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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 August 23, 2019**

PLAINTIFF'S WRITTEN CLOSING ARGUMENT

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PRELIMINARY STATEMENT

In December 2018, three Nuveen employees, including John Miller, the head of Nuveen's municipal bond group, called every major broker-dealer with which Preston Hollow Capital ("PHC") does business and threatened to stop doing business with them if they continued to do business with PHC. At the same time, Miller and one of his deputies, Steven Hlavin, called Deutsche Bank, PHC's primary source of financing, to deliver the same threat, insisting that Deutsche Bank stop lending to PHC. Their goal was to put PHC out of business. In the words of Hlavin: "We want the lending practices of Preston Hollow to stop."

Miller and Hlavin informed Deutsche Bank that the major broker-dealers had all committed to "never, never do business with Preston Hollow again," and that it was Miller's "goal" to see to it that PHC's deals "become less financeable." They informed Deutsche Bank of Nuveen's decision to take its tender option bond financing with Deutsche Bank, then at $1.9 billion, "to zero" as punishment for having financed PHC's business, and said they were going after PHC's other sources of financing as well. Hlavin went so far as to ask Deutsche Bank what it would take for Deutsche Bank to unwind existing lending relationships with PHC because he said he had to "set the proper expectations" internally at Nuveen. Throughout this series of calls – a few of which,

unbeknownst to Nuveen, were recorded – Miller, Hlavin, and Karen Davern (another of Miller's deputies), repeatedly told PHC's counterparties that:

- Nuveen had heard directly from an underwriter that PHC lied to issuers of municipal bonds in order to get business;
- PHC was being investigated by multiple states' attorneys general;
- PHC did business in a "dirty" and "[un]ethical" manner;
- PHC's personnel were "bad people"; and
- PHC "fleeced" borrowers and engaged in "predatory" lending practices.

These statements were lies. Miller and his deputies have admitted they had no factual basis for the statements when they made them to PHC's counterparties. Instead of accepting responsibility for their conduct, however, Nuveen and its employees have steadfastly – and absurdly – denied that what is captured on the recorded conversations is what they intended. Miller and Hlavin testified at trial that their statements were "role playing" and "exaggerations." Miller and Hlavin testified under oath that their threats to withhold business unless banks and dealers boycotted PHC, and their slanderous comments about PHC, were nothing out of the ordinary for them. This testimony was flatly unbelievable; witness after witness testified that they had never experienced anything like these calls.

Miller's and Hlavin's attempt to convince this Court through their sworn testimony that the calls were simply "business as usual" was not merely absurd; it is contradicted directly by Miller himself. In a call recorded on December 20, 2018, Miller told a representative of Goldman Sachs ("Goldman") that, in order to do business with Nuveen, Goldman "can't do any of this private bullshit business with Preston Hollow." Shortly thereafter, he told the Goldman representative that "in my 25-year career I've actually never made this kind of a request of any dealer" and "I never made a phone call like this in 25 years but I have to make these calls now." The calls were plainly not business as usual, but the lies told by Miller and Hlavin, including in their sworn testimony before this Court, certainly appear to be.

Davern – who admitted at trial that it would be "wrong" for Nuveen to threaten not to do business with a dealer because that dealer did business with PHC – testified that she didn't mean what she said in calls with Morgan Stanley, and that "everyone knew" what she really meant. Those who received Nuveen's threats and slanderous statements about PHC disagreed, however; representatives of Deutsche Bank and the broker-dealers testified that they took Nuveen's threats with the utmost seriousness. That testimony is obviously, and provably, true: since the date the threats were delivered, none of the major underwriters have originated and underwritten a municipal bond offering purchased 100% by PHC.

While many dealers bowed to Nuveen's pressure, Deutsche Bank did not. In January 2019, a few weeks after receiving Nuveen's threats, Deutsche Bank personnel met with Miller. In that meeting, Deutsche Bank informed Miller that it would not accede to Nuveen's demands because Deutsche Bank's legal and compliance groups had instructed them that Nuveen's request to boycott PHC was illegal. Miller responded: "So you're letting your Legal and Compliance tell you how to run your business?" as if he was incredulous that anyone would allow compliance with the law to get in the way of doing business.

Miller's statement evinces a culture of lawlessness and unaccountability at Nuveen that is not limited to Miller; every single Nuveen employee involved in the calls about PHC testified under oath that they do not believe they did anything wrong. Nuveen's lack of respect for the law is palpable: the conduct continued even after PHC sent a letter on January 15, 2019 demanding that Nuveen put a stop to the conduct, and Miller testified at trial that he would not "rule []out" engaging in the same conduct in the future.

Institutionally, Nuveen has made it clear that it will do nothing about the conduct. William Huffman, Nuveen's Head of Equities and Fixed Income and the person responsible for supervising Miller and his deputies, testified that he does virtually nothing to supervise Miller. When confronted with the transcripts of Miller's telephone calls with PHC's counterparties, Huffman admitted that he had

never listened to the calls, and then testified, over and over, that he did not know if the conduct of Miller and his people was wrongful because he did "not have enough information" – although he never even attempted to speak directly with Miller about the conduct or, for that matter, read the Complaint in this case to find out what was alleged. When pressed, Huffman could not think of *any* facts that would make it acceptable for a Nuveen representative to seek a firm commitment from a counterparty to never do business with a competitor.[1]

Huffman is part of the culture of lawlessness at Nuveen. At trial, Huffman and Miller tried to give this Court the impression that Huffman had taken steps to address Miller's conduct in January 2019. Huffman testified at trial that he met with Miller to discuss the calls shortly after Nuveen received the January 15, 2019 cease and desist letter from counsel for PHC, and that he then instructed Miller and his team to stop talking about PHC. Miller gave similar testimony at trial. In depositions taken three weeks earlier, however, both men told a different story. Huffman testified under oath on July 9 that he had never read PHC's cease and desist letter, and, when asked if he did anything in response to the letter other than asking legal to look into it, he responded "No." He testified that the only time he remembered telling Miller not to talk about PHC was in May, *four months after*

[1] Plaintiff's Proposed Findings of Fact ("FOF") ¶¶ 216 - 231.

the cease and desist letter. Miller's deposition testimony also made it clear that Huffman did not give him any instructions after the January 15 letter was received by Nuveen.[2] In other words, Nuveen presented a charade of supervision at trial that is belied by the sworn testimony of its witnesses.

Nuveen steadfastly refuses to acknowledge the wrongfulness of the conduct of Miller and his deputies, and it lacks any semblance of a system of controls adequate to police Miller even if it was willing to admit to wrongdoing. In the lawless world of Nuveen truth is optional, slander and wanton aggression is condoned in the name of competition, and the mechanisms that ordinarily constrain the conduct of business actors do not exist. PHC seeks an order from this Court enforcing the rule of law. As Jim Thompson, PHC's Chairman and CEO, testified:

> "[W]hat we are seeing here is the accumulation of a lot of power over a long period of time and insufficient fetters, whether internal or external, on that power. They've just done whatever they want, and my experience with situations like that is it keeps going until somebody or something stops it. And we're here asking the Court to stop it."

[2] FOF ¶¶ 216 - 231.

BACKGROUND

PHC is an innovative municipal finance company whose principal business is to leverage its permanent capital base and the expertise of its diverse array of professionals to structure customized high-yield municipal bond issuances in which it typically purchases 100% of the issued bonds. 100% placements provide flexibility to both PHC and the municipal borrower because there is only one bondholder, not a group of several bondholders, with which to negotiate; this is especially important in the universe of high-yield municipal bond issuers with unique needs in which PHC does business.

PHC's business model relies heavily upon relationships with broker-dealers to identify borrowers that may benefit from PHC's unique services, and upon liquidity to finance its bond purchases. This business model has allowed PHC to grow from a start-up in 2014 to approximately $1.7 billion in municipal bond assets, in a market in which high-yield bonds have been consistently in high demand and supply was generally constrained. Obviously, PHC has been doing something right. PHC's innovative services have earned it the admiration of borrowers (like Roosevelt University) and the broker-dealers with which it did business.

PHC's success also caught the eye (and ire) of Nuveen, the dominant player in high-yield municipal finance. The supply of new high-yield bond

issuances has been inadequate to meet demand for those bonds over the last several years, and Nuveen came to consider the success of PHC – and future competitors that may try to duplicate that success – a threat to Nuveen's preferred access to that supply. Although a Nuveen employee suggested to Huffman in October 2018 that Nuveen compete directly with PHC on direct origination of bond issuances, Nuveen never gave the idea serious thought. In fact, Huffman's reaction was, "We're never going to do this" because direct origination of municipal bonds "wasn't something that was in our strategy."[3]

Nuveen chose instead to use its market power combined with a smear campaign to drive PHC out of the market. With $160 billion of municipal assets and $27 billion in high-yield municipal funds, Nuveen is 80-times larger than PHC in terms of total municipal bonds, and 13.5-times larger in just the high-yield market.[4] In other words, this is a classic case of a market "disruptor" (PHC) threatening the status of an entrenched market player (Nuveen), resulting in an effort by the entrenched player to destroy the disruptor.

Nuveen had punished broker-dealers for doing business with PHC on a case-by-case basis starting in 2017. In late 2018, alarmed by PHC's success in closing two major deals involving Howard University and Roosevelt University,

[3] Miller Tr. 80:12-81:5; Huffman Tr. 72:4-75:8.

[4] Trial Tr. 57:14-58:1 (Metzold).

Nuveen decided to "turn[] the system in a different direction." But rather than do so through legitimate competitive means, Nuveen elected to enforce the status quo by using its market power and influence to launch a coordinated, multifaceted, illegal attack on PHC. In the space of a few days in December 2018, Miller and his deputies, Hlavin and Davern, placed telephone calls to PHC's major business partners designed to cut off PHC's access to the markets.

PHC has amply proven the elements of its claims for tortious interference with prospective business relations and a *per se* violation of the Donnelly Act. With respect to tortious interference, there is no question that Nuveen's conduct was specifically intended to stop PHC from engaging in its core business, and that Nuveen employed wrongful means (including reckless attacks on PHC's conduct and reputation and unlawful restraint of trade) to accomplish that goal. With respect to the Donnelly Act, PHC has proven, through direct evidence of coordination by Nuveen and ample circumstantial evidence of a tacit conspiracy, that Nuveen orchestrated a successful boycott by nine broker-dealers of 100% placements with PHC that will deprive those broker-dealers' borrower

clients of the opportunity to choose PHC's bespoke solution over a traditional public offering.[5]

Nuveen's conduct has no legitimate procompetitive justification, and its purported intent to "protect the market" from competition by PHC "confirms rather than refutes the anticompetitive purpose and effect of its agreement."[6] It is well-settled that agreements that seek to "protect" the market from allegedly harmful competition are inherently anticompetitive. PHC also has proven that Nuveen's unlawful conduct has already caused substantial (if unquantifiable) harm to PHC's business and financial performance.

PHC asks only to be able to conduct its business and compete on a free and equal footing without unlawful interference by Nuveen. PHC is sufficiently concerned that it will be unable to do so and commenced this action, investing millions of dollars and countless hours of its senior executives' time, to obtain judicial protection. PHC has proven that, absent injunctive relief, it remains particularly exposed to further unlawful conduct. Miller is unrepentant, as are his subordinates; he is dismissive of efforts by "legal and compliance" to set guardrails

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[5] The nine broker-dealers are Goldmam, Bank of America Merrill Lynch ("BAML"), JPMorgan, Morgan Stanley, Wells Fargo, Mesirow, Stifel, KeyBanc, and RBC.

[6] *See Nat'l Soc. of Professional Engineers v. U.S.*, 435 U.S. 679, 693 (1978) (rejecting argument that restraint purportedly intended to protect consumers by limiting their choice was a procompetitive justification).

on his way of conducting business; at trial he declared he would not "rule out" continuing his campaign against PHC in the very same manner. Nuveen lacks the inclination, initiative and institutional controls necessary to protect against this behavior, which Huffman, Miller's supervisor, incredibly characterized at trial as the "ordinary course of business."

ARGUMENT

I. PHC HAS PROVEN THAT NUVEEN TORTIOUSLY INTERFEREND WITH ITS PROSPECTIVE BUSINESS RELATIONS

The elements of tortious interference with prospective business relations under Delaware law are as follows: (1) the reasonable probability of a business opportunity; (2) the intentional interference by defendant with that opportunity; (3) proximate causation; and (4) damages. *Agilent Techs., Inc. v. Kirkland*, 2009 WL 119865, at *5 (Del. Ch. Jan. 20, 2009) (Strine, J.); *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). The elements "must be considered in light of a defendant's privilege to compete or protect his business interests *in a fair and lawful manner*." *Agilent*, 2009 WL 119865, *5 (emphasis added); *Beard*, 8 A.3d at 608.

PHC has proven that Nuveen tortiously interfered with PHC's prospective business relations in two ways: (A) by pressuring Deutsche Bank, via

threats and actual punishment, to stop financing PHC in the future; and (B) by coercing broker-dealers to agree to cease altogether, or refuse to originate, 100% placement transactions with PHC.

A. Nuveen Interfered With PHC's Prospective Business Relations With Deutsche Bank

At the time that Miller and Hlavin demanded that Deutsche Bank cease doing business with PHC, they knew that Deutsche Bank financed PHC by providing "tender option bond" ("TOB") financing. TOB financing is a form of secured lending through which a borrower (PHC) deposits municipal bonds with a broker-dealer (Deutsche Bank) which in turn issues notes ("floaters") that are purchased in the market generating proceeds that are lent to the borrower. Nuveen attempted to coerce Deutsche Bank into not providing TOB financing to PHC. Nuveen's intentional and ongoing interference with PHC's relationship with Deutsche Bank constitutes tortious interference with prospective business relations and justifies equitable relief even though Deutsche Bank has not yet succumbed to Nuveen's coercion. *See Beard*, 8 A.3d at 608; *CPM Indus. v. Fayda Chemicals & Minerals, Inc.*, 1997 WL 770683, at *6 (Del. Ch. May 1, 1998).

(1) Reasonable Probability of Business Opportunity

Deutsche Bank is PHC's primary source of TOB financing and provided financing in connection with the Roosevelt University and Howard

Center transactions.[7] Nuveen does not appear to dispute that the continuation of Deutsche Bank's lending relationship with PHC constitutes a reasonably probable business relationship, satisfying this element.

(2) Intentional Interference

On the morning of December 20, 2018, Miller instructed his subordinates that if Deutsche Bank provided TOB financing to PHC for the Howard Center transaction, "we will be taking our business to zero with them as soon as practicable."[8] Thereafter, on December 20 and 21, 2018, Hlavin and then Miller called Deutsche Bank.[9] During these calls Hlavin and Miller pressured Deutsche Bank to cut off its financing for PHC and to agree not to provide financing for PHC's business in the future. Consistent with his email message to his subordinates, Miller threatened to withdraw Nuveen's TOB business with Deutsche Bank if Deutsche Bank refused to comply with Miller's demands.[10] According to Ron Van Den Handel of Deutsche Bank, "[s]top doing business with

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[7] FOF ¶ 83; Trial Tr. 430:10-13 (Weiner), 140:16-22 (Hlavin).

[8] JX301.

[9] JX263R; JX310R.

[10] JX263R at 6:22-7:13; JX310R at 23:24-24:14.

them [*i.e.*, PHC] or we won't do business with you was the way [it] was expressed."[11]

Nuveen has attempted to portray these threats as ordinary business. At trial, Nuveen elicited testimony from its witnesses that the threat to Deutsche Bank was not about PHC but was made because Nuveen perceived Deutsche Bank to be a risky counterparty with which to do business.

Nuveen's post hoc attempt at trial to decouple its removal of business from Deutsche Bank from its threats relating to PHC is belied by *what Hlavin and Miller actually said to Deutsche Bank*. In Hlavin's words:

> "But John [Miller] views Deutsche Bank as their financing and their source of liquidity and the stance is very clear: We will not be doing any business with anyone who chooses to conduct business with Preston Hollow."[12]
>
> "We want the lending practices of Preston Hollow to stop."[13]

Miller made it equally clear to Deutsche Bank that he wanted to cut PHC off from *all* sources of financing.[14] An email Miller sent to Davern on

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[11] Van Den Handel Tr. 23:15-27:2, 26:24-27:2.

[12] JX263R at 10:19-23.

[13] JX263R at 22:19-20.

[14] JX310R at 11:14-20 ("[W]ho else are they going to get financing from when Wells Fargo, Goldman, JP Morgan, BAML and Citi have . . . agreed to . . . not do

December 20, 2018 confirms this intent. In that email, Miller told Davern that if BAML (another major broker-dealer, though one with no alleged counterparty risk issues) was providing TOB financing to PHC "I won't even speak [to] BAML for 2019 for BBB and below."[15] In light of this unequivocal, contemporaneous record, it is simply not credible for Nuveen to now ask this Court to believe that its discussions with Deutsche Bank on December 20 and 21, 2018 were about "counterparty risk" and not focused on harming PHC.

Accordingly, there is no question that Nuveen intentionally interfered with PHC prospective business relations with Deutsche Bank.[16]

(3) Harm and Proximate Cause

(. . . continued)
this business anymore? I don't know where they're going to get the financing from.").

[15] JX 297.

[16] Nuveen's argument that it transferred financing away from Deutsche Bank due to the alleged poor performance of Nuveen's Deutsche Back-backed TOBs and not as punishment for lending to PHC is pure pretext. By its own admission, the purported issues with the Deutsche Bank TOBs were longstanding. Nuveen Pre-Trial Brief at 28-29. Regardless of those issues, Miller decided on December 20, 2018 to punish Deutsche Bank for financing PHC's Howard Center bonds. JX301; Van Den Handel Tr. 77:14-78:14. Moreover, Van Den Handel explained that Nuveen was never adversely impacted by widening of spreads on Deutsche Bank TOBs because when that happened, Deutsche Bank reduced its fee to offset any cost to Nuveen. Van Den Handel Tr. 114:5-115:20.

Nuveen made good on its threats by moving approximately $1 billion of its financing from Deutsche Bank to other lenders as a punishment.[17] Because Nuveen continued to move funding away from Deutsche Bank even after this case was filed and could move more at any time, Deutsche Bank is under a continuous threat from Nuveen.[18] Nuveen's interference with PHC's relationship with Deutsche Bank is therefore *ongoing*.

Nuveen's argument that PHC has not been harmed because Nuveen's efforts to cut off its financing have not been successful *yet* fails. Injunctive relief is appropriate to protect PHC from further interference. *See CPM Indus.*, 1997 WL 77068, at *6 (enjoining tortious interference with contract to prevent future breaches because "where wrongful interference is shown, this Court can grant injunctive relief as a remedy in an appropriate case"). Courts in other jurisdictions that generally follow the Restatement have authorized injunctive relief to prevent tortious interference even where no breach or tangible harm has yet occurred.[19] The Third Circuit has recognized that injunctive relief may be appropriate before

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[17] Trial Tr. 227:15-20 (Hlavin); JX301.

[18] *See, e.g.*, JX310R at 23:24-24:45; Sorensen Tr. 284:5-285:12.

[19] *See, e.g., Hosp. Assocs. of Lancaster, L.P. v. Lancaster Land Dev., L.P.*, 2008 WL 4444249, at *12 (E.D. Pa. Sept. 30, 2008); *Flanagan v. Stalnaker*, 607 S.E.2d 765, 771 (W. Va. 2004) (sustaining entry of injunction to stop further interference").

an actual pecuniary loss is sustained where the claimant has demonstrated that there is a "presently existing actual threat of injury."[20] The Restatement also supports this kind of prophylactic injunctive relief. Section 266B of Restatement (Second) of Torts addresses intentional interference with prospective contractual relations and specifically incorporates the commentary on remedies in Section 766 on intentional interference with contract. Comment u to Section 766 recognizes that equitable relief is available to prevent conduct "that would subject a defendant to liability."[21]

Moreover, this Court has the power, under fundamental principles of equity, to grant injunctive relief to prevent ongoing tortious interference and need not wait for that interference to succeed in cutting off PHC's liquidity. As Vice Chancellor Lamb stated in enjoining a transaction, the consummation of which would have constituted a breach of fiduciary duty:

> To say that this Court has the power to condemn the egregious conduct involved here (as it has preliminarily done), but yet must declare itself powerless to prevent the very harmful transaction that is the object and purpose of the conduct, affronts the very notion of equity and the

[20] *Ride the Ducks of Phila., LLC v. Duck Boat Tours, Inc.,* 138 Fed.Appx. 431, 434 (3d Cir. 2005) (citing *Cont'l Grp., Inc. v. Amoco Chems. Corp.,* 614 F.2d 351, 359 (3d Cir. 1980)).

[21] Restatement (Second) of Torts § 766 cmt. u; *see also Hosp. Assocs. of Lancaster*, 2008 WL 4444249 at *12 (citing comment u).

> fiduciary standards that have been articulated time and time again by the Courts of this State.

T. Rowe Price Recovery Fund, LP v. Rubin, 770 A.2d 536, 557 (Del. Ch. 2000).

(4) No Privilege

Nuveen's conduct against Deutsche Bank is not privileged as PHC's relationship with Deutsche Bank is not "involved in the competition between the actor and the other."[22] Nuveen and PHC do not compete for Deutsche Bank's financing services. Deutsche Bank also has made clear, both directly to Nuveen on the audio recordings and in deposition testimony, that its role as TOB provider does not give it any ability to allocate bonds to Nuveen or determine what bond issuances are shown to Nuveen.[23] Nuveen agrees.[24] Nuveen's ongoing efforts to coerce Deutsche Bank to cut off PHC's liquidity have but one goal – to harm PHC.

B. Prospective Business Relations With Broker-Dealers

Nuveen's intentional interference with PHC's relationships with the broker-dealers is also indisputable. That interference has harmed PHC in certain

[22] Restatement (Second) of Torts § 261 (formerly Section 268).

[23] Van Den Handel Tr. 33:4-34:23; JX263R at 12:19-13:25, 20:22-21:12.

[24] *See* Nuveen Pre-Trial Brief at 28 (stating that Nuveen does not assess Deutsche Bank on "its ability to supply Nuveen with potential deals").

specific, identifiable transactions and has had a material adverse impact on PHC's deal flow and resulting financial performance in 2019.[25]

(1) Reasonable Probability of Business Opportunity

To be "reasonably probable" a business opportunity must only be "something more than a mere hope or the innate optimism of the salesman" or a "mere perception of a prospective business relationship." *Agilent*, 2009 WL 119865, *7. This standard is easily met with respect to the specific transactions with which Nuveen interfered.[26]

PHC has proven that each of the broker-dealers at issue had a business relationship with PHC involving either prior engagement in 100% placements or a reasonable expectation of future 100% placement transactions that was far more than "mere hope" or ephemeral "perception."[27] To highlight some of the most obvious examples, (i) PHC previously received interest from BAML, Goldman, and JPMorgan with respect to a transaction with Howard University known as the "Howard Quad" transaction, and (ii) PHC and Goldman were in discussions with

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[25] FOF ¶¶ 256-268.

[26] *See* FOF ¶¶ 240-247.

[27] *See, e.g.,* FOF ¶¶ 146-152, 242 (BAML), ¶¶ 129-145, 243 (Goldman), ¶¶ 163-166, 247 (Morgan Stanley), ¶¶ 74-79, 246 (Wells Fargo), ¶¶ 167-169, 245 (Mesirow), ¶¶ 153-159, 244 (JPMorgan), ¶¶ 69-73 (KeyBanc), ¶¶ 170-174 (Stifel), ¶¶ 160-162 (RBC).

respect to a dozen different potential transactions at the time of Miller's threats.[28] Nuveen clearly recognized the reasonable probability of PHC's future business with each of the broker-dealers, which is why it targeted those broker-dealers.

(2) Intentional Interference

The audio recordings indisputably establish intentional interference. Although Nuveen witnesses tried to spin their conduct as unrelated to PHC and targeted instead at 100% placements *in the abstract*, or a generic desire to "see deals," once again the witnesses' own words on the contemporaneous recordings contradict this story. For example, Hlavin told Deutsche Bank that the reason for his calls was because "we want the lending practices of Preston Hollow to stop."[29] Miller made crystal clear to Goldman that his demand was specifically about PHC: "to be a partner with Nuveen, and I need you on my team, you can't do any of this private bullshit business with Preston Hollow."[30] Similarly, in her call to Morgan Stanley, Davern removed any doubt that Nuveen was focused on PHC. Davern informed Morgan Stanley that it was being punished for doing a 100% placement transaction with PHC. When a Morgan Stanley representative pointed out that many entities other than PHC engaged in 100% transactions, Davern exclaimed

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[28] FOF ¶¶ 55, 129, 140, 157, 242, 244, 256.

[29] JX263R at 22:19-20.

[30] JX267R at 6:22-7:2.

"it's *Preston Hollow* that is mostly doing this" and "I don't want change the subject,"[31] making clear that the "subject" was PHC, not 100% placements in general.

Miller acknowledged at trial that all of the deals he was concerned with were PHC deals and he never put a broker-dealer in the box for doing a 100% placement with an investor other than PHC.[32] As PHC is virtually the only market participant that engages in 100% placements as part of its core business, Nuveen's pseudo-distinction between 100% placements in the abstract and *PHC* 100% placements is one without a difference.[33] The Court can, and should, infer that when Nuveen demanded that broker-dealers not do 100% placements, it was talking about PHC.

The evidence also establishes intentional interference even for those broker-dealers (*i.e.,* Wells Fargo, BAML, KeyBanc, JPMorgan, Stifel Nicolaus) for which no audio recordings have been produced. First, Nuveen admits they

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[31] JX299R at 8:6-9:4 (emphasis added).

[32] Trial Tr. 249:2-9 ("everything that was being identified to me over the last couple years completely coincided with Preston Hollow"), 251:9-13 (Miller); *see also* Miller Tr. 105:20-108:4 (Miller's file of 100% deals that Nuveen did not get to see consisted entirely of PHC deals).

[33] *See, e.g.,* Jentis Tr. 95:17-97:16 [redacted].

contacted a group of eleven broker-dealers with the same message.[34] Second, PHC has proven that each of these broker-dealers has stopped doing 100% placements with PHC or (at minimum) agreed not to originate any future 100% placement with PHC without giving Nuveen a right of first refusal.[35] Lest there be any doubt, Davern herself testified that Nuveen obtained commitments from five broker-dealers not to do any deals with PHC without first "showing" the deal to Nuveen.[36]

At trial, Nuveen's counsel made misleading and ultimately vain attempts to misread a "trade log" to suggest that "six broker dealers that are alleged to be part of this group boycott have completed 100% placements with Preston Hollow in 2019."[37] Her assertion, belied by the evidence and emphatically rejected by Thompson, is false. Of the six broker-dealers, three broker-dealers are not alleged by PHC to be boycott participants, and the remaining transactions were originated in 2018, before Nuveen's attack.[38]

(3) Harm and Proximate Cause

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[34] JX531 at 10-11; Trial Tr. 146:13-22, 176:7-15, 183:12-19 (Hlavin), 305:13-18, 306:3-12 (Miller); Davern Tr. 321:6-16.

[35] FOF ¶¶ 74-79 (Wells Fargo), ¶¶ 146-152 (BAML), ¶¶ 69-73 (KeyBanc), ¶¶ 170-174 (Stifel).

[36] Trial Tr. 372:3-373:19 (Davern); Davern Tr. 321:6-16.

[37] Trial Tr. 650:13-19 (Thompson).

[38] See FOF ¶¶ 263-268.

"In Delaware, proximate cause is that direct cause without which the incident would not have happened." *Beard*, 8 A.3d at 609 (internal quotations omitted). Nuveen's assertion that PHC has not been harmed by its conduct ignores the unambiguous record. PHC has proven three separate categories of harm.

First, Nuveen's interference impacted several specific transactions, resulting in PHC being unable to do a 100% transaction, or (in the case of Howard Quad) being forced to work with an underwriter that is less prestigious and has less capital, adversely impacting the value and liquidity of the bonds.[39]

Second, Nuveen's threats and slanderous statements to Goldman resulted in termination of discussions between PHC and Goldman regarding twelve different specific opportunities that [redacted] of Goldman identified by name.[40] PHC also has not received an inquiry or contact from Morgan Stanley, BAML, or Mesirow with respect to a 100% placement since Miller's threats.[41]

Third, immediately following Miller's threats in late December 2018, contacts and inquiries from broker-dealers about potential deals trailed off drastically, which resulted in a massive decline in originations and the likelihood

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[39] *See, e.g.,* FOF ¶¶ 55, 129, 140, 157, 242, 244, 256 (Howard Quad), ¶ 127 (Napa Pipe).

[40] FOF ¶¶ 129, 143, 243, 258.

[41] Trial Tr. 422:19-24, 424:11-20, 424:21-425:7 (Weiner).

that PHC will achieve only half of its budgeted originations in 2019 (after exceeding budget in 2018).[42]

That it may be difficult to quantify the precise dollar value of the harm that PHC proved does not invalidate the existence of the harm. Indeed, the fact that the harm is difficult to quantify is precisely why PHC has sought injunctive relief rather than damages and why it is the appropriate remedy here.[43]

Nuveen produced at trial testimony from broker-dealer employees that they were willing to "do business" with PHC, but such testimony is irrelevant. PHC is not claiming that any broker-dealer ceased engaging in secondary market trading, or ceased accepting bids from PHC in a traditional public offering; its claim is specific to 100% placements, and it is undisputed that the boycotting broker-dealers have stopped doing 100% placements with PHC. Nuveen's argument that the boycotting broker-dealers chose to stop doing 100% placements with PHC for "independent business reasons" is particularly disingenuous because those "business reasons" materialized immediately after Miller threatened them and were based on Nuveen's slanderous statements about PHC.[44]

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[42] FOF ¶¶ 30, 258-262.

[43] *See Cantor Fitzgerald L.P. v. Cantor*, 724 A.2d 571, 586 (Del. Ch. 1998); *see also* Mar. 14, 2019 Hr'g Tr. 18:1-3 (the Court noting that "the effect on the plaintiff's business will be in some ways, it seems to me, difficult to calculate").

[44] FOF ¶¶ 67-215.

(4) No Privilege

The only potential defense available to Nuveen is that its conduct vis-à-vis the broker-dealers was "privileged" competition. To benefit from the so-called "privilege to compete," the burden is on the defendant to satisfy each of the elements of Section 768 of the Restatement (Second) of Torts:

> (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.

Beard, 8 A.3d at 611 n. 25 (*citing* Restatement (Second) of Torts § 268) (emphasis added)).

Conduct is "wrongful," and therefore falls outside the privilege to compete, when (among other things) it is otherwise tortious, constitutes an unlawful restraint of trade, or involves extreme economic pressure. *See Agilent*, 2009 WL 119865, *7-8 (tortious interference based on defamatory conduct); *Beard*, 8 A.3d at 609-12 (tortious interference found where defendant schemed to "bury" plaintiff); *CPM Indus.*, 1997 WL 770683, *9.

Nuveen's conduct was wrongful for at least three separate reasons:

Defamatory Conduct. Intentional interference with prospective business relations is "wrongful" if it includes false and defamatory statements about the plaintiff.[45]

PHC has amply proven that Miller and his subordinates acted in bad faith *and* with fraudulent intent when they made defamatory statements to Deutsche Bank and the broker-dealers. Under Delaware law, to prove fraudulent intent "a misrepresentation must be made either knowingly, intentionally, or with reckless indifference to the truth." *Metro Comm'n Corp. BVI v. Advanced Mobilecomm Tech.*, 854 A.2d 121, 143 (Del. Ch. 2004). Each of Nuveen's defamatory statements to Deutsche Bank, Goldman, Morgan Stanley, and/or RBC, as captured on the audio recordings, was either knowingly false or made with reckless indifference to the truth, as Miller and Hlavin both admitted at trial and in depositions.[46]

Nuveen tries to reargue that its defamatory statements were mere "opinions" and therefore not actionable. The Court heard this argument regarding defamatory statements alleged in the Complaint and rejected it in denying

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[45] *See Clouser v. Doherty*, 175 A.3d 86 (Del. 2017) (sustaining tortious interference claim where defendant "provided false information (that [plaintiff] engaged in sexual misconduct and had a criminal conviction) to the NASDTEC website, which prospective employers, including school district authorities, use to guide hiring decisions"); *Agilent*, 2009 WL 119865, *7-8.

[46] *See* FOF ¶¶ 177-215.

Nuveen's motion to dismiss. In particular, the Court found that Nuveen's communications "appear to meet the requirement for slander *per se* because, if true, they malign Preston Hollow's business."[47]

In any event, assertions that PHC lied to issuers, was being investigated by multiple states' attorneys general, engaged in predatory lending, and had no or insufficient covenants in its transaction documents, and that Nuveen was in possession of "evidence" to back all of this up, are all unambiguously statements of fact, not mere opinions.[48]

Nuveen's sole attempt to justify its panoply of defamatory statements on the merits is that the interest rates on the Roosevelt University and Howard Center bonds are too high, but here as with so many of Nuveen's positions its own witnesses contradict each other. Hlavin testified that a yield of 7% is presumptively "predatory."[49] Miller disagreed, as well he must, since Nuveen itself engaged in 100% placements with yields higher than 7%.[50] Aside from the hypocrisy of this argument, Nuveen myopically focuses on yield to the exclusion

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[47] 5/14/19 Hr'g Tr. 16:3-8.

[48] *See* FOF ¶¶ 177-215.

[49] Neither the Roosevelt bonds nor the Howard bonds carried a yield in excess of 7%.

[50] Trial Tr. 250:1-11 (Miller).

of all the non-price features that PHC offers (and Nuveen, by and large cannot) that may compensate a borrower for a higher interest rate. Moreover, for some borrowers, like Roosevelt University, yield is not the most important factor in a transaction.[51]

Even as to yield, however, Nuveen can present no credible evidence that the yields on the Roosevelt University or Howard Center bonds are higher than would have been available in a traditional public offering (assuming that a traditional public offering was even an option for those borrowers given their specific needs and challenges).[52] The opinions of the Nuveen witnesses are both self-serving and without any reasonable basis as they never actually reviewed the terms and conditions of the bonds to be able to evaluate the yields.[53]

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[51] *See, e.g.,* Trial Tr. 522:5-523:1 (Harris).

[52] The "benchmark" analysis performed by Nuveen's expert Dr. Edward Snyder is similarly useless as Dr. Snyder has no expertise with respect to municipal bonds to be able to select comparable bonds for the analysis; he did not consider the credit quality of the bonds or any non-price structural features (such as the taxable to tax free conversion element in the Roosevelt University transaction, the unique senior/subordinate structure of the Howard Center bonds, or the value of PHC's willingness to commit its capital and lock interest rates at the outset of the transaction) in selecting his "comparable" bonds; and (not surprisingly) the "comparable" bonds he used were not remotely comparable.

[53] Trial Tr. 258:11-259:7, 284:1-285:14 (Miller), 161:10-162:8, 190:18-191:2 (Hlavin). Both Miller and Hlavin admitted that they were involved in transactions with 7% yields similar to the Roosevelt University and Howard Center and did not

Ultimately, the evidence demonstrates that Nuveen's campaign of slander against PHC had its intended effect. The slanders allowed the broker-dealers (including Goldman, BAML, JPMorgan, and Wells Fargo) to claim they were protecting issuers or needed to engage in more rigorous "review" when they stopped doing 100% placements with PHC.[54]

Nuveen's false and unsubstantiated defamatory statements about PHC were wrongful under Delaware law by any standard, and they provide a predicate for a finding that Nuveen tortiously interfered with PHC's prospective business relations. *Agilent*, 2009 WL 119865, *7-8.

Unlawful restraint of trade. As set forth below, Nuveen's efforts to organize a horizontal boycott of PHC constitute a violation of New York's Donnelly Act (as well as the federal Sherman Act). That is wrongful under

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(. . . continued)
deem those transactions to be predatory. Trial Tr. 162:9-163:14 (Hlavin), 250:1-11 (Miller).

[54] Trial Tr. 487:6-19 (Scruggs) ("the allegations and the issues that Nuveen raised" caused Goldman to start to develop the so-called "matrix"); Jentis Tr. 70:11-72:21, 74:9-22, 76:20-79:10, 81:5-82:4, 83:22-85:4 ([redacted]); JX484 ([redacted]); JX221 (Miller email confirming that Wells Fargo was out of the box following the Roosevelt transaction because it agreed to put new deals through "a more rigorous approval and due diligence process").

Delaware law and not protected by the privilege to compete. *Beard*, 8 A.3d at 611 n. 25 (*citing* Restatement (Second) of Torts § 268) (emphasis added)).

Economic pressure. Under Delaware law, some forms of economic pressure qualify as wrongful to support a tortious interference claim. *Beard*, 8 A.3d at 609-12; *CPM Indus.*, 1997 WL 770683, *9; Restatement (Second) of Torts § 767 cmt. c.

According to the Restatement:

> The question whether this [economic] pressure is proper is answered in the light of the circumstances in which it is exerted, the object sought to be accomplished by the actor, the degree of coercion involved, the extent of the harm that it threatens, the effect upon the neutral parties drawn into the situation, the effects upon competition, and the general reasonableness and appropriateness of this pressure as a means of accomplishing the actor's objective.

Restatement (Second) of Torts § 767 note c. The economic pressure brought to bear on Deutsche Bank and the broker-dealers was (and is) wrongful by any measure.

With respect to the "degree of coercion" and the "object sought to be accomplished," if the defendant uses economic pressure to intentionally interfere with the plaintiff's business with the goal of driving the plaintiff out of business, that is improper. *See Beard*, 8 A.3d at 611-12 (finding defendants' conduct to be

improper where they "aimed to take all of [plaintiff's] business and make [plaintiff] shut its doors").

With respect to the effect on neutral third-parties, Nuveen's conduct has caused significant harm to Deutsche Bank, serving as a warning to Deutsche Bank and others, and also has interfered with the business of the broker-dealers who were put "in the box" for doing business with PHC.[55] It has particularly impacted Goldman, which has curtailed discussions on a dozen potential transactions it was discussing with PHC.

With respect to the impact on competition, Nuveen's actions clearly have an adverse effect on competition by threatening to deprive issuers of the option of choosing PHC rather than a traditional public offering and eliminating PHC as a competitive threat to Nuveen.

Application of these factors, individually and in the aggregate, compels the finding that Nuveen's deployment of economic pressure to interfere with PHC's prospective business relations is wrongful.

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[55] *See* FOF ¶¶ 67-176, 240-241.

II. PHC HAS PROVEN THAT NUVEEN VIOLATED THE DONNELLY ACT

A. The Donnelly Act Applies To Nuveen's Conduct

Several of the key broker-dealers that participated in the horizontal boycott – including, at least, BAML, Goldman, Morgan Stanley, Wells Fargo, and JPMorgan – are located in New York, and Nuveen conducts reviews of the broker-dealers in New York.[56] Accordingly, Nuveen's anticompetitive conduct has a direct impact on PHC's ability to compete for those broker-dealers' borrower clients and on competition by these broker-dealers for underwriting engagements on PHC transactions. Nuveen's anticompetitive conduct therefore has "significant local consequences" in New York, implicating the Donnelly Act.[57]

B. A Horizontal Group Boycott Of PHC Is A *Per Se* Violation Of The Donnelly Act

The Donnelly Act, Section 340 of the New York General Business Law, prohibits "[e]very contract, agreement, arrangement or combination whereby . . . Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be

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[56] Costello Tr. 9:19-25; Haskell Tr. 75:25-77:2; Jentis Tr. 16:6-20, 34:9-13, 61:17-21; Markeiwicz Tr. 95:8-10; O'Loughlin Tr. 11:13-22, 112:9-21. Nuveen also often conducted its annual review of the broker-dealers' performance in New York. Davern Tr. 338:19-339:17.

[57] *Two Queens, Inc. v. Scoza*, 296 A.D.2d 302, 303-04 (N.Y. App. Div. 2002); *see also* 5/14/19 Hr'g Tr. 13:13-24.

restrained." N.Y. Gen. Bus. L. § 340(1). "The Donnelly Act was modeled on the Federal Sherman Act of 1890 and thus . . . State antitrust law should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result." *People v. Rattenni*, 81 N.Y.2d 166, 171 (N.Y. 1993) (internal citations and quotations omitted); *see also Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 334 (N.Y. 1988) (same). New York state and federal courts generally look to federal precedent.

Under the Donnelly Act (as under the Sherman Act), certain conduct is deemed to be *per se* unlawful. *Rattenni*, 81 N.Y.2d at 166, 171-72 (*citing* case law under the Sherman Act). A *per se* antitrust conspiracy relates to those "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985). In a *per se* case, the issue of market power is irrelevant, antitrust injury is presumed, and complex economic analysis is not required. *See, e.g., Toys 'R' Us, Inc. v. FTC*, 221 F.3d 928, 934-37 (7th Cir. 2007) (analysis of market power is not relevant when a claim is *per se*); *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1221 n.7 (7th

Cir. 1993) ("Proof of actual impact on competitive conditions can result in both parties presenting extensive economic analysis of the relevant market. It is in part to avoid such excessive costs of litigation that the *per se* rule is applied in cases where the anticompetitive effect of certain practices may be presumed."). In a *per se* case under the Donnelly Act, proof of the existence of the conspiracy, standing alone, is sufficient to establish a violation. *See Rattenni*, 81 N.Y.2d 171-72 (approving grand jury instruction that the existence of *per se* antitrust conspiracy was sufficient to indict).

Horizontal group boycotts are *per se* unlawful under the antitrust laws. *See*, *e.g.*, *Nw. Wholesale Stationers, Inc.*, 472 U.S. at 289; *Klor's, Inc. v. Broadway–Hale Stores, Inc.*, 359 U.S. 207 (1959); *United States v. Gen. Motors Corp.*, 384 U.S. 127 (1966); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Associated Press v. United States*, 326 U.S. 1 (1945); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941); *Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939); *E. States Retail Lumber Dealers' Assn. v. United States*, 234 U.S. 600 (1914); *United States v. Apple, Inc.*, 791 F.3d 290, 322 (2d Cir. 2015); *Toys 'R' Us, Inc.*, 221 F.3d at 934-37; *see also Two Queens, Inc. v. Scoza*, 296 A.D.2d 302, 303-04 (N.Y. App. Div. 2002) (reversing dismissal of horizontal boycott claim under the Donnelly Act).

A "hub-and-spoke" conspiracy, where an entity at one level of the market structure, the "hub" (*i.e.,* Nuveen), coordinates an agreement among competitors at a different level, the "spokes" (*i.e.,* the broker-dealers) not to do business with a competitor of the hub (*i.e.,* PHC) is a particular form of horizontal group boycott that is considered *per se* unlawful even when organized by a "vertical" player that does not compete with the group (like Nuveen). *Klor's, Inc.*, 359 U.S. 207 (finding a *per se* violation where a retailer organized a group boycott by its distributors of a competing retailer); *Interstate Circuit*, 306 U.S. 208 at 226; *United States v. Apple, Inc.*, 791 F.3d 290, 322 (2d Cir. 2015); *Toys 'R' Us, Inc.*, 221 F.3d 928; *see also Two Queens*, 296 A.D.2d at 303-04.

Nuveen argued in its Pre-Trial Brief, based on an unpublished bar association committee article and a 34-year old federal trial court decision, that "group boycotts" under the Donnelly Act are subject to the rule of reason.[58] There is no authoritative pronouncement by the New York Court of Appeals or recent appellate authority as to the standard on horizontal group boycotts. However, the

[58] Nuveen Pre-Trial Br. at 47. The article relies on a small number of early 20th Century decisions from New York courts and older federal trial court decisions pre-dating the New York Court of Appeals decision in *Anheuser-Busch*. *See* Antitrust Comm. of N.Y. Bar Ass'n, *Experiments in the Lab: Donnelly Act Diversions from Federal Antitrust Law*, May 2010 at 13-14. Nuveen also cites *Worldhomecenter.com, Inc. v. KWC Am., Inc.*, 2011 WL 4352390, at *3 (S.D.N.Y. Sept. 15, 2011), but that was not a horizontal boycott case.

Court of Appeals has repeatedly instructed courts applying the Donnelly Act to follow federal precedent unless the statutory language or some clear state policy requires otherwise. Indeed, in *Anheuser Busch*, the Court of Appeals expressly said courts should ***not*** "find that a contrary State rule has been established by a combination of equivocal pronouncements from the lower courts."[59] Nuveen has identified nothing in the language or the Donnelly Act or New York policy that would justify deviating from the longstanding federal authority holding that horizontal boycotts are *per se* violations.

Nuveen also string cites a series of cases standing for the general proposition that Courts should not automatically conclude that challenged conduct is a horizontal boycott subject to the *per se* standard, but none of those cases calls into question the unbroken line of authority that horizontal group boycotts, correctly identified, are subject to *per se* treatment.[60] Indeed, the two most recent and influential decisions in this area have confirmed that horizontal group boycotts (structured nearly identically to the conduct at issue here) are subject to the *per se* rule.[61]

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[59] *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 335 (N.Y. 1988); *see also Rattenni*, 81 N.Y.2d at 171-72.

[60] *See* Nuveen Pre-Trial Br. at 47-49.

[61] *See Apple, Inc.*, 791 F.3d at 290, 322; *Toys 'R' Us, Inc.*, 221 F.3d at 934-37.

The Supreme Court in *Northwest Stationers* provided guidance to identify a horizontal group boycott that is subject to the *per se* rule, and the description provided by the Court lines up precisely with the present case. According to *Northwest Stationers*, horizontal boycott cases

> have generally involved joint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, and frequently the boycotting firms possessed a dominant position in the relevant market. In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive.

472 U.S. at 294 (citations omitted).

As detailed below, the evidence here shows that (i) Nuveen (ii) coerced the major broker-dealers (iii) to disadvantage PHC (a competitor of Nuveen) (iv) by depriving PHC of relationships with those broker-dealers for 100% placements (v) that enable PHC to compete. Nuveen, which owns no less than approximately 20% of all high-yield municipal bonds, has a dominant position in the market and, as demonstrated by the conduct of the broker-dealers

here, has the coercive power to compel cooperation by the broker-dealers.[62] There is no "plausible" argument that Nuveen's conduct is actually procompetitive. The evidence demonstrates that PHC is an innovator in the high-yield municipal bond market, combining its structure as a permanent capital vehicle with its diverse roster of finance and legal professionals to provide customized financing solutions to municipal borrowers. Nuveen's conduct – which prevents PHC from competing and deprives the broker-dealers' borrower clients of the option of choosing PHC's customized solutions over a traditional public offering – is inherently anticompetitive.[63]

Accordingly, if the Court concludes that PHC has proven a hub and spoke conspiracy to form a horizontal boycott, it should deem the conduct to be *per se* unlawful.

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[62] Trial Tr. 620:10-22 (Verlinda). Notably, *Toys 'R' Us* also had a 20% market share of toys sold in the United States, which was deemed sufficient to establish its coercive power be able to organize the boycott. *Toys 'R' Us, Inc.*, 221 F.3d at 930, 936.

[63] As discussed below, the law is clear that claims that a particular restraint is procompetitive because it purports to "protect" the market by reducing consumer choice fail because that is directly contrary to the policy codified in the antitrust statutes. *Professional Engineers*, 435 U.S. at 693-95 ("The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain —quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."); *Apple,* 791 F.3d at 298 ("market vigilantism" targeting a particular competitor alleged to be harmful to consumers "is wholly foreign to the antitrust laws").

C. PHC Has Proven That The Broker-Dealers Agreed To Participate In A Horizontal Boycott

1. Each Broker-Dealer Agreed To Boycott

A combination of direct and circumstantial evidence shows that at least BAML, Goldman, JPMorgan, Morgan Stanley, Wells Fargo, Mesirow, and RBC, under economic pressure from Nuveen, all agreed with Nuveen (and tacitly with each other) not to engage in 100% placements with PHC, and KeyBanc and Stifel both agreed not to originate any 100% placements for PHC.[64]

It is undisputed that Miller and his subordinates contacted the major broker-dealers and Deutsche Bank starting no later than December 20, 2018 and threatened to cut off or significantly reduce business with each broker-dealer unless it agreed to stop "doing business" with PHC – or, more specifically, to stop facilitating PHC's 100% placements that "take paper away" from Nuveen.[65] Although recordings only exist as to four third-parties, Miller and his subordinates boasted during the recorded conversations that they were engaged in parallel conversations with all the broker-dealers.[66]

Certain broker-dealers who were threatened by Nuveen – including BAML, Goldman, and Morgan Stanley – put Miller in touch with more senior

[64] FOF ¶¶ 69-176.

[65] *See* FOF ¶¶ 101-128.

[66] *See, e.g.*, FOF ¶¶ 78, 89, 103-104, 131, 150, 155, 239.

members of firm management.[67] Following those conversations, these broker-dealers (i) received no punishment from Nuveen and (ii) declined to do 100% placements with PHC and discontinued all inquiries to and contacts with PHC regarding potential deals.[68] From this sequence of events, the Court can and should infer that each broker-dealer agreed with Nuveen to not do 100% placements with PHC. In fact, Mike Jentis of BAML informed Cliff Weiner of PHC that BAML agreed not to do 100% placements because Nuveen threatened to pull its business. On December 21, 2018, Miller represented to Deutsche Bank that he had a "firm commitment" from each of these broker-dealers not to do 100% placements with PHC.[69]

The case of JPMorgan illustrates well the results achieved by Nuveen from its campaign of threatening calls. [redacted]

[67] FOF ¶¶ 135, 149, 164-166.

[68] FOF ¶¶ 129-152, 163-166; Trial Tr. 422:8-425:7 (Weiner).

[69] FOF ¶¶ 78, 89, 103-104, 131, 150, 155.

[redacted][70]

Conversely, after the calls JPMorgan abruptly stopped talking with PHC about business. Although JPMorgan was eager to do business with PHC and actively courted PHC for the Howard Quad transaction prior to Miller's conversation with O'Loughlin,[71] after that conversation JPMorgan refused to participate on the Howard Quad deal.[72] From this series of events, the Court can and should infer that JPMorgan agreed with Nuveen not to do 100% placements with PHC. Indeed, on December 21, 2018, Miller represented to Deutsche Bank that he had a "firm commitment" from JPMorgan not to do 100% placements with PHC.[73]

Mesirow is another dealer that succumbed to Nuveen's pressure. Miller represented to Deutsche Bank on December 21, 2018 that Mesirow (among others) was "onboard with our procedures on a going forward basis." PHC was working with Mesirow on six transactions in late December 2018, including one transaction that was scheduled to close before Christmas. After contact with

[70] O'Loughlin Tr. 73:20-74:11.

[71] Trial Tr. 419:10-421:15 (Weiner); JX180; JX217.

[72] Trial Tr. 421:18-422:7 (Weiner).

[73] FOF ¶¶ 89, 103, 155.

Miller, Mesirow pulled out of all six deals, including the one that was just about to close. Mesirow has not brought any potential opportunities to PHC since. Hlavin later bragged to Deutsche Bank that Nuveen was responsible for Mesirow's about-face with respect to PHC.[74]

Stifel also joined the boycott. Miller represented to Deutsche Bank on December 21, 2018 that Stifel (among others) was "onboard with our procedures on a going forward basis." Stifel informed Cliff Weiner that, due to being put in the penalty box by Nuveen for a large 100% placement with PHC, Stifel promised Nuveen that it would show potential 100% placements that it originates to Nuveen first, effectively giving Nuveen a right of first refusal.[75] Although Stifel will still underwrite deals for PHC that PHC originates by itself (which are a small portion of PHC's business), it will not originate a 100% placement for PHC. Weiner's testimony is corroborated by the head of Stifel's municipal securities group, who testified that [redacted][76]

Nuveen put Wells Fargo "in the box" shortly after the Roosevelt University transaction closed in late September 2018. This punishment ended on

[74] FOF ¶ 169.

[75] Trial Tr. 425:8-21 (Weiner); FOF ¶¶ 170-174, 240, 267.

[76] FOF ¶ 171.

or around November 21, 2018 when Wells Fargo agreed not to do 100% placements with PHC. On December 21, 2018, Miller represented to Deutsche Bank that he had a "firm commitment" from Wells Fargo not to do 100% placements with PHC.[77]

Miller represented to Deutsche Bank on December 21, 2018 that KeyBanc was "onboard with our procedures on a going forward basis." KeyBanc was put "in the box" by Nuveen via phone call from Davern in April 2018 because it participated in a 100% placement with PHC. KeyBanc understood that it would remain "in the box" until it made a commitment to Nuveen that it would show every deal to Nuveen and not participate in 100% placements, and it only came out of the box after it made that commitment.[78]

There is thus a consistent pattern of broker-dealers receiving threats or punishment from Nuveen and, as a result, changing their relationships with PHC. At trial, Nuveen attempted to defuse this pattern through snippets of deposition testimony in which broker-dealer employees denied that they agreed to boycott

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[77] FOF ¶¶ 78, 89, 103. Interestingly, Miller characterized Wells Fargo's commitment, internally, as an agreement to put new deals through "a more rigorous approval and due diligence process." JX221. The use of a new "internal review" process as euphemism for agreeing not to do 100% placements with PHC is repeated with Goldman and JPMorgan.

[78] FOF ¶¶ 69-73, 175-176.

PHC and/or said that they were still "doing business" with PHC.[79] For the most part, PHC takes no issue with this generic testimony because such testimony is not relevant to PHC's specific claim that the broker-dealers agreed to stop engaging in 100% placement transactions with PHC. "Doing business" – on secondary trading, for example – is one thing; engaging in 100% placements is something else entirely, and it is the latter that is PHC's lifeblood.

It is true that certain broker-dealer employees denied that they "agreed" not to do 100% placements with PHC. It is not surprising, however, that senior employees of sophisticated financial firms would deny entering into an unlawful antitrust conspiracy, and the Court may choose to give those denials little weight.[80] The broker-dealers' actions speak louder than their words. For example, where a broker-dealer (like Goldman, JPMorgan, and Wells Fargo) avoids punishment by adopting rigorous "internal review" procedures or a "matrix" that

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[79] Trial Tr. 583:16-610:22.

[80] *See In the Matter of Benco Dental Supply Co., a corporation, Henry Schein, Inc., a corporation, and Patterson Companies, Inc. a corporation.*, Post-Trial Brief, 2019 WL 2869183, at *10 ("because antitrust law does not require the existence of an express agreement, witness denials of an agreement are given little weight when contemporaneous documents and other evidence show an agreement") (internal quotes omitted); *see also United States v. U.S. Gypsum Co.*, 333 U.S. 364, 396 (1948); *Advert. Specialty Nat'l Ass'n v. FTC*, 238 F.2d 108, 116-17 (1st Cir. 1956) (stating that "[i]t is to be expected that [Respondents'] witnesses would deny that there was an agreement" and nevertheless finding the existence of an agreement based on other evidence).

somehow never permit the broker-dealer to agree to do a 100% placement with PHC, the Court need not accept a broker-dealer witness's characterization of the arrangement as not an "agreement."[81] This is particularly true when the change in internal procedures is accompanied by conduct evincing an agreement – here, a total cessation of contacts and inquiries regarding potential new opportunities.[82]

In any event, there is conclusive proof of the very agreement that Nuveen tries so hard to deny. Both in her deposition and at trial Davern admitted unequivocally that, as a result of the calls made in December concerning PHC, Miller had secured agreements from five broker-dealers not to enter into any transaction (with PHC) without first "showing" every transaction to Nuveen.[83] This agreement makes it impossible for PHC to do 100% placements except where Nuveen decides that it is not interested in the deal. Davern's admission is binding on Nuveen, and is corroborated by the broker-dealers' abrupt change in conduct towards PHC immediately after the calls with Miller.[84]

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[81] *See, supra,* note 54.

[82] FOF ¶¶ 69-176.

[83] Trial Tr. 372:6-373:19 (Davern); Davern Tr. 321:6-16.

[84] Trial Tr. 372:9-373:7 (Davern), 422:8-425:7 (Weiner).

Ironically, Nuveen's expert Dr. Snyder preached the importance of looking at "outcomes" rather than witness testimony.[85] The "outcomes" here are compelling and point clearly toward the conclusion that the nine broker-dealers agreed to the boycott. Each of the broker-dealers was either in discussions with PHC on 100% placements, or had recently participated in 100% placements with PHC, and/or were actively pitching PHC to do 100% placements prior to Miller's threats, and each of them suddenly reversed course.[86] Nuveen ignores these "outcomes" in favor of witness denials when those witnesses have every incentive to portray their firms' conduct in the most innocent light.[87]

2. The Boycott Was A Horizontal Restraint

The framework for analyzing whether there is a "hub and spoke" conspiracy involving a horizontal restraint or just a series of separate, parallel "vertical" agreements (which would be subject to the rule of reason) is discussed at length in the *Apple* and *Toys 'R' Us* cases.

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[85] *See* Trial Tr. 569:18-571:9 (Snyder).

[86] FOF ¶¶ 69-176, 242-247.

[87] Nuveen's reliance on the "Trade Log" produced by PHC for the (inaccurate) assertion that "six broker-dealers that are alleged to be part of this group boycott have completed 100 percent placements with Preston Hollow in 2019" is misplaced, apparently intentionally. *See* Trial Tr. 648:11-650:23 (Thompson); JX740. As Nuveen knows or should know, each of the transactions that it claims were done in 2019 originated prior to 2019 and appear on the list only because some part of the transactions closed in 2019. *See* FOF ¶¶ 263-268.

Generally speaking, "[p]arallel action is not, by itself, sufficient to prove the existence of a conspiracy" and, while there must be an "agreement" to restrain trade, that agreement can be "tacit or express." *Apple*, 791 F.3d at 314. The Court must "determin[e] whether the evidence reasonably tends to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* To do that, courts look for "'plus' factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy." *Id.*

Dr. Jeremy Verlinda, PHC's expert on antitrust economics as applied to the municipal bond market, identified six economic factors present here that, based on his study of group boycotts, are suggestive of the existence of a horizontal boycott, many of which are recognized by the courts as "plus factors."[88]

(i) Nuveen's role in explaining to potential boycott participants that other Tier 1 broker-dealers have already agreed to participate. The existence of a "hub" that coordinates the horizontal parties, shares information among them, and provides assurance to each horizontal party that the others are also participating in the agreement is an important indication of a horizontal agreement. *See Apple*, 791 F.3d at 318-19. This interdependence among the ostensibly separate vertical

[88] Trial Tr. 618:20-623:1 (Verlinda).

agreements, in conjunction with some other plus factor, is sufficient to find a horizontal conspiracy *even in the absence of direct contacts between the horizontal parties*.

It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan.[89]

This element of interdependence is present here. The audio recordings show that Nuveen informed the broker-dealers that "concerted action was contemplated" and that "others were asked to participate" (or, rather, that others were being coerced to participate by threat that Nuveen would withhold business). Miller did *even more* than inform individual firms about agreements with others; he made clear that all participants would be acting together as "partners" on his "team."[90]

The recordings also show it was important for the broker-dealers to be assured that other broker-dealers were also participating, that the arrangement would be "uniform across the street," and that Nuveen made clear it would enforce

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[89] *Interstate Circuit,* 306 U.S. at 226; *see also Toys*, 221 F.3d at 935-36; *In re Nexium (Esomeprazole) Antitrust Litigation*, 42 F.Supp.3d 231, 252-53 (S.D.N.Y. 2014).

[90] JX310R at 4:1-9:2; JX267R at 6:22-7:2; JX277R at 2:19-3:21.

compliance by putting non-compliant broker-dealers "in the box."[91] Indeed, Deutsche Bank was told by Hlavin that if it did not join the boycott it would be easy for Nuveen to cut off ties since Deutsche Bank would be only one of two non-participants in the boycott.[92] "And so the fact that so many have done it, it just makes it easier for us to -- to not do business with counterparties who can't make that certification right now."[93] This degree of coordination and assurance by Nuveen that the boycott would be "uniform across the street" is the hallmark of a horizontal agreement.[94]

(ii) The broker-dealers have sufficient economic incentives to join a boycott. As detailed above, the broker-dealers were willing (and often eager) to work with PHC and had no incentive to boycott PHC but for Nuveen's threats.[95]

[redacted]

[91] JX299R at 4:13-22, 10:20-11:11.

[92] JX 390 at 9:22-10:2; Trial Tr. 183:3-184:15, 297:12-299:11 (Hlavin), 305:13-18 (Miller).

[93] JX390R at 10:15-18.

[94] *Toys*, 221 F.3d at 935-36.

[95] *See, e.g.,* (i) Goldman: Trial Tr. 94:22-95:10 (Albarran), 422:12-18 (Weiner), 470:12-23 (Weiner); Scruggs Tr. 55:25-58:21; (ii) JPMorgan: JX180; JX217; Trial Tr. 421:1-17 (Weiner); (iii) BAML: JX224 (Howard Center); (iv) Wells Fargo: Trial Tr. 496:1-20 (Harris); (v) Morgan Stanley: JX189; (vi) Stifel: Trial Tr. 425:8-21 (Weiner); (vii) KeyBanc: Trial Tr. 425:8-21 (Weiner); (viii) RBC: JX396R at 2:1-24.

[redacted][96] This is considered a plus factor.[97]

(iii) Nuveen has "coercive power". "Coercive power" means the ability by a market participant to coerce or threaten other participants into forming a boycott.[98] It is something less than market power, which refers to a firm's ability to impact the market unilaterally.[99] Here, the audio recordings – specifically, the reactions from the recipients of Nuveen's threats – and other evidence of the existence of the boycott confirm Nuveen's coercive power.[100]

(iv) The broker-dealers' sudden change in behavior with respect to PHC. As discussed above, each of the broker-dealers either was in discussions with PHC on 100% placements, or had recently participated in 100% placements

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[96] *See, e.g.,* Leahy Tr. 48:21-49:6; Costello Tr. 23:15-24:2; Haskell Tr. 62:16-63:11; Hummel Tr. 16:20-17:25; Jentis Tr. 36:11-22; O'Loughlin Tr. 25:3-24; Markeiwicz Tr. 20:12-20, 32:18-21; Maple Tr. 13:11-17.

[97] *See Apple*, 791 F.3d at 315.

[98] Trial Tr. 620:23-621:11 (Verlinda).

[99] *See Toys*, 221 F.3d at 936.

[100] *See* FOF ¶¶ 80-128, 229, 238-239, 248-251.

with PHC, or was actively pitching PHC to do 100% placements prior to Miller's threats, and each of them suddenly reversed course.[101]

(v) The existence of a system of rewards and punishments – the threat of the "box" – to enforce the boycott. Nuveen made it clear in the recorded conversations that it intended to punish any counterparty that did not comply with Nuveen's demand that they stop doing business with PHC. Deutsche Bank, Goldman and Morgan Stanley were told specifically that they could not do business with both PHC and Nuveen.[102] And, when Deutsche Bank refused to comply with Nuveen's demands, Nuveen removed $1 billion in TOB business from Deutsche Bank.[103] The record amply supports the existence of a system of rewards and punishment to enforce the boycott.

(vi) The existence of a structure for reporting and policing "cheating" by boycott participants. This factor shows that the boycott participants recognize that they are acting in concert with the other participants. There is clear evidence of "policing" here. For example, in December 2018, when threatened with being put in the box by Nuveen because it had served as underwriter for a transaction

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[101] FOF ¶¶ 69-176, 242-247; *see Apple*, 791 F.3d at 315 (identifying simultaneous changes in conduct as a plus factor).

[102] Trial Tr. 148:18-23, 149:7-9 (Hlavin); JX263R at 12:2-18, 22:19-24:2; JX 267 6:22-7:2, 22:9-18; JX299R at 8:6-11; JX277R at 2:19-3:12.

[103] Trial Tr. 227:15-20 (Hlavin).

with Howard University that closed in November 2018 (the "Howard Center" transaction), BAML reported to Nuveen that Morgan Stanley was working on a 100% placement with PHC.[104]

Similarly, in February 2019, [redacted] of RBC told Davern and Miller [redacted].[105] Shortly thereafter, Hummel informed Nuveen about a deal RBC's bankers were trying to close with PHC.[106] These examples of broker-dealer policing of the group boycott further demonstrate the reinforcing nature of the punishment strategy, where the potential to recapture rival broker-dealer business with Nuveen when a noncompliant member is placed in the "box" creates strong incentives both to identify cheaters and to remain compliant themselves.

D. Nuveen's Conduct Harms Competition

The Court need not evaluate harm to competition if it finds a *per se* violation of the Donnelly Act.[107] Nevertheless, the evidence here demonstrates that the boycott organized by Nuveen harms competition by depriving the borrower

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[104] JX299R at 4:13-5:24.

[105] JX450; JX452.

[106] JX735.

[107] *See, e.g., Nw. Wholesale Stationers,* 472 U.S. at 289.

clients of the boycotting broker-dealers of the option of choosing PHC's innovative, customized solution rather than a traditional public offering and by preventing competition among those broker-dealers to provide underwriting services for PHC's 100% placements.[108]

PHC is an innovator in the municipal finance space. With its permanent capital base and deep bench of municipal finance bankers, lawyers, credit analysts and financial engineers who review, analyze, and structure municipal transactions, PHC is able to provide a wide array of custom features to tailor investments to the specific needs of particular borrowers, typically through 100% placements. The record demonstrates that there are very few, if any, other participants in the high-yield municipal market that have PHC's ability and resources and provide the complete package of customized financing solutions that PHC provides.[109]

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[108] *See generally* FOF ¶¶ 32-55, 255.

[109] Trial Tr. 17:11-19, 24:6-19 (Thompson), 56:2-18 (Metzold), 83:5-21 (Albarran); Haskell Tr. 29:13-20; JX189 at 8 ("[redacted]"); Scruggs Tr. 64:10-65:19; JX935 at 2 ("[redacted]").

PHC's unique business model and value to borrowers is recognized by borrowers, including both Howard University (which is a "repeat customer" of PHC) and Roosevelt University.[110] The testimony of Andrew Harris, Roosevelt's CFO, illustrates well PHC's unique value to borrowers:

> I think it's important for the Court to hear that there's a very satisfied customer in Roosevelt University. This was a problem we were trying to solve that needed speed, flexibility, nimbleness, customization, and a willingness to get to know the peculiarities and specifics of our situation at Roosevelt. And Preston Hollow in every way was true to form, performed as advertised, did what they said they would do when they said they would do it. And we got what we wanted and needed out of this deal. So I think that's worth talking about openly and we're proud of it.[111]

Broker-dealers have also come to recognize the benefits that PHC offers borrowers. According to the Head of Municipal Securities at Morgan Stanley:

[redacted][112]

[110] Trial Tr. 83:12-21, 93:15-94:9 (Albarran), 500:23-501:12 (Harris).

[111] *Id.* at 500:23-501:12 (Harris).

[112] Haskell Tr. 29:13-20.

Morgan Stanley has prepared pitch materials to potential borrowers lauding PHC's innovation and bespoke capabilities:

[redacted][113]

Similarly, Goldman had also come to recognize the valuable service PHC provides borrowers. Prior to December 2018, Goldman was discussing approximately a dozen projects with PHC.[114] In internal comments in response to Nuveen's threats, the Goldman co-head of municipal finance stated, "[redacted]"[115] This observation is unsurprising since, as noted earlier, Nuveen has definitively ruled out serving as a direct originator of municipal bonds as being inconsistent with its overall strategy.[116]

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[113] JX189 at 8.

[114] Trial Tr. 94:22-95:10 (Albarran), 422:12-18, 470:12-23 (Weiner); Scruggs Tr. 55:25-58:21.

[115] JX935 at 2.

[116] Huffman Tr. 72:4-75:8.

Dr. Verlinda explained that economic evidence, particularly PHC's extraordinary growth from 2014 to 2018 and his review of certain PHC transactions, corroborates the testimony of PHC witnesses and Thomas Metzold (former head of the municipal bond group at Eaton Vance) that PHC offers unique services.[117] In particular, PHC has seen significant growth since its inception in 2014, from $110 million par value of transactions to approximately $1.7 billion by the end of 2018 despite shortages in the supply of high-yield bonds over that period.[118] The market for high-yield municipal bonds was down by approximately 25% from 2017 through 2018, but PHC's origination volume increased by 35% during that time, providing further economic evidence of PHC's unique value.[119] Despite a seller's market since 2014, PHC has been able to use its unique solution to achieve year-over-year growth.[120]

Dr. Verlinda emphasized the particular competitive harm that arises when entrenched market participants are able to stymie the ability of an innovative market disruptor, like PHC, to compete.[121] The boycott here, if proven, would

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[117] Trial Tr. 624:4-627:18 (Verlinda)

[118] Trial Tr. 17:11-19:9 (Thompson).

[119] Trial Tr. 126:12-21 (Albarran).

[120] Trial Tr. 129:20-131:4 (Albarran).

[121] Trial Tr. 630:21-631:18 (Verlinda).

harm competition in two ways: (1) by reducing borrower choice at the origination stage by preventing broker-dealers from presenting the borrower with the option of PHC's unique solution rather than a traditional public offering, and (2) by reducing competition among broker-dealers to provide underwriting services to PHC.[122]

Dr. Snyder failed to give sufficient consideration to whether PHC offers unique or innovative services to borrowers in assessing harm to competition and the role of broker-dealers at the origination stage (as opposed to the underwriting stage). If the Court concludes that PHC does offer unique or innovative services, then "everything else [Dr. Snyder] says would then fall apart."[123]

E. Nuveen's Conduct Constitutes An Unreasonable Restraint Of Trade Under A "Quick Look" Analysis

Even if the Court does not find a horizontal boycott, the Court should still conclude that Nuveen's series of vertical agreements with broker-dealers violated the Donnelly Act under a "quick look" analysis. Alleged restraints that are not deemed unlawful *per se* are subject to the "rule of reason" and deemed unlawful only if they unreasonably restrain trade. A "quick look" is "an

[122] Trial Tr. 627:21-629:14 (Verlinda).

[123] Trial Tr. 616:5-618:10 (Verlinda).

abbreviated version of the rule of reason"[124] where "no elaborate industry analysis is required."[125] It applies when "an observer with even a rudimentary understanding of economics can conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[126] "Quick look" can be so brief that "the rule of reason can . . . be applied in the twinkling of an eye."[127]

If the defendant can show a procompetitive justification for its conduct, "the court must weigh the overall reasonableness using a full-scale rule of reason analysis."[128] But if the defendant *cannot* show a procompetitive justification, "the presumption of adverse competitive impact prevails and 'the court condemns the practice without ado.'"[129]

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[124] *Apple*, 791 F.3d at 330; *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1139 (9th Cir. 2011).

[125] *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999) (quoting *Professional Engineers*, 435 U.S. at 692.

[126] *Cal. Dental Ass'n*, 526 U.S. at 770.

[127] *Nat'l Collegiate Athletic Ass'n v. B. of Regents*, 468 U.S. 85, 109 n.39 (1984).

[128] *Ross v. Am. Express Co.*, 35 F. Supp. 3d 407, 455 (S.D.N.Y. 2014) (citation omitted).

[129] *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993) (quoting *Chi. Prof'l Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir. 1992)).

Application of a "quick look" analysis is appropriate here, and the Court can "condemn" Nuveen's conduct "without ado." Nuveen cannot establish any procompetitive justification for its conduct for at least three reasons.

First, Dr. Snyder did not analyze or identify any procompetitive justification for Nuveen's conduct as of his July 16 deposition.[130] Dr. Snyder suggested at trial that stopping allegedly "predatory" lending by PHC could be a procompetitive justification, but on cross-examination he declined to offer an affirmative opinion that it was procompetitive for Nuveen to organize a boycott to prevent predatory lending.[131]

Second, there is no credible evidence that PHC's conduct towards Howard University or Roosevelt University was predatory. To the contrary, Howard University has chosen to be a repeat customer of PHC, and Andrew Harris of Roosevelt University testified at trial that Roosevelt knowingly paid a yield premium as the result of negotiations in which Roosevelt obtained considerations that were more important than the interest rate.[132] As discussed above (s*upra*, at 28-29), Nuveen's sole focus on the yield of the bonds is overly narrow, and, in any

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[130] Trial Tr. 561:6-23 (Snyder).

[131] Trial Tr. 562:10-563:3 (Snyder).

[132] FOF ¶¶ 37-43, 186.

event, Nuveen has not offered any credible basis for concluding the yields on the Howard Center and Roosevelt University bonds were too high.

Third, and perhaps most importantly, the law is clear that a restraint of trade that purports to "protect" consumers from purportedly harmful competitors (and themselves) by reducing consumer choice is inherently *anticompetitive* as a matter of law and not procompetitive.[133] A market player like Nuveen is not permitted to assume the role of "cop on the beat" – what the *Apple* court referred to as "marketplace vigilantism" – to fight back against a particular market competitor by restricting competition.[134] Thus, the Court in *Apple* rejected as "wholly foreign to the antitrust laws" Apple's argument that the horizontal agreement it organized among publishers to fix prices was procompetitive because it was necessary to resist Amazon's monopolistic tendencies.[135]

Similarly, in *Professional Engineers*, the defendant sought to defend price restraints it organized under the rule of reason as procompetitive and in the public interest "because bidding on engineering services is inherently imprecise, would lead to deceptively low bids, and would thereby tempt individual engineers

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[133] *See Professional Engineers*, 435 U.S. at 693-95; *Apple,* 791 F.3d at 298.

[134] *Apple,* 791 F.3d at 298.

[135] *Id.*

to do inferior work with consequent risk to public safety and health."[136] The Court said that argument "confirms rather than refutes the anticompetitive purpose and effect of its agreement."[137] The Court observed, in words that are particularly apt here given Nuveen's overly narrow focus on yield:

> The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain —quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.[138]

The particular evil inherent in Nuveen's conduct here – and the reason it violates the Donnelly Act under either a *per se* or rule of reason analysis – is that it deprives borrowers of "the free opportunity to select among alternative offers." Depending on their particular needs and circumstances, some borrowers may prefer a traditional public offering. However, some borrowers may prefer – and some (like Roosevelt University) may actually *need* – to choose PHC's innovative, bespoke option, even if that means paying a slightly higher interest rate. The Donnelly Act, like the Sherman Act, presumes that consumers (which, here, are the borrowers), and not a self-interested market participant like Nuveen, are best

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[136] *Professional Engineers*, 435 U.S. at 693.

[137] *Id.*

[138] *Id.* at 695.

positioned to determine what is in their own best interests and therefore prohibits conduct that inhibits competition between providers of "alternative offers" like PHC and Nuveen.[139]

III. THE COURT SHOULD GRANT INJUNCTIVE RELIEF

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 bond market, (ii) directing Nuveen to take steps to rectify the harm already caused by Nuveen's unlawful conduct by disavowing the tortious and unlawful communications previously made, and to take all other actions necessary to restore PHC'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.

"[I]injunctive relief is a common and non-controversial remedy for tortious interference with prospective economic advantage." *Organovo Holdings, Inc. v. Dimitrov*, 162 A.3d 102, 122 (Del. Ch. 2017); *see also* Restatement (Second) of Torts § 266 cmt. u. ("In appropriate circumstances under the general

[139] In a highly regulated market like the municipal securities market, the sort of paternalistic reduction of borrower choice that Nuveen purports to be advancing should be determined (if at all) by the appropriate regulatory bodies and not a self-interested market participant.

rules relating to equitable relief . . . one may be enjoined from conduct that would subject him to liability under the rule stated in this section."); *id.* § 766B (incorporating comment u from § 266). Injunctive relief is also available for violations of the Donnelly Act. *See Peekskill Theater v. Advance Theatrical Co. of N.Y.*, 206 A.D. 138, 142 (N.Y. App. Div. 1923).

The Court may grant injunctive relief where plaintiff establishes: (1) actual success on the merits, (2) irreparable harm, and (3) that the balance of the equities weighs in favor of issuing the injunction. *Weichert Co. of Pa. v. Young*, 2007 WL 4372823, at *2 (Del. Ch. Dec. 7, 2007). PHC established the merits of its claims at trial. In terms of irreparable harm, where the defendant's conduct has caused and, if not stopped, will continue to cause harm to the plaintiff's business that is difficult to quantify, injunctive relief is the appropriate remedy. *See, e.g., Agilent*, 2009 WL 119865, at *10; *Tristate Courier & Carriage, Inc. v. Berryman*, 2004 WL 835886, at *12 (Del. Ch. Apr. 15, 2004), *judgment entered sub nom.* (Del. Ch. 2004). The evidence shows that is the case here. Miller refuses to acknowledge the wrongfulness of his conduct and refuses to "rule [] out" engaging in similar conduct in the future. Huffman has refused to do anything about the conduct – indeed, he refused to take the steps necessary to understand the allegations in this case, apparently preferring to remain ignorant about Miller's

conduct – and then he came before this Court and misleadingly claimed to have taken action when he had not.

Finally, the balance of the equities weighs heavily in favor of PHC. Nuveen's unprovoked and unlawful attack on PHC's business should not be permitted to continue. As Nuveen is unrepentant and lacks any institutional controls to prevent future misconduct, an injunction is the only thing likely to stop it.

CONCLUSION

The evidence of Nuveen's tortious interference with PHC's prospective business relations and anticompetitive conduct in violation of the Donnelly Act is compelling. PHC respectfully requests that the Court grant injunctive relief to undo some of the harm caused by Nuveen's unlawful conduct and protect PHC from future harm.

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