at *12.

[202] WCA, 63-65.

[203] FOF ¶¶137-40.

[204] [redacted] DB 130:12-131:12.

2019 WL 2647520, at *6 (Del. Ch. June 27, 2019) ("'lost business opportunities and lost investments'" are not irreparable harm). Such financial losses are not, by definition, "irreparable" harm. *Alpha Builders, Inc. v. Sullivan*, 2004 WL 2694917, at *5 (Del. Ch. Nov. 5, 2004) (plaintiff "has made only a weak showing of irreparable harm" where "[d]amages . . . as well as any additional costs . . . caused by the [defendant's] actions, should be fully recoverable through an award of monetary damages" and "if any damages do occur, [plaintiff] has not shown that those damages likely would not be quantifiable").[205] At trial, witnesses were clear that any loss of business was temporary: "no one ever stops doing business with each other; certainly not for an extended period of time."[206]

Indeed, the *only* evidence PHC raises is the supposed lack of contrition by Miller and his team, which (PHC suggests) forebodes a future recurrence of their allegedly tortious conduct.[207] PHC has failed, however, to provide any concrete indication of when, where, or how the supposedly improper actions might recur. Such an "unsubstantiated fear that a legal duty may be breached in an uncertain

[205] *Alpha Builders* also recognizes that the inability to calculate damages may be because the injury to plaintiff was speculative in the first place. *Id*.

[206] Tr. 589:22-24 (Costello/MS).

[207] WCA, 63.

future" is precisely the type this Court routinely rejects.[208] "An injunction against future wrongdoing is not generally available."[209]

Moreover, because PHC has failed to prove a causal link between any of Nuveen's actions and any of the harms it asserts[210], there is no conceivable threat of irreparable harm, much less one that "will" be suffered. *Troy Corp. v. Schoon*, 959 A.2d 1130, 1138 (Del. Ch. 2008) (denying injunction where there was no initial harm, and therefore no reasonable apprehension of future wrong).

B. The Proposed Injunctions Will Not Remedy the Harms Alleged

Delaware courts have repeatedly denied permanent injunctions that do not actually remedy the harms involved.[211] Even if PHC could show irreparable harm, the injunctive relief sought here is untethered from the claimed harms, and thus should be denied.[212]

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[208] *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 536 (Del. Ch. 2005); *Young v. Red Clay Consol. Sch. Dist.*, 159 A.3d 713, 780 (Del. Ch. 2017).

[209] *Organovo*, 162 A.3d at 114. PHC cites to *Organovo* (WCA, 64) for the limited proposition that this Court "need not dismiss the non-speech business tort itself merely because the remedy sought may include injunction of allegedly-defamatory speech." Dkt. 370, at 25. *Organovo* does not support the grant of injunctive relief and maintains unchanged "the general rule … that a court of equity will not issue an injunction against future defamatory speech." 162 A.3d. at 119.

[210] FOF ¶¶147-71.

[211] *N. River Ins. Co.*, 105 A.3d at 384-85.

[212] New York courts appear split over whether injunctive relief is available to private litigants under the Donnelly Act. The statute does not explicitly allow private litigants to pursue injunctive relief. N.Y. Gen. Bus. Law § 340(5). PHC cites

PHC seeks a permanent injunction: (i) "preventing Nuveen from engaging in further unlawful and tortious communications with lenders, broker-dealers and other participants in the high-yield municipal market;" (ii) "directing Nuveen to take steps to rectify the harm already caused by Miller's unlawful conduct by expressly disavowing his retaliatory threats in order to restore Preston Hollow's right to freely and fairly compete;" and (iii) "directing Nuveen to adopt supervisory procedures to ensure that Miller and the other culpable Nuveen representatives do not engage in similar misconduct in the future."[213]

None of the requested relief addresses PHC's claim that its relationship with its primary lender, DB, remains at risk because of how Nuveen allocates its TOB

Peekskill Theater v. Advance Theatrical Co. of N.Y., 206 A.D. 138, 142 (N.Y. App. Div. 1923) for the proposition that injunctive relief is available, but ignores later New York law to the contrary. *Blumenthal v. Am. Soc'y of Travel Agents, Inc.*, 1977 WL 18392, at *4 (N.Y. Sup. Ct. July 5, 1977) ("[U]nder the Donnelly Act, the Attorney General alone is authorized to bring an injunction action (General Business Law, Sec. 342) …. This authority cannot be shared with any private litigant."); *Leider v. Ralfe*, 2003 WL 22339305, at *8 (S.D.N.Y. Oct. 10, 2003) ("[T]his statute permits a private party to recover monetary damages but not an injunction.").

When faced with a question of sister-state law, Delaware courts are "chary about innovating[.]" *RBC Capital Mkts., LLC v. Educ. Loan Trust IV*, 2011 WL 6152282, at *6 n.43 (Del. Ch. Dec. 6, 2011). "If litigants want innovative common law, they should address their claims to the courts of the state whose law applies." *Id.* This Court should decline to resolve the question of New York law by simply denying the injunction on its merits.

[213] WCA, 63-64.

funding.[214] The relief requested will be manifestly ineffective to remedy either past or future (illusory) harms arising from Nuveen's business with DB.

The same applies to PHC's claims of harm that it can only make deals with non bulge-bracket broker-dealers.[215] None of the requested relief will remedy that supposed harm. The only injunction that would remedy that harm is an injunction *requiring* the larger broker-dealers to do business with PHC—a prospect that is ridiculous on its face.

As a matter of due process, an injunction may not issue if the action to be enjoined is unclear.[216] Because an injunction can be the foundation for a future contempt motion, it must be framed with precision. "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one."[217] PHC has failed to ask for injunctive relief precise enough to put Nuveen on notice of what is prohibited or required.

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[214] Delaware courts are extremely reluctant to interfere so directly with a business's internal decision-making. *Barry v. Full Mold Process, Inc.*, 1975 WL 1949, at *2 (Del. Ch. June 16, 1975) ("judicially sanctioned interference with the internal affairs of a corporation is an exceedingly delicate matter and such power should not be exercised except where necessary to protect the vital interests of stockholders").

[215] PHC FOF ¶¶256-57.

[216] Del. Ct. Ch. R. 65(d); *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974).

[217] *Int'l Longshoreman's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967).

C. The Proposed Injunction Is Also Unconstitutional, Unworkable, and Pointless

Leaving aside the absence of irreparable harm and the disjunction between PHC's asserted injuries and its proposed equitable remedy, PHC's specific proposed injunction is unlawful and inappropriate for a host of other reasons.

1. The Proposed Injunction Would Unconstitutionally Infringe on Nuveen's Free-Speech Rights

The first aspect of PHC's proposed injunction would bar Nuveen from engaging in "unlawful, anticompetitive, retaliatory, and tortious communications with lenders, broker-dealers and other participants in the high-yield municipal market." The second would "direct[ ] Nuveen to . . . disavow[ ] [Miller's] retaliatory threats . . . ."[218] Both proposals are squarely directed at Nuveen's expression, rather than its conduct, and would unconstitutionally infringe on Nuveen's free-speech rights.

First, PHC's attempt to ban Nuveen from engaging in "unlawful, anticompetitive, retaliatory, and tortious communications" is, on its face, a prior

[218] WCA, 63-64.

restraint on speech,[219] forbidden by the federal and Delaware Constitutions.[220] This is true "even if the speech, once uttered, would constitute a tort or breach of contract."[221] That is why "the general rule continues to be that a court of equity will not issue an injunction against future defamatory speech."[222]

Second, PHC's request for a court order instructing Nuveen to "disavow" Miller's prior speech would amount to compelled speech, which is similarly impermissible under both the federal and Delaware Constitutions. The Court could not order *the removal* of a statement *adjudicated to be defamatory* because of the rule against equity enjoining a libel.[223] Yet PHC asks for more: the *compelled affirmative disavowal of speech not adjudicated by this Court to be defamatory*. If constitutional concerns prohibit the lesser injunction against future libel, they necessarily prohibit the greater injunction compelling affirmative disavowal.

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[219] This Court previously recognized the possibility of such a defense. Dkt. 370 at 25-26 nn.98-99. Nuveen raises those objections here because the same "broad injunction" is still being sought. *Id.*, at 26 n.99.

[220] U.S. Const., amend. I; Del. Const. art. I, § 5; *CapStack Nashville 3 LLC v. MACC Venture Partners*, 2018 WL 3949274, at *4 (Del. Ch. Aug. 16, 2018).

[221] *Carteret Bancorp, Inc. v. Home Grp., Inc.*, 1988 WL 3010, at *8 n.6 (Del. Ch. Jan. 13, 1988).

[222] *Organovo*, 162 A.3d at 119.

[223] *Perlman*, 2019 WL 2647520, at *1, 5-6.

2. The Proposed Injunction Would Improperly Interfere with Nuveen's Internal Corporate Governance and Would Impose Undue Burdens on the Court

PHC's third requested injunction seeks an order "directing Nuveen to adopt supervisory procedures" to prevent further alleged misconduct. Such an order would amount to a consent decree, requiring that the Court engage in ongoing monitoring of Nuveen's internal governance systems.

But, this Court does not interfere in the internal affairs of a corporation short of "a clear showing of fraud or gross mismanagement" which "threatens to result in direct loss to the corporation and cannot otherwise be prevented."[224] PHC has not even tried to make the required showing for this extraordinary intervention. And, indeed, Huffman's testimony regarding the process implemented to deal with PHC's complaints belies PHC's claims of Nuveen's purported culture of unaccountability.[225]

Separately, the requested monitoring would unworkably require an inordinate expenditure of court resources, which this Court is loath to do. *Carteret Bancorp*, 1988 WL 3010, at *8 (declining to supervise an ongoing "best efforts" covenant

[224] *Barry*, 1975 WL 1949, at *2.

[225] Tr. 590:3-591:20 (Huffman).

because it "would risk involving the court in the detailed administration of this contract").

3. The Proposed Injunction is Pointless and Substantially Moot

The proposed injunction is also pointless and substantially moot. The first part of the injunction, which seeks an order "preventing Nuveen from engaging in further unlawful and tortious communications,"[226] seeks little more than an injunction to follow the law. Unless proved otherwise, parties must be assumed to follow the law; an injunction commanding them to do what the law already requires is futile, and is not an appropriate equitable remedy. *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d at 536-37 (denying as futile an injunction prohibiting party "from violating duly enacted statutes that it is already duty-bound to honor"); *Pleasanton v. Hugg*, 2010 WL 5313228, at *1 (Del. Super. Ct. Nov. 29, 2010) ("Courts have traditionally refused to issue 'obey the law' injunctions. . . .").

The second part of the injunction, seeking that Nuveen "disavow" its prior statements,[227] is not merely futile, but moot for two reasons. First, in its February 22 Letters to the various underwriters, Nuveen already effectively disavowed the

[226] WCA, 63.

[227] *Id*., 64.

very statements about which PHC complains.[228] Second, the evidence is that Nuveen, through counsel and Huffman, has already taken steps to stop further communications regarding PHC.[229] *Penton Bus. Media Holdings, LLC v. Informa PLC*, 2018 WL 3343495 (Del. Ch. Jul. 9, 2018) (denying injunction based on defendant's representation that it would not engage in the conduct at issue).

D. The Balance of Equities Favors Nuveen

PHC has completely failed to analyze the third requirement for obtaining a permanent injunction: the balance of equities favors granting the injunction, *i.e.*, "the harm that will result from a failure to enjoin the actions that threaten plaintiff *outweighs the harm that will befall the defendant if an injunction is granted*."[230] Although PHC recognizes that it is required to prove this element, it has never acknowledged the harms that its proposed injunction would cause to Nuveen.[231]

1. The Injunction Would Have Anti-Competitive Effects on Nuveen

The injunction requested by PHC is radical and unworkable, as discussed above, and would be a court-ordered anticompetitive hobble on Nuveen. A court-ordered gag on Nuveen from saying certain things will harm Nuveen's reputation

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[228] FOF ¶174-76.

[229] FOF ¶¶176-77.

[230] *N. River Ins. Co.*, 105 A.3d at 384 n.65 (emphasis added).

[231] WCA, 64.

and in terms of the candor with which Nuveen can communicate to broker-dealers and its own clients. A court-mandated disavowal of prior warnings, over and above the statements already issued in the February 22 Letters, will likewise cast doubt on future statements Nuveen may make, and create uncertainty in its recommendations. And a consent-decree-style court-supervised restructuring has long-range effects for Nuveen's corporate structure, governance, and employment policies.

PHC fails to show how any purported benefit it would receive from the requested injunctions outweigh these harms to Nuveen. Indeed, as described above, the requested injunction will not touch the two largest harms PHC has suggested: Nuveen's business with DB and the lack of desire of large broker-dealers to work with PHC.[232]

2. An Injunction May Trigger Regulatory Harms

Nuveen could suffer substantial harm from an injunction because various regulatory bodies have disclosure requirements that may be triggered by an injunction.[233] Those disclosures may be accessible not only to industry

[232] PHC's silence on this canonical requirement for an injunction raises the question whether this litigation was brought "to engage in litigation for purposes of improper leverage, pursuit of ends unrelated to the matter in litigation, or simple vexation[.]" *Horsey v. Horsey & Sons, Inc.*, 2016 WL 1274021, at *1 (Del. Ch. Mar. 21, 2016).

[233] The burdens from these potential disclosures would be completely unjustified for Nuveen LLC, Nuveen Investments, Inc., and Nuveen Securities LLC, against whom PHC has brought no evidence whatsoever, nor any theory of vicarious liability. Even assuming the balance of equities favors PHC with respect to Nuveen Asset

professionals, but also to retail clients, including Nuveen's investment clients. The ripple effect could thus have serious commercial implications, which dramatically outweigh the benefit of purportedly protecting one firm from unspecified monetary harms that have not yet, and may never, come to pass.

For all these reasons, PHC's request for a permanent injunction should be denied.

CONCLUSION

For the foregoing reasons, Nuveen respectfully requests that the Court enter judgment in its favor and deny PHC the relief it seeks.

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Dated: August 30, 2019
6354141

Words: 13,975

Management LLC—and it does not—no injunction should issue against the other Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2019, a copy of the foregoing document was served electronically upon the following counsel of record via File & Serve*Xpress*:

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