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 November 25, 2019**

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO REOPEN AND SUPPLEMENT THE TRIAL RECORD

PRELIMINARY STATEMENT

Nuveen's motion highlights the need for injunctive relief in this case. It takes evidence that – viewed fairly – shows PHC's bespoke solutions help issuers with unique problems, and attempts to use that evidence to support its continued baseless assertions that PHC harms borrowers. The motion reeks of desperation and should be denied.

Coming 57 days after the post-trial argument, the motion seeks to supplement the record with "evidence" consisting of a news report that PHC has sold "a portion" of its Roosevelt bonds and a new expert affidavit that purports to give significance to the news report. Although the Court has discretion to reopen the trial record, admission of post-trial evidence is disfavored. It is particularly

disfavored where (as here) consideration of the new evidence would require additional fact and expert witness testimony for context, and would not change the outcome of the trial. To the extent the Court does not deem evidence of PHC's sale of a small portion of its Roosevelt bonds to be immaterial or cumulative (as it should), it would need to conduct a "mini-trial" to evaluate its significance, wasting judicial and party resources on an issue that adds nothing of substance to the existing record.

One does not need to be a finance expert to recognize that the core theory of Nuveen's submission – that the trading price of a security is meaningful evidence of the fairness of the value of the security when it was originally issued 14 months earlier – is nonsense. One of the many flaws in Dr. Snyder's opinions at trial is that he never attempted to evaluate the credit quality or non-price structural features of the Roosevelt bonds, without which it would be impossible to express any opinion on the fairness of the terms of the deal. Snyder persists in the same error in his new affidavit. The financial turnaround at Roosevelt University, quarterbacked by its CFO Andrew Harris, has been extremely successful. In October 2019, Roosevelt (1) projected a balanced budget after years of operating deficits and (2) expanded enrollment by nearly 50% by acquiring certain assets of

Robert Morris University.[1] Given Roosevelt's greater financial stability and creditworthiness, it is no surprise that the Roosevelt bonds now trade at higher values. In fact, the current value of the Roosevelt bonds highlights a PHC success story. PHC's financing allowed Roosevelt to restructure its finances, leading to significant improvement of the Roosevelt credit during that time.

Even if the recent sale price were evidence that the *original* yield on the Roosevelt bonds was too high (and it is not), the evidence would be at best cumulative. At trial, Mr. Harris [redacted].[2] That was particularly true because none of the other financial firms they met with indicated that they could support Roosevelt's objectives in the necessary time frame and at an acceptable price.[3]

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[1] *See, e.g.*, Rick Seltzer, *Chicago Universities Plan Acquisition*, INSIDE HIGHER ED, (Oct. 2, 2019), https://www.insidehighered.com/news/2019/10/02/roosevelt-plans-acquire-chicago-neighbor-robert-morris.

[2] [redacted].

[3] [redacted].

Nuveen's motion is also replete with inaccuracies. Among other things, PHC made a net sale of approximately $18 million in Roosevelt bonds (not $42 million as Nuveen asserts) and remains the controlling bondholder with more than $100 million in bonds. Nuveen mischaracterizes Mr. Harris' testimony, asserting that Mr. Harris valued having a "single bondholder" when he actually said "a single bondholder representative" (and PHC remains the sole bondholder representative today).[4] Nuveen also argues that the new evidence shows that statements made by John Miller, its head of municipal bonds, are not defamatory, but the statements identified by Nuveen were not alleged by PHC to be defamatory.[5]

Ultimately, Nuveen's *continued* baseless efforts to paint PHC as predatory demonstrate why injunctive relief is necessary here. The current motion is consistent with the steadfast insistence of Miller and his colleagues at trial that

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[4] *Compare* Nuveen Mot. at 6 *with* Trial Tr. at 496:21-499:6 (Harris).

[5] *See* Nuveen Mot. at 2-3. Of the statements identified by Nuveen, the only one that PHC has asserted was defamatory is the statement that PHC "fleeced" Roosevelt. That is demonstrably false and no one at Nuveen had any reasonable basis for making it. FOF ¶ 186. The fact that the value of the Roosevelt bonds has increased in the last 14 months as a result of improvements in the University's financial condition provides no corroboration and cannot retroactively justify the statement in any event. PHC has not focused on the charge that it is a "flipper" rather than a long term investor, but the sale of $18 million in bonds (while retaining *more than $100 million*) is not "flipping." PHC was, and remains, a long term investor in the Roosevelt bonds.

they did nothing wrong, which is belied by the actual recordings of their conduct, and the motion echoes Miller's refusal to "rule out" engaging in the same conduct in the future. The record is clear: Miller will not stop his attacks on PHC unless the Court orders him to.

ARGUMENT

I. STANDARD TO REOPEN THE TRIAL RECORD

It is within the Court's discretion to "determine whether reopening the trial record to consider allegedly newly discovered evidence would serve the interest of fairness and substantial justice."[6] However, "the admission of late-submitted evidence is not favored."[7] "Ultimately, a motion to supplement the record turns on the interests of fairness and justice."[8]

To prevail on a motion to reopen the record, the movant has the burden to show the following: (1) newly discovered evidence has come to its knowledge since the trial; (2) it could not, in the exercise of reasonable diligence, have been discovered for use at the trial; (3) *it is so material and relevant that it probably will change the result if a new trial is granted*; (4) it is not merely

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[6] *Vianix Del. LLC v. Nuance Commc'ns, Inc.*, 2011 WL 487588, at *3 (Del. Ch. Feb. 9, 2011).

[7] *Akorn, Inc. v. Fresenius Kabi Ag*, 2018 Del. Ch. LEXIS 1311, at *3 (Del. Ch. Oct. 17, 2018).

[8] *Sutherland v. Sutherland*, 2008 WL 571253, at *2 (Del. Ch. Feb. 14, 2008).

cumulative; (5) whether the moving party has made a timely motion; (6) whether undue prejudice will inure to the nonmoving party; and (7) considerations of judicial economy.[9] Nuveen has failed to make a showing as to at least factors (3), (4), (6) and (7).

II. THE NEW "EVIDENCE" IS IMMATERIAL AND CUMULATIVE

The new "evidence" must be so material that it is likely to change the outcome of the case.[10] That standard cannot be met here. At trial PHC proved that Nuveen had made numerous defamatory statements (and engaged in other wrongful, anticompetitive conduct for which Nuveen does not contend the new evidence is relevant), including that PHC "lied" to borrowers; PHC engaged in "predatory lending" and "predatory sales practices;" PHC deals were "rushed" and "covenant light;" PHC was the subject of investigation by multiple state attorneys general; and Nuveen had evidence to back up each of these assertions - not to mention Nuveen's coercive threats directed at PHC's lenders and the municipal

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[9] *In re Mobilactive Media, LLC*, 2013 WL 1900997, at *1 (Del. Ch. May 8, 2013) (emphasis added); *Akorn*, 2018 Del. Ch. LEXIS 1311, at *3-*4; *Vianix*, 2011 WL 487588, at *3-*4; *Whittington v. Dragon Grp., LLC,* 2012 WL 3089861, at *3 (Del. Ch. July 20, 2012); *see also Concord Steel, Inc. v. Wilmington Steel Processing Co.,* 2010 WL 3931097, at *4, *8 (Del. Ch. Oct. 7, 2010); *Haldeman v. Worrell*, 2016 WL 4184011, at *1 (Del. Ch. Aug. 8, 2016).

[10] *Whittington*, 2012 WL 3089861, at *3.

dealer community in general.[11] Therefore, even if the new evidence supported John Miller's statement that PHC "fleeced" Roosevelt (which it does not), the full trial record amply supports a finding that Nuveen tortiously interfered with PHC's business via multiple other defamatory statements.

Even as to the narrow question of whether the interest rate and yield on the Roosevelt bonds were fair at the time the deal was negotiated and closed in September 2018, PHC's sale of $18 million in bonds is immaterial. It is beyond dispute that the trading price (and implied yield) of a security on or about October 31, 2019 – standing alone – sheds absolutely no light on whether the security was fairly priced *14 months earlier*. Changes in market conditions, *and* the tax status of a majority of the bonds from taxable to tax exempt, *and* the financial condition of the issuer have a significant impact on the trading price in the secondary market. Snyder may not have expertise with municipal bonds, but he could not disagree with this basic concept.

As to the fairness of the deal as of September 2018, Mr. Harris

[redacted]

[11] FOF ¶¶ 179-185, 187-215.

[redacted] and the objectives it wanted to achieve: cash flow relief within 90 days, certainty of execution, reasonable covenants, and a single bondholder representative with whom to work on a future restructuring.[12]

Notably, Roosevelt engaged a financial advisor that ran a robust process and met with many other large investment firms, none of which indicated that they could support the University's objectives in the necessary time frame and at an acceptable price.[13] PHC, with its unique ability to provide a "Cinderella" structure (with a portion of the issuance structured as taxable bonds at closing, to be restructured later as tax exempt bonds), provided a bespoke solution to Roosevelt's needs and its financial advisor advised Roosevelt at the time that it was unlikely to get a better deal elsewhere.[14]

Roosevelt's financial turnaround plan, of which the debt refinancing was a foundational component, has been a success. Shortly before the 2018 refinancing, Moody's gave Roosevelt a negative outlook due to "material structural imbalance, with large operating deficits and insufficient debt service coverage that

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[12] [redacted].

[13] FOF ¶¶ 38-43.

[14] FOF ¶¶ 41-43.

require draws on the [U]niversity's reserves."[15] Following the refinancing, the school was able to stabilize its fiscal condition, is predicting a balanced budget after many years of deficits, and (in October 2019) was able to expand by acquiring certain assets of Robert Morris University in Chicago, increasing enrollment by nearly 50% from 4,100 to 5,900 students.[16]

Over the same period, there has been a significant rally in the market for high yield municipal bonds.[17] As a result of both the general increase in the market for high yield municipal bonds and the dramatic improvement in Roosevelt's financial condition, it is not surprising that the bonds traded at higher values in late October/early November 2019.

Neither Snyder's opinions at trial nor his new affidavit give any consideration to Roosevelt's actual financial condition. Snyder's opinion at trial that the yield on the Roosevelt bonds was "too high" was based on a comparison with a handful of other bonds. However, Snyder admitted he had no training or expertise with municipal bonds, and therefore he was totally unqualified to

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[15] *See* Seltzer, note 1.

[16] *Id.*

[17] The 30-year MMD AAA rate on 9/26/18 was 3.26, and on 10/31/19 it was 2.14; the Bloomberg Barclays Muni High Yield index (YTW) on 9/26/18 was 4.90%, and on 10/31/19 it was 4.04%. *See* Bloomberg.

evaluate Roosevelt's financial condition and the unique structure of the Roosevelt bonds, or to select purportedly comparable bonds.[18] In fact, the bonds he selected were not remotely comparable, and one of the purported comps was issued by an *investment grade* issuer.[19] Similarly, his new affidavit does not consider Roosevelt's current financial condition and whether improvements in its creditworthiness would be expected to cause the bonds to trade at higher prices in the secondary market. Without any consideration of Roosevelt's current financial condition, Snyder's opinion is meaningless.

III. PERMITTING THE NEW "EVIDENCE" WOULD BE UNDULY PREJUDICIAL TO PHC AND WOULD WASTE JUDICIAL RESOURCES

As detailed above, in order for the Court to responsibly assess the significance (if any) of PHC's sale of a portion of the Roosevelt bonds, it would need to hear additional fact and expert witness testimony. Even the amount of bonds that PHC sold is in dispute. Nuveen asserts, without any apparent basis, that "PHC sold a substantial portion ($42 million) of the relevant Roosevelt bonds."[20] In reality, PHC made a net sale of approximately $18 million of the

[18] Trial Tr. at 563:4-564:3 (Snyder); *see also* Plaintiff's Written Rebuttal Statement at 12, n.43.

[19] Trial Tr. at 657:7-658:13; JX541.

[20] Nuveen Mot. at 6.

bonds and continues to hold more than $100 million. It remains very much a long term investor in the deal and the sole bondholder representative.

Nuveen's motion also presupposes that the only explanation for an increase in Roosevelt bonds' price during the 14-month period in question is that they were mispriced upon origination. This is nonsense. Were the court to consider this evidence, it would in fairness need to consider all factors affecting the Roosevelt bonds during the intervening period – including the broad rally in municipal bonds during this time, the migration of most of the Roosevelt bonds from taxable to tax-exempt under the "Cinderella" structure, and facts showing Roosevelt's improved financial performace and credit quality.

PHC would be entitled to cross-examine Snyder with respect to his hearsay affidavit, and Nuveen's suggestion that no cross-examination is necessary is wrong. At the very least, PHC would establish that Snyder did not consider Roosevelt's current financial condition, and that significant improvement in Roosevelt's financial condition would be expected to cause the bonds to trade up in the secondary market. PHC also would probe whether Snyder's analysis sufficiently controlled for changes in the broader high-yield municipal bond market as he claims.

Other municipal bond issuances similarly increased in value above benchmark yields during the same period. For example, Bloomberg data reflects

that Nuveen owns $18.75 million of Nevada - Fulcrum Sierra Holdings LLC bonds that priced on August 23, 2018 at 6.95%, +223 basis points off the Barclays Muni High Yield Index (YTW) of 4.72%. These bonds later evaluated on October 31, 2019 at 4.84% when the same index was at 4.04%, + 80 points off the index. This reflects spread compression in these bonds of 143 basis points above the rate decline of 68 basis points, which is comparable to the spread compression of 156 basis points above the benchmark rate decline of 86 basis points in the Roosevelt bonds from September 26, 2018 to October 31, 2019. Presumably Nuveen did not consider the Fulcrum bonds predatory when it bought them, and PHC would be entitled to explore these and similar transactions to contextualize Nuveen's "new" evidence. In short, to equitably assess the significance of PHC's sale of a portion of the Roosevelt bonds without severely prejudicing PHC, the Court would need to hold a "mini-trial" on that issue alone.

However, forcing PHC to engage in further proceedings on a non-dispositive issue nearly two months after post-trial argument – in a matter in which PHC sought and was granted expedited treatment and continues to suffer substantial harm as a result of the boycott of PHC organized by Nuveen – would

also cause severe prejudice to PHC.[21] Further proceedings would only waste the Court's limited resources. In similar circumstances, Vice Chancellor Steele denied a motion to reopen the record to consider evidence that developed after trial in order to avoid the "burden placed on the parties and the Court that would result from the need to conduct, over five months after trial, a 'mini-trial' to reconcile disputed evidence with limited probative value."[22] In fact, Nuveen has cited no case in which the court has permitted a party to submit a new expert affidavit after post-trial argument briefing and argument has been completed, presumably because courts recognize that they cannot consider a new expert opinion without affording the opposing party the opportunity to cross-examine, thereby consuming judicial and party resources long after the trial was completed.[23]

Moreover, it would be unfair for the Court to consider only post-trial developments that (in Nuveen's view) favor Nuveen.[24] PHC could also offer new

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[21] *See Akorn*, 2018 Del. Ch. LEXIS 1311, at *6-7 ("permitting discovery and holding a hearing would inflict another, equally real form of prejudice on [a party] by retrying aspects of the case").

[22] *Fitzgerald v. Cantor*, 2000 WL 128851, at *2 (Del. Ch. Jan 10, 2000).

[23] *See Akorn*, 2018 Del. Ch. LEXIS 1311, at *6-7.

[24] *Id.* at *8 ("Moreover, if the record were reopened and discovery permitted into the Post-Decision Approval, it would be necessary in the interest of fairness to permit discovery into other recent developments. . . ").

evidence of its unique value to the two borrowing relationships that Nuveen has falsely characterized as predatory. Specifically, PHC [redacted]; and on November 15, 2019, PHC and Howard University received an award from the Washington, D.C. Economic Partnership for the "Revenue Deal of the Year" for the Howard Quad Transaction.

But trials have to end. The parties made substantial efforts to complete the trial in the two days the Court set aside. The Court no doubt has devoted numerous hours to evaluating the case and may even have begun drafting a decision. It would be unfair to the Court, as well as to PHC, to put that on hold while the parties engaged in further proceedings on issues that will not, as demonstrated above, affect the outcome of the case.

CONCLUSION

PHC respectfully requests that the Court deny the Motion.

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