10-722-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MAYOR and CITY COUNCIL OF BALTIMORE, MARYLAND, on behalf of themselves and all others similarly situated, RUSSELL MAYFIELD, individually and on behalf of themselves and all others similarly situated, PAUL WALTON, individually and on behalf of themselves and all others similarly situated, JOHN ABBOTT, individually and on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

—against—

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

Defendants-Appellees.

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

BRIEF FOR DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for the following Defendants-Appellees certify that:

- Citigroup Global Markets Inc. is a wholly-owned subsidiary of Citigroup Financial Products Inc., which is a wholly-owned subsidiary of Citigroup Global Markets Holdings Inc., which is a wholly owned subsidiary of Citigroup Inc. Citigroup Inc. is a publicly traded corporation that has no parent corporation. No publicly held corporation owns 10 percent or more of its stock.

- UBS AG is a publicly traded Swiss corporation that has no parent corporation. No publicly traded corporation owns 10% or more of its stock. UBS Financial Services, Inc. is a wholly-owned subsidiary of UBS Americas, Inc., which is a wholly-owned subsidiary of UBS AG. UBS Securities LLC is wholly owned by UBS AG and UBS Americas, Inc.

- Merrill Lynch & Co., Inc. is a direct subsidiary of Bank of America Corporation, which owns all of the common stock of Merrill Lynch & Co., Inc. Bank of America Corporation is a publicly traded company whose shares are traded on the New York Stock Exchange. It has no parent company and no publicly held company owns more than 10% of Bank of America Corporation's shares.

- Morgan Stanley is a publicly held corporation that has no parent corporation. Based on Securities and Exchange Commission Rules regarding beneficial ownership, State Street Corporation ("State Street"), State Street Financial Center, One Lincoln Street, Boston Massachusetts 02111, beneficially owned 11.1% of Morgan Stanley's outstanding common stock (based on a Schedule 13G filed under the Securities Exchange Act of 1934 (the "Exchange Act") on February 12, 2010 by State Street (the "State Street Schedule 13G")). As reported in the State Street Schedule 13G, all of the securities are beneficially owned by State Street and its direct or indirect subsidiaries in their various fiduciary and other capacities.

According to a Schedule 13D filed under the Exchange Act on October 23, 2008, as amended on October 30, 2008, May 22, 2009, June 11, 2009, April 1, 2010 and May 3, 2010 (together, the "MUFG Schedule 13D") by Mitsubishi UFJ Financial Group, Inc. ("MUFG"), 7-1 Marunouchi 2-chome, Chiyoda-ku, Tokyo 100-8330, MUFG beneficially owned 21.70% of Morgan Stanley's outstanding common stock (assuming full conversion of all of the shares of Series B Preferred Stock held by MUFG at the Initial Conversion Price and further assuming no conversion of any other securities not beneficially owned by MUFG that are convertible or exchangeable into shares of Morgan Stanley common stock).

According to a Schedule 13G filed under the Exchange Act on June 18, 2010 (the "CIC Schedule 13G") by China Investment Corporation ("CIC") and Best Investment Corporation ("Best"), New Poly Plaza, No. 1 Chaoyangmen Beidajie, Dongcheng District, Beijing 100010, People's Republic of China, CIC beneficially owned 11.64% of Morgan Stanley's outstanding common stock, of which CIC's wholly owned subsidiary, Best, beneficially owned 8.63% of Morgan Stanley's outstanding common stock. According to the CIC Schedule 13G, the shares of common stock beneficially owned by CIC are held by wholly owned subsidiaries, including Best. The shares beneficially owned by Best include (i) 14,600,000 shares of common stock and (ii) 116,062,911 shares of common stock which Best is required to purchase and Morgan Stanley is required to issue and sell, pursuant to 5,579,143 PEPS Units held by Best, on a date that is currently expected to be August 17, 2010 but that may be extended for a period of up to a year under certain circumstances.

Capitalized terms used and not defined in these descriptions shall have the meanings set forth in the MUFG Schedule 13D and the CIC Schedule 13G, as applicable.

- Bank of America Corporation, a publicly held corporation, does not have a parent corporation, and no publicly held corporation owns more than 10% of Bank of America Corporation's shares.

- Wachovia Corporation was acquired by Wells Fargo & Company on or about December 31, 2008, and has been subsequently dissolved. Wachovia Securities, LLC changed its name to Wells Fargo Advisors,

LLC, and is ultimately a wholly owned subsidiary of Wells Fargo & Company. Wachovia Capital Markets, LLC changed its name to Wells Fargo Securities, LLC, and is ultimately a wholly owned subsidiary of Wells Fargo & Company. Wells Fargo & Company, a publicly held corporation, does not have a parent corporation. No publicly held corporation owns 10% or more of Wells Fargo & Company's stock.

- The Goldman Sachs Group, Inc. ("GS Group") has no parent corporation and, to the best of its knowledge, no publicly held company owns 10% or more of GS Group's common stock.

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- Royal Bank of Canada, a publicly held corporation, does not have a parent corporation. No publicly held corporation owns 10% or more of Royal Bank of Canada's stock.

- Deutsche Bank AG, a publicly held corporation, does not have a parent corporation. No publicly held corporation owns 10% or more of Deutsche Bank AG's stock.

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT ... 1

STATEMENT OF ISSUES PRESENTED ... 3

STATEMENT OF THE CASE ... 3

STATEMENT OF FACTS ... 4

A. The Complaints ... 4

B. Auction Rate Securities ... 5

C. The Alleged Conspiracy ... 6

D. The Defendants' Motions to Dismiss and the District Court's Dismissal ... 7

SUMMARY OF ARGUMENT ... 10

STANDARD OF REVIEW ... 13

ARGUMENT ... 14

A. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS' ANTITRUST CLAIM IS PRECLUDED BY THE FEDERAL SECURITIES LAWS ... 14

1. The Preclusion Framework of *Billing* and *Short Sale* ... 14

2. All Four *Billing* Factors Support Preclusion Here ... 18

a. Plaintiffs Concede That ARS Is an Area of Financial Market Activity That the Securities Laws Seek to Regulate ... 18

b. The SEC Has Clear Statutory Authority Over the Role of Broker-Dealers in Auction Rate Securities ... 19

c. The SEC Has Actively Regulated Broker-Dealers in Auction Rate Securities, Including Investigating

the Mass Auction Failures Alleged to Be Collusive in Plaintiffs' Complaints 23

d. Maintenance of Plaintiffs' Antitrust Suit Is Practically Incompatible with the SEC's Regulation of Auction Rate Securities 28

i. Actual Conflict 29

ii. Potential Conflict 32

iii. Unusually Small Need for Private Antitrust Enforcement 34

B. THIS COURT CAN AFFIRM THE DISTRICT COURT'S DECISION ON THE GROUNDS THAT PLAINTIFFS HAVE FAILED TO PROPERLY PLEAD CONSPIRACY OR INJURY 36

1. The Complaints Fail to Plead a Violation of Section 1 of the Sherman Act 37

a. The Complaints Do Not Adequately Allege an Agreement Under *Twombly* and *Iqbal* 37

b. The Complaints Fail To Allege Facts Permitting a Plausible Inference of a Conspiracy from Parallel Conduct 42

2. The District Court Decision Should Be Affirmed Because Neither Complaint Pleads Antitrust Injury 48

CONCLUSION 54

TABLE OF AUTHORITIES

Page(s)

Cases

ACEquip Ltd. v. Am. Eng'g Corp., 315 F.3d 151
(2d Cir. 2003) 13

Adirondack Transit Lines, Inc. v. United Transp. Union, Local 1582, 305 F.3d 82 (2d Cir. 2002) 36

Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) 13

Arista Records LLC v. Lime Group LLC, 532 F. Supp. 2d 556 (S.D.N.Y. 2007) 44

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) 2, 14, 37, 47

Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 48

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) .... passim

Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc., 203 F.3d 1028 (8th Cir. 2000) 43, 46

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 43

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 48, 51

Bunker Ramo Corp. v. United Bus. Forms, Inc., 713 F.2d 1272 (7th Cir. 1983) 52

Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284 (5th Cir. 1988) 50

Cosmetic Gallery, Inc. v. Schoeneman Corp., 495 F.3d 46 (3d Cir. 2007) 42

Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264 (2007) .... passim

Dahl v. Bain Capital Partners, *LLC*, 589 F. Supp. 2d 112 (D. Mass 2008) 23

DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53 (1st Cir. 1999) 38

Eagletech Communications Inc. v. Citigroup, Inc., No. 07-60668-CIV, 2008 U.S. Dist. LEXIS 49432 (S.D. Fla. June 27, 2008) 23

Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., *Inc.*, 129 F.3d 240 (2d Cir. 1997) 48

Electronic Trading Group, LLC v. Banc of America Securities LLC, 588 F.3d 128 (2d Cir. 2009) (*"Short Sale"*) .... passim

Fair Isaac Corp. v. Experian Info. Solutions Inc., 645 F. Supp. 2d 734 (D. Minn. 2009) 53

Finnegan v. Campeau Corp., 915 F.2d 824 (2d Cir. 1990) 20, 21, 23

Fisher v. JPMorgan Chase & Co., 303 F. App'x 979 (2d Cir. 2008) 36

In re Baby Food Antitrust Litig., 166 F.3d 112 (3d Cir. 1999) 43

In re Elevator Antitrust Litig., 502 F.3d 47 (2d Cir. 2007) 37, 42

In re Municipal Derivatives Antitrust Litigation ("Municipal Derivatives"), 700 F. Supp. 2d 378 (S.D.N.Y. 2010) 22, 32

In re Western States Wholesale Natural Gas Antitrust Litig., 661 F. Supp. 2d 1172 (D. Nev. 2009) 32

Int'l Travel Arrangers, Inc. v. W. Airlines, Inc.,
623 F.2d 1255 (8th Cir. 1980) 53

Johnson v. Univ. Health Servs., Inc., 161 F.3d
1334 (11th Cir. 1998) 50

Kreuzer v. Am. Acad. of Periodontology, 735 F.2d
1479 (D.C. Cir. 1984) 42

Oreck Corp. v. Whirlpool Corp., 639 F.2d 75 (2d
Cir. 1980) 42

*Paycom Billing Servs., Inc. v. Mastercard Int'l,
Inc.*, 467 F.3d 283 (2d Cir. 2006) 48

Penn. Ave. Funds v. Borey, 569 F. Supp. 2d 1126
(W.D. Wash. 2008) 23

Santa Fe Indus., Inc. v. Green, 430 U.S. 462
(1977) 20

*Santana Prods. Inc. v. Bobrick Washroom Equip.,
Inc.*, 401 F.3d 123 (3d Cir. 2005) 53

SEC v. Banc of Am. Sec. LLC, No. 09 Civ. 5170
(S.D.N.Y. Compl. filed June 3, 2009) 26

SEC v. Deutsche Bank Sec. Inc., No. 09 Civ. 5174
(S.D.N.Y. Compl. filed June 3, 2009) 26

SEC v. Morgan Keegan & Co. Inc., No. 09 Civ.
1965 (N.D. Ga. Compl. filed July 21, 2009) 26

SEC v. RBC Capital Markets Corp., No. 09 Civ.
5172 (S.D.N.Y. Compl. filed June 3, 2009) 26

Shumway v. United Parcel Serv., Inc., 118 F.3d 60
(2d Cir. 1997) 36

Silverstein v. TD Ameritrade Holding Corp., No.
1:08-5467 (D. Neb. Compl. filed June 17, 2008) 36

Starr v. Sony BMG Music Entertainment, 592 F.3d 314 (2d Cir. 2010) 46, 47

Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 903 F.2d 988 (4th Cir. 1990) 46

Summey v. Ford Motor Credit Co., 449 F. Supp. 132 (D.S.C. 1976), *aff'd*, 573 F.2d 1306 (4th Cir. 1978) 52

Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430 (6th Cir. 2008) 42

United States v. Taubman, 297 F.3d 161 (2d Cir. 2002) 42

Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55 (2d Cir. 1988) 51

Wedgewood Tacoma LLC v. Citigroup Inc., No. 1:08-4360 (S.D.N.Y. Compl. filed May 8, 2008) 35

Statutes

Securities Act of 1933

Section 2, 15 U.S.C. § 77b(b) 35

Section 17(a), 15 U.S.C. § 77q(a) 20

Securities Exchange Act of 1934

Section 9(a)(6), 15 U.S.C. § 78i(a)(6) 20

Section 10(b), 15 U.S.C. § 78j(b) 20

Section 15(c), 15 U.S.C. § 78*o*(c) 19, 20, 26

Section 19, 15 U.S.C. § 78s 20

Sherman Act, 15 U.S.C. § 1 .... 4, 37

Rules

Federal Rule of Civil Procedure 12(b)(6)... 4, 7, 13, 37

PRELIMINARY STATEMENT

Set against the backdrop of a global financial liquidity and credit crisis, the demand for auction rate securities ("ARS") swiftly and severely declined in early 2008, causing widespread auction failures. As a result of these failures, some investors could not sell their ARS at auction. The SEC and numerous state securities regulators investigated broker-dealer conduct related to ARS, and aggrieved investors and issuers filed scores of private securities lawsuits across the country. Plaintiffs' Complaints, which describe the same practices at issue in the government investigations and private litigations, and their argument on appeal, which focuses narrowly on the broker-dealers' alleged "simultaneous" withdrawal of support for ARS auctions, are nothing more than unsuccessful efforts to dress securities claims in antitrust clothing.

The District Court, applying *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007), identified the clear incompatibility between the securities laws and the antitrust laws with respect to the ARS at issue in this case and held that Plaintiffs' claims were precluded. The SEC has continuously exercised its clear statutory authority to regulate broker-dealer conduct relating to ARS, including deploying "tremendous resources to discover and identify potential wrongdoing" relating to, among other things, "the reasons why the firms stopped

supporting the auctions in mid-February." (JA[1] 248-49.) The SEC already permits collaborative conduct among broker-dealers that antitrust plaintiffs otherwise could claim as a basis for antitrust liability, and there is potential for additional conflicts between the antitrust laws and SEC regulation of ARS broker-dealers in the future. The District Court correctly applied *Billing* in holding that a private antitrust complaint challenging the broker-dealer conduct that Plaintiffs allege—including the allegations of mass withdrawal from the market—is incompatible with federal securities law.

In the alternative, this Court may affirm the District Court's dismissal based upon two additional arguments that were fully briefed below: (1) Plaintiffs fail to plead the existence of an antitrust conspiracy under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and (2) Plaintiffs do not plead that they suffered antitrust injury. First, Plaintiffs' own allegations reveal a textbook case of conscious parallel behavior: the market for ARS was failing of its own accord due to the credit crisis and drop in demand for ARS; the broker-dealers in the market observed the declining market conditions and monitored each other's public behavior; and as conditions deteriorated they all ultimately decided to exit the market around the same time. Plaintiffs' bare-bones allegations do not contain a single fact that suggests Defendants' conduct was

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[1] References to "JA" herein refer to the Joint Appendix filed on July 13, 2010.

anything other than their lawful and independent reactions to the same economic conditions. Without more, Plaintiffs' conspiracy allegations fall far short of crossing the line from "conceivable to plausible" as *Twombly* requires. 550 U.S. at 570. In addition to the failure to adequately plead an antitrust conspiracy, Plaintiffs fail to plead an essential element of any antitrust claim—antitrust injury—because they do not allege any injury *to competition* resulting from Defendants' alleged mass exit from the ARS market.

STATEMENT OF ISSUES PRESENTED

1. Whether the District Court correctly dismissed the Complaints because application of the antitrust laws to the Defendants' alleged conduct is precluded by comprehensive securities laws and regulations concerning auction rate securities and broker-dealer conduct. *See Billing*, 551 U.S. 264.

2. In the alternative, whether the dismissal of the Complaints should be affirmed because Plaintiffs failed to plead any facts plausibly suggesting an antitrust conspiracy, as opposed to mere parallel conduct, as *Twombly* requires. *See Twombly*, 550 U.S. 544.

3. In the alternative, whether the District Court's dismissal should be affirmed because Plaintiffs failed to plead antitrust injury.

STATEMENT OF THE CASE

Plaintiffs filed their Complaints on September 4, 2008. Defendants filed motions to dismiss the Complaints on January 15, 2009, under Federal Rule

of Civil Procedure 12(b)(6). On January 26, 2010, after briefing and oral argument, the District Court granted Defendants' motions to dismiss the Complaints. On March 1, 2010, Plaintiffs appealed to this Court from the District Court's Judgment. On July 23, 2010, Plaintiffs filed a motion to consolidate appeals, to which Defendants consented. On July 27, 2010, this Court granted that motion.

STATEMENT OF FACTS

A. The Complaints

Two virtually identical purported class action complaints were filed by two separate sets of plaintiffs on September 4, 2008. *Mayfield v. Citigroup, Inc.*, No. 08-CIV-7747 (BSJ) (S.D.N.Y.), was brought by three individual purchasers of ARS on behalf of a purported class of all persons or entities who acquired ARS from Defendants or their alleged co-conspirators and held those securities as of February 13, 2008. (JA 35 ¶ 39.) *Mayor and City Council of Baltimore, Maryland v. Citigroup, Inc.*, No. 08-CIV-7746 (BSJ) (S.D.N.Y.), was brought by a local government, which filed a separate Complaint with substantively identical allegations on behalf of a putative class of all persons or entities that issued ARS underwritten by Defendants between May 12, 2003 and February 13, 2008. (JA 69 ¶ 38.) Both Complaints allege a single *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

B. Auction Rate Securities

As alleged in the Complaints, ARS are municipal bonds, corporate bonds and preferred stocks with interest rates or dividend yields that are periodically reset through auctions. (JA 35 ¶ 49; JA 69 ¶ 47.) The terms of each ARS (*e.g.*, the frequency of the auctions and the debt maturity dates) vary from security to security, and are set forth in a unique offering statement for each ARS. (*See* JA 35 ¶ 51; JA 69 ¶ 49.) Auctions for each ARS are managed by one or more broker-dealers selected by the issuer of that particular ARS. (JA 35 ¶ 58; JA 69 ¶ 57.) There were "at a minimum, thousands" of issuers and purchasers of ARS during the putative class period, and each issuer may have engaged in multiple ARS offerings, each with its own separate auctions. (JA 35 ¶ 40; JA 69 ¶ 39.)

In an ARS auction, each broker-dealer managing that auction receives bids from investors and, subject to certain SEC rules, also can submit bids to purchase ARS for that broker-dealer's own account. (JA 35 ¶¶ 54, 59; JA 69 ¶¶ 52, 58.) If sufficient bids are received (from investors or for the broker-dealer's own accounts) to purchase all ARS available for sale in that auction, a "clearing" rate payable to investors by the ARS issuer during the succeeding period is set based on the winning bids, and the ARS are distributed to the winning bidders. (JA 35 ¶¶ 52-55, 60; JA 69 ¶¶ 50-53, 59.) If insufficient bids are received to purchase all ARS offered in an auction, that auction "fails." The issuer then pays a

rate defined in the ARS' offering statement (generally called the "maximum rate") for the succeeding period, while the ARS holders continue holding their ARS until the next auction. (JA 35 ¶¶ 56-57; JA 69 ¶¶ 54-56.)

C. The Alleged Conspiracy

The Complaints allege a single, continuous, industry-wide conspiracy among Defendants and additional unnamed co-conspirators, dating back to 2003, to (1) prevent ARS auctions from failing by "intervening in auctions where demand was insufficient"; (2) conceal "the true extent of their involvement" in ARS auctions and the "deterioration of the market for [ARS]"; and (3) "withdraw[] their support for the [ARS] auctions on or about the same dates [in February 2008], thereby causing the failure of the auction market." (*See* JA 35 ¶¶ 114, 125; JA 69 ¶¶ 113, 125.) As a result of this alleged conspiracy, Plaintiffs contend that they and "members of the Class are now paying higher interest rates on or are holding more illiquid assets than they would have paid [sic] absent the concerted unlawful activity." (JA 35 ¶ 126; JA 69 ¶ 126.) Plaintiffs have since attempted to walk away from many of these allegations and now assert that the "antitrust violation alleged in the Complaints is confined to the broker-dealers' collusion to simultaneously exit the ARS market."[2] (Opening Br.[3] at 7 n.3.)

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[2] As argued below, while Plaintiffs may have strategically abandoned their former allegations in an (unsuccessful) effort to bolster their argument under *Billing*, they have moved even further away from being able to meet the pleading standards under *Twombly*.

D. The Defendants' Motions to Dismiss and the District Court's Dismissal

On January 15, 2009, pursuant to Fed. R. Civ. P. 12(b)(6), Defendants filed motions to dismiss both Complaints, arguing that (1) under the Supreme Court's decision in *Billing*, Plaintiffs' antitrust claim is precluded by the federal securities laws; (2) the Complaints' conspiracy allegations failed to satisfy the pleading standards set forth in *Twombly*; and (3) the Complaints failed to plead antitrust injury or any legally cognizable injury.

On November 24, 2009, the District Court held oral argument on Defendants' Motions to Dismiss. (JA 430.) In an Order dated January 26, 2010, the District Court, after finding that all four *Billing* factors had been satisfied, held that Plaintiffs' antitrust claim was precluded by the federal securities laws and dismissed the Complaints. (JA 399.) The District Court did not reach Defendants' alternate bases for dismissal—Plaintiffs' failure to plead a Section 1 violation and Plaintiffs' failure to plead antitrust injury.

On the first *Billing* factor, the District Court held that the auction rate securities market "lies squarely within an area of market activity that the securities laws seek to regulate." (JA 409.) The court cited the SEC's own words in a recent no-action letter that the "mission of the Commission[] to protect investors,

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[3] References to "Opening Br." herein refer to the "Brief and Special Appendix of Plaintiffs-Appellants Mayor and City Council of Baltimore, Maryland and All Others Similarly Situated" filed on July 15, 2010.

maintain fair and orderly securities markets, and facilitate capital formation . . . extends to the market for auction rate municipal securities." (*Id.*)

The District Court held that the second *Billing* factor was met because the SEC has "clear and adequate" authority to regulate the ARS market, "including the alleged practices challenged by the Plaintiffs." (*Id.*) Noting that Plaintiffs themselves had conceded that the SEC has authority to regulate ARS registration, reporting, and disclosures (*id.*), the District Court found that the SEC possesses vast authority to "forbid, permit, encourage, discourage, tolerate, limit or otherwise regulate virtually every aspect of the ARS market." (JA 410 (internal quotation marks omitted).)

Next, the District Court found the third *Billing* factor satisfied after considering the SEC's numerous past and current investigations and regulatory activity related to ARS. Notably, the court examined the SEC's "ongoing investigation into the specific events at issue in this case: the collapse of the ARS market in February 2008." (JA 411.) The court highlighted the congressional testimony of the SEC's Director of Enforcement explaining that its investigation was focused on "the reasons why the firms stopped supporting the auctions in mid-February." (*Id.*) The court correctly observed that this ongoing investigation by the SEC would encompass—by statutory mandate—"competitive considerations, such as the antitrust law violation alleged by Plaintiffs in this case." (JA 411-12

(internal quotation marks omitted).) Based on "such extensive SEC investigation and regulation," including SEC enforcement activity involving Defendants in the present case, the District Court concluded the SEC has actively exercised "its authority to investigate and regulate the ARS market, including the alleged practices challenged by the Plaintiffs." (JA 410, 413.)

On the final *Billing* factor, the District Court found a serious conflict between the securities and antitrust laws. As in *Billing*, the District Court found that the antitrust laws' application to the alleged conduct involved the same "fine line-drawing" between coordinated activity permissible under the securities laws and activity that the SEC "must (and inevitably will) forbid." (JA 413.) The court cited examples of permissible joint interactions among broker-dealers that have been and may continue to be regulated by the SEC. (*Id.*) Referring to this Court's recent decision in *Electronic Trading Group, LLC v. Banc of America Securities LLC*, 588 F.3d 128 (2d Cir. 2009) (*"Short Sale"*), the District Court stated, "[I]t is unreasonable to expect broker-dealers in the ARS market to determine the fine line between permissible communications under securities law and impermissible communications under antitrust law." (JA 415.)

In addition, the court found that there is an "'unusually small' need for antitrust enforcement in the ARS market" because the SEC "thoroughly" exercises its regulatory authority over this market and because investors and

issuers have legal recourse under existing securities laws. (JA 416.) As these important mechanisms exist and have been robustly utilized, there is a "diminished need for antitrust enforcement." (*Id.*)

Likening the Complaints here to the "securities complaint[s] in antitrust clothing" in *Billing* (JA 416-17), the District Court granted Defendants' motions and dismissed both Complaints.

SUMMARY OF ARGUMENT

This Court should affirm the dismissal of the Complaints because the District Court correctly applied the four *Billing* factors and concluded that, based on the alleged agreement among Defendants to withdraw from the ARS market, Plaintiffs' antitrust claims are precluded by the federal securities laws. As the District Court properly found, the ARS market "lies squarely within an area of market activity that the securities laws seek to regulate." (JA 409.) Not only has the SEC stated that its "mission" to "protect investors . . . extends to the market for auction rate municipal securities" (JA 409), but the SEC has also actively regulated the ARS market by conducting investigations of ARS practices, entering into consent decrees with ARS broker-dealers, and reporting to Congress concerning ARS developments.

In addition, as the District Court recognized, there can be no question that the SEC possesses, and has repeatedly exercised, "considerable power to

forbid, permit, encourage, discourage, tolerate, limit or otherwise regulate virtually every aspect of the ARS market." (JA 410.) Plaintiffs' contention that the SEC's authority is somehow limited to regulating "registration, reporting and disclosures concerning ARS," but not the conduct of broker-dealers concerning ARS, is not only inconsistent with the plain statutory language enforced by the SEC, but also contrary to Second Circuit precedent and belied by the SEC's own conduct. The SEC's supervisory and enforcement activity has repeatedly extended to regulating bidding and other conduct of ARS broker-dealers, including investigating the mass auction failures that Plaintiffs allege were collusive.

Ignoring the robust history of SEC enforcement in the ARS market, Plaintiffs focus on the fact that the SEC has not brought enforcement actions concerning the alleged conspiracy to withdraw from the ARS market. (Opening Br. at 39-40.) But that argument disregards this Court's previous guidance that the third *Billing* factor should be evaluated based not on whether the SEC has exercised regulatory authority over the specific anticompetitive conduct alleged, but rather over the general activity at issue. Here, the SEC has clearly and repeatedly exercised its regulatory authority over the ARS bidding activities of broker-dealers.

Lastly, maintaining this suit is practically incompatible with the SEC's regulation of ARS. The District Court was correct that "the securities laws

are in serious conflict with the antitrust laws within the ARS context at issue in this case" because of both actual and potential conflicts between antitrust and securities regimes, and because there is an "unusually small" need for antitrust enforcement of ARS broker-dealer conduct in view of the SEC's oversight and the availability of private securities actions.

Separately, the District Court can be affirmed on the alternative ground that Plaintiffs have failed to plead an antitrust conspiracy under *Twombly*. Although the District Court dismissed the Complaints without addressing this pleading deficiency, this Court could affirm the dismissals because the Complaints fall far short of pleading sufficient facts to push Plaintiffs' claims "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. The Complaints' bare-bones allegations do not support any reasonable inference that Defendants engaged in a widespread antitrust conspiracy as opposed to lawful, independent behavior. Nothing in the Complaints suggests that similar conduct by Defendants in withdrawing support for ARS auctions during an historic credit crisis resulted from a conspiracy rather than each Defendant's lawful and independent reaction to the same dire economic conditions.

Plaintiffs' failure to plead any antitrust injury provides another alternative ground for affirmance. Although the District Court did not reach this additional pleading deficiency, it is undisputed that an antitrust complaint must

adequately allege an injury of the type the antitrust laws were intended to prevent and that flows from the conduct which makes Defendants' acts unlawful under the antitrust laws. The Complaints here allege, at most, that Defendants jointly defrauded ARS investors and issuers by misrepresenting the nature of the securities and concealing that the viability of ARS auctions depended on Defendants' support of the auctions. But a complaint does not plead antitrust injury if the alleged injury flows solely from purportedly fraudulent conduct—or the cessation of such fraudulent conduct—that does not harm competition. While Plaintiffs now seek to narrow the alleged antitrust violation to "the broker-dealers' collusion to simultaneously exit the ARS market" (Opening Br. at 7, n.3), the Complaints are devoid of any allegations that such simultaneous withdrawal from the ARS market (or any other conduct of Defendants) harmed competition among Defendants or that any injury resulted from a competition-reducing aspect of Defendants' purported conduct.

STANDARD OF REVIEW

The Court of Appeals reviews dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) *de novo*. *Arar v. Ashcroft*, 585 F.3d 559, 567 (2d Cir. 2009); *Short Sale*, 588 F.3d at 133. This Court may affirm the dismissal of a complaint on any ground appearing in the record below. *See ACEquip Ltd. v. Am. Eng'g Corp.*, 315 F.3d 151, 155 (2d Cir. 2003). To withstand dismissal, Plaintiffs

must plead "enough facts to state a claim to relief that is plausible on its face," and not merely "conceivable." *Twombly*, 550 U.S. at 570. This standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S. Ct. at 1949. When a complaint "pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 556-57).

ARGUMENT

A. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS' ANTITRUST CLAIM IS PRECLUDED BY THE FEDERAL SECURITIES LAWS

In the recent *Billing* and *Short Sale* decisions, the Supreme Court and this Court, respectively, have provided clear guidance on when antitrust claims are precluded by federal securities law. As the District Court correctly determined, application of these precedents to the allegations and regulatory record in this case demonstrates that Plaintiffs' antitrust claims are precluded.

1. The Preclusion Framework of *Billing* and *Short Sale*

The U.S. Supreme Court has held in a long line of cases culminating in its recent decision in *Billing* that the securities laws preclude application of antitrust law where the two regimes are "clearly incompatible." *Billing*, 551 U.S. at 275. *Billing* explained that four factors determine whether such "clear incompatibility" exists in a particular context:

> (1) "the possible conflict affect[s] practices that lie squarely within an area of financial market activity that the securities

> law[s] seek[] to regulate"; (2) "the existence of regulatory authority under the securities law[s] to supervise the activities in question"; (3) "evidence that the responsible regulatory entities exercise that authority"; and (4) "a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct."

Id. at 275-76. Applying this analysis to allegations that broker-dealers engaged in an antitrust conspiracy in connection with marketing securities in initial public offerings ("IPOs"), the Court determined that the SEC's ongoing exercise of its authority to regulate the IPO process made the alleged IPO practices at issue impliedly immune from scrutiny under the antitrust laws. *Id.* at 276-85.

In *Short Sale*, the first appellate decision to apply *Billing*, this Court ruled in late 2009 that an antitrust complaint alleging that brokers had conspired to set fees for short sellers to borrow securities was impliedly precluded by the securities laws, given the SEC's supervision over short selling and the permissibility of broker interactions in the short selling process. *See Short Sale*, 588 F.3d 128. *Short Sale* elaborated on *Billing* by identifying the level of generality a court should use in assessing each of the four *Billing* factors. The first *Billing* factor, whether the alleged conduct lies "squarely within an area of financial market activity that the securities law seeks to regulate," requires consideration of "the underlying market activity"—in that case, "short selling" generally. *Id.* at 133-34. The second and third *Billing* factors, "the existence of

regulatory authority" and evidence that such authority was exercised, require assessment at a level "more particular than the . . . underlying market activity . . . and more general than the . . . alleged anticompetitive conduct." *Id.* at 134-35. In *Short Sale*, this analysis required determining whether the SEC had authority to regulate, and had regulated, "the role of the prime brokers in short selling." *Id.* at 134-36. The Court found both factors satisfied even though the legal authority invoked did not mention, and the SEC's enforcement efforts had not focused on, borrowing fees, the subject of the purported conspiracy. *Id.* at 135-36. The Court concluded that the fourth *Billing* factor, concerning the risk of practical conflict, was the only one to require assessment of the specific anticompetitive conduct alleged. *Id.* at 136-37.

Short Sale also held that in evaluating the fourth *Billing* factor, a court must consider both actual and potential conflicts between the securities and antitrust laws. Because a "potential conflict . . . may exist even if there is no conflict that is actual and immediate," the Court concluded that "[i]t is therefore not decisive that neither securities law nor antitrust law allows—or encourages" the anticompetitive conduct alleged. *Id.* at 138.

Indeed, in addressing the nature of the "conflict" relevant to the fourth factor, the *Billing* Court concluded that a "serious conflict" sufficient to preclude application of antitrust laws could exist even where the SEC "has *disapproved* (and

. . . will continue to disapprove) the conduct that the antitrust complaints attack." 551 U.S. at 279 (emphasis in original). In such circumstances, an antitrust suit could still be "practically incompatible with the SEC's administration of the Nation's securities laws," where "only a fine, complex, detailed line separates activity that the SEC permits or encourages . . . from activity that the SEC must (and inevitably will) forbid." *Id.* at 277, 279. To determine where such lines should be drawn requires "securities-related expertise," and the problem is compounded because "evidence tending to show unlawful antitrust activity and evidence tending to show lawful securities marketing activity may overlap, or prove identical." *Id.* at 281-82. Allowing antitrust liability in such circumstances would create a substantial risk that securities industry participants would be subject to erroneous and inconsistent results emerging from "different courts with different nonexpert judges and different nonexpert juries," and that joint activity permitted and encouraged by the SEC would be chilled. *Id.* at 279-83.

Billing also made clear that antitrust and securities regulation could be "practically incompatible" even in the absence of present conflicts or line-drawing difficulties, where antitrust liability could penalize or deter conduct that the SEC currently prohibits but might permit in the future. *Id.* at 277, 279-81. Such circumstances particularly demand securities expertise, rather than ad hoc decisions by lay antitrust juries, because "who but a securities expert could say

whether the present SEC rules set forth a virtually permanent line, unlikely to change in ways that would permit the sorts of . . . conduct that it now seems to forbid?" *Id.* at 280. *Billing* also found relevant that there was an "unusually small" need for antitrust enforcement in light of the SEC's broad enforcement authority, the SEC's statutory directive to take into account competitive considerations, and investors' ability to bring lawsuits and obtain damages under the securities laws. *Id.* at 283-84.

The Court below expressly, and properly, followed the framework described in *Billing* and *Short Sale* in concluding that Plaintiffs' antitrust claims are precluded by the federal securities laws.[4]

2. All Four *Billing* Factors Support Preclusion Here

a. Plaintiffs Concede That ARS Is an Area of Financial Market Activity That the Securities Laws Seek to Regulate

The District Court below correctly concluded that "[t]he auction rate securities market lies squarely within an area of market activity that the securities laws seek to regulate"; hence, the first *Billing* factor weighs in favor of preclusion. (JA 409.) As the Court below observed, ARS comprise $330 billion of debt

[4] This Court indicated in *Short Sale* that it "need not address the weight to be accorded" to each of the four factors because all four were satisfied in that case, thereby suggesting that not all four *Billing* factors need be satisfied for preclusion to be appropriate. 588 F.3d at 138 n.6. While Defendants believe that all four factors are satisfied here, the factors favoring preclusion far outweigh other considerations.

securities that "raise capital for municipalities and corporations and provide a means to spread ownership and diversify risk." (*Id.*) The SEC has stated that its "mission . . . to protect investors, maintain fair and orderly securities markets, and facilitate capital formation . . . extends to the market for auction rate municipal securities." (*Id.*) The SEC has demonstrated that commitment in practice by investigating ARS practices, entering into consent decrees with ARS broker-dealers, and reporting to Congress concerning ARS developments. Plaintiffs concede that this factor is satisfied. (Opening Br. at 23 n.11.)

b. The SEC Has Clear Statutory Authority Over the Role of Broker-Dealers in Auction Rate Securities

The second *Billing* factor requires "the existence of regulatory authority under the securities law." 551 U.S. at 275. As the District Court below found, there can be no question that the SEC possesses, and has repeatedly exercised, "'considerable power to forbid, permit, encourage, discourage, tolerate, limit or otherwise regulate virtually every aspect' of the ARS market"; hence, the second *Billing* factor weighs in favor of preclusion. (JA 410.)

Section 15(c) of the 1934 Act, 15 U.S.C. § 78*o*(c), prohibits broker-dealers from effecting a securities transaction or attempting to induce the purchase or sale of a security "by means of any manipulative, deceptive, or fraudulent device or contrivance," and provides the SEC with broad power to "define, and prescribe means reasonably designed to prevent, such acts and practices,"

including the power to issue orders requiring compliance. 15 U.S.C. § 78*o*(c)(1)(A), (c)(2)(D), (c)(4). Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), also forbids the use of "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." Indeed, the Supreme Court and this Court have already invoked these statutory provisions in *Billing* and *Short Sale* as a source of "regulatory authority under the securities laws" satisfying the second *Billing* factor. *See Billing*, 551 U.S. at 277; *Short Sale*, 588 F.3d at 134; *see also Finnegan v. Campeau Corp.*, 915 F.2d 824, 831 (2d Cir. 1990) (finding preclusion because SEC could regulate agreements between bidders "by virtue of its authority to define fraudulent, deceptive or manipulative practices and to prescribe means to prevent such practices"). As the Supreme Court has held, the SEC has authority "to prohibit the full range of ingenious devices that might be used to manipulate securities prices." *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477 (1977).[5]

Plaintiffs' principal argument in response is the surprising proposition that the SEC only has authority to regulate "registration, reporting and disclosures concerning ARS," but not the conduct of broker-dealers concerning ARS.

[5] *See also, e.g.*, Section 17(a) of the 1933 Act, 15 U.S.C. § 77q(a) (making it unlawful to employ any device, scheme, or artifice to defraud in the offering of a security); Section 9(a)(6) of the 1934 Act, 15 U.S.C. § 78i(a)(6) (giving the SEC authority to make rules and regulations to regulate joint price stabilization practices following an initial securities offering); Section 19 of the 1934 Act, 15 U.S.C. § 78s (giving SEC the power to regulate securities broker-dealers through oversight of self-regulatory organizations).

(Opening Br. at 37.) That crimped reading of the SEC's authority is inconsistent with the plain language of the statutes, contrary to Second Circuit precedent, and belied by the SEC's actions, which have repeatedly extended to regulating the bidding and other conduct of ARS broker-dealers. *See, e.g.*, JA 116 (*Mun. Auction Rate Sec.*, 2008 SEC No-Act. LEXIS 396 (Mar. 14, 2008) (permitting broker-dealers to accept bids from issuer of municipal ARS in auctions for that issuer's securities)); JA 222-24 (*In re Bear, Stearns & Co. Inc.*, 2006 SEC LEXIS 1246 (May 31, 2006) (issuing cease-and-desist order and imposing sanctions, prohibiting certain broker-dealer conduct in ARS auctions, such as "completion of open or market bids" or "prioritization of bids," while expressly permitting other conduct, such as broker-dealers' bidding on behalf of their own proprietary accounts, as long as disclosure is adequate)); *see also Finnegan*, 915 F.2d at 831 (rejecting argument that "the SEC is only empowered to regulate in the area of disclosure" because it "misperceives the scope of that federal agency's power" to regulate fraudulent, deceptive and manipulative conduct). If Plaintiffs were correct, the SEC would have lacked authority to take these actions.

Plaintiffs also argue that whatever authority the SEC has, it somehow fails to reach the broker-dealers' alleged mass withdrawal from ARS. (Opening Br. at 33.) That is not only incorrect, but, as this Court has made clear, it is the wrong question. In *Short Sale*, the Court clarified that the relevant question for the

second factor was whether the SEC had regulatory authority over the general "role of the prime brokers in short selling and . . . the borrowing fees charged by prime brokers," not over the particular anticompetitive conspiracy alleged. 588 F.3d at 134-35. Similarly, in this case, the relevant question for the second factor is whether the SEC has regulatory authority over the role of broker-dealers in ARS auctions, not the alleged conspiracy to jointly withdraw from the marketplace.

In any event, the SEC's authority does in fact extend to any such "conspiratorial" conduct among the Defendants. Plaintiffs' unsupported assertion that "a conspiracy to drop out of a market altogether is not a 'manipulative device'" is incorrect. (Opening Br. at 33.) A purported agreement among the country's largest financial institutions not to bid in auctions could have price effects and, if the SEC were to deem it manipulative, could fall within the scope of the same statutory authority cited in *Billing* and *Short Sale*. Even under its authority over disclosures, which Plaintiffs do not question, the SEC could assert that Defendants' failure to disclose an alleged agreement simultaneously to withdraw from the ARS market was a material omission, thus defrauding investors and issuers who dealt with the Defendants while such agreement was in effect.[6]

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[6] None of the cases cited by Plaintiffs has any bearing on the second *Billing* factor, because none concerns the extent of the SEC's authority over broker-dealers. In *In re Municipal Derivatives Antitrust Litigation ("Municipal Derivatives")*, 700 F. Supp. 2d 378, 404 (S.D.N.Y. 2010), the court held that an antitrust claim of bid-rigging and price-fixing in transactions related to the reinvestment of municipal bond proceeds was not precluded by IRS regulations governing the tax-exempt status of such bonds, based on the

c. The SEC Has Actively Regulated Broker-Dealers in Auction Rate Securities, Including Investigating the Mass Auction Failures Alleged to Be Collusive in Plaintiffs' Complaints

From the inception of ARS in the early 1980s, the SEC has actively—indeed, vigorously—exercised its regulatory authority over the activities of ARS broker-dealers, as required under the third *Billing* factor. Hence, the District Court correctly concluded that the SEC has exercised "its authority to investigate and regulate the ARS market, including the alleged practices challenged by the Plaintiffs" (JA 410), and the third *Billing* factor weighs in favor of preclusion.

An abbreviated list of the SEC's regulation of ARS and ARS broker-dealer activity includes its regulation of: ARS bidding practices, ARS registration requirements, accounting treatment for ARS, systems for centralized reporting and dissemination of information about ARS, and the entities that may purchase ARS.[7]

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unremarkable proposition that the anticompetitive conduct alleged "goes far beyond an attempt to avoid taxes." Two more of Plaintiffs' cases (one in dicta) declined to extend *Billing* to preclude antitrust actions alleging agreements among *investors in private transactions* because of limitations on the SEC's authority over private market transactions, limitations that have no bearing on the extent of SEC authority over broker-dealers. *Penn. Ave. Funds v. Borey*, 569 F. Supp. 2d 1126 (W.D. Wash. 2008); *Dahl v. Bain Capital Partners*, *LLC*, 589 F. Supp. 2d 112 (D. Mass 2008) (cited in Opening Br. at 36-37). These out-of-circuit cases are also of limited if any authority in this Circuit, as they reject *Finnegan*, 915 F.2d 824, which remains the law of this Circuit. *Eagletech Communications Inc. v. Citigroup, Inc.*, No. 07-60668-CIV, 2008 U.S. Dist. LEXIS 49432, at *31-32 & n.12 (S.D. Fla. June 27, 2008), also cited by Plaintiffs, concerned RICO claims, and the court never reached the question of *Billing* preclusion.

[7] JA 120-30 (SEC No-Action Letters, 1984 SEC No-Act. LEXIS 2691 (May 20, 1984) (responding to query about filing requirements related to ARS); 1984 SEC No-Act. LEXIS 2692 (July 22, 1984) (same); 1984 SEC No-Act. LEXIS 2719 (Nov. 12, 1984) (same)); JA 132-33 (SEC No-Action Letter, 1988 SEC No-Act. LEXIS 1277 (Sept. 7,

In 2006, the SEC concluded a two-year, industry-wide investigation into ARS broker-dealers' underwriting and bidding activities (JA 35 ¶ 74), promulgating rules through consent decrees that tightly regulate ARS broker-dealer conduct. The SEC permitted broker-dealers to bid for their proprietary accounts, even if those bids affected the clearing rate for ARS or prevented auctions from failing, provided that the practice was properly disclosed. (JA 219, 223 (*In re Bear, Stearns & Co. Inc.*, 2006 SEC LEXIS 1246).) The SEC prohibited other ARS broker-dealer practices, including processing "open bids" (in which the broker-dealer designated some or all of the bid's parameters after viewing other orders), prioritizing bids of favored investors, and submitting or revising bids after bid submission deadlines. (*Id.* at 222-24.) As the Court below observed, the Complaints allege that the 2006 consent decrees directed broker-dealers to "cease engaging in [certain] practices," and also indicated that the SEC "had explored

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1988) (setting forth position on proper treatment of ARS by money market mutual funds)); JA 213-17 (*In re Lehman Bros. Inc.*, 1995 SEC LEXIS 2119 (Aug. 15, 1995) (SEC Release imposing sanctions related to ARS practices)); JA 139-45 (SEC No-Action Letter, 2002 SEC No-Act. LEXIS 506 (May 10, 2002) (opining that money market funds could purchase auction rate preferred stock)); JA 207, 209 (SEC Comment Letter, 2005 SEC Comment LEXIS 8438 (Dec. 14, 2005) (issuing guidance on appropriate treatment of ARS holdings in SEC reporting documents)); JA 115-16 (SEC No-Action Letter, 2008 SEC No-Act. LEXIS 396 (Mar. 14, 2008) (allowing municipal ARS issuers to bid in their own auctions)); JA 291-300 (SEC Release No. 34-59212 (Jan. 7, 2009) (approving rule change establishing centralized system providing public access to information about ARS)); JA 455-60 (SEC Release No. 34-59873 (May 6, 2009) (soliciting comments on proposed rule change regarding maintenance of records for brokers and dealers of municipal ARS)).

collective conduct relating to preventing market failure." (JA 35 ¶ 74; JA 69 ¶ 73; JA 411.)

More recently, as the District Court found, the SEC "has undertaken an ongoing investigation into the specific events at issue in this case: the collapse of the ARS market in February 2008." (JA 411.) As the Director of the SEC's Division of Enforcement testified to the House Committee on Financial Services, the SEC "deployed tremendous resources to discover and identify potential wrongdoing." (JA 248-49.) Director Thomsen reported that the SEC had investigated, among other things, "the reasons why the firms stopped supporting the auctions in mid-February." (JA 249.) Director Thomsen also explained to Congress the SEC's view of the reasons that the market froze, including: the "significant increase in the size of the ARS market . . . requir[ing] the firms to find more and more customers to bid in the auctions"; "the rating agencies' downgrades of the monoline insurers . . . result[ing] in the loss of customers willing to invest in ARS"; and "the sub-prime mortgage and credit crisis that unfolded throughout the second half of 2007, which limited the firms' ability to support the auctions with their own capital." (JA 248.)

The SEC subsequently proposed new rules for ARS broker-dealers and reached settlements requiring a number of broker-dealers to purchase at par value ARS held by clients, including a nearly $30 billion settlement described by

then-SEC Chairman Christopher Cox as "the largest in SEC history, and represent[ing] the largest return of customer money in the agency's 75 years." (JA 259-90 (SEC Releases reporting settlements); JA 287-90 (SEC Litig. Release No. 20824 (Dec. 11, 2008)).) The SEC also filed civil complaints against various broker-dealers alleging, among other charges, fraudulent or manipulative conduct, in violation of 15 U.S.C. § 78*o*(c), relating to the collapse of the ARS market in February 2008. *See, e.g.*, *SEC v. Banc of Am. Sec. LLC*, No. 09 Civ. 5170 (S.D.N.Y. Compl. filed June 3, 2009); *SEC v. RBC Capital Markets Corp.*, No. 09 Civ. 5172 (S.D.N.Y. Compl. filed June 3, 2009); *SEC v. Deutsche Bank Sec. Inc.*, No. 09 Civ. 5174 (S.D.N.Y. Compl. filed June 3, 2009); *SEC v. Morgan Keegan & Co. Inc.*, No. 09 Civ. 1965 (N.D. Ga. Compl. filed July 21, 2009).

Plaintiffs cannot dispute that this history represents evidence of robust SEC regulation of ARS, including of broker-dealer conduct. Instead, Plaintiffs' only response is that the SEC did not bring enforcement actions concerning the purported conspiracy among the Defendants to withdraw from the ARS market in February 2008. (Opening Br. at 39-40.) That argument ignores this Court's guidance in *Short Sale* that the third *Billing* factor should be evaluated based not on whether the SEC has exercised regulatory authority over the specific anticompetitive conduct alleged, but on whether it has exercised such authority over the general activity at issue—as the SEC has clearly done with respect to the

ARS bidding activities of broker-dealers. Moreover, the SEC did seek to address and remedy the specific harm that Plaintiffs complain stemmed from the auction failures, *i.e.*, the illiquidity of the securities. The settlements that the SEC negotiated allowed many ARS purchasers to sell their ARS at par value to the broker-dealers managing the auctions. Thus, the SEC has exercised authority over the general activity at issue, as well as the events relating to the auction failures, and taken action to remedy any harm caused by those events. Plaintiffs' argument also misses the point of preclusion: it is properly within the SEC's expert discretion to determine whether, how and when to regulate particular securities market conduct, and its enforcement agenda cannot be dictated by private antitrust plaintiffs. There can be many reasons that the SEC chooses not to bring an enforcement action against particular market conduct—including that the SEC sees no evidence that it exists. But, in any event, there is no indication that the SEC believed that it would be beyond its jurisdiction or capabilities to pursue remedies for a "concerted mass withdrawal" by ARS broker-dealers, had it occurred.

For these reasons, Plaintiffs' claim that the District Court misunderstood Director Thomsen's report to Congress concerning the SEC's investigations is both irrelevant and incorrect. (Opening Br. at 38-39.) Plaintiffs are incorrect because Director Thomsen testified that the SEC investigated the reasons broker-dealers stopped supporting auctions in February 2008. (JA 249.)

That the SEC did not identify a purported collusive withdrawal by broker-dealers as a cause of the market freeze, and focused instead on sales and marketing issues in its enforcement actions, hardly implies that the SEC "did not investigate" the possibility of "collusion . . . at all," as Plaintiffs illogically assert. (Opening Br. at 39.) Plaintiffs' argument is also irrelevant because, even putting aside the most plausible inference that the SEC saw no "collusion" worth pursuing, it was within the SEC's discretion to determine its own regulatory response to the ARS auction failures. Director Thomsen's testimony, like the rest of the record, provides not the slightest hint that the SEC regarded itself as constrained from extending its active regulatory oversight of ARS to include unmasking, and taking enforcement action against, a conspiracy by broker-dealers simultaneously to abandon the ARS market—had it found any evidence of such a conspiracy.

d. Maintenance of Plaintiffs' Antitrust Suit Is Practically Incompatible with the SEC's Regulation of Auction Rate Securities

The District Court rightly determined that "the securities laws are in serious conflict with the antitrust laws within the ARS context at issue in this case" because of both actual and potential conflicts between antitrust and securities regimes, and because there is an "unusually small" need for antitrust enforcement of ARS broker-dealer conduct. (JA 413-16.) Hence, the fourth *Billing* factor weighs in favor of preclusion.

i. Actual Conflict

As the District Court observed, "the SEC has permitted or encouraged interactions amongst broker-dealers," including recognizing "that ARS issuers may retain multiple broker-dealers to jointly underwrite ARS offerings and jointly manage ARS auctions." (JA 413.) The SEC has determined that broker-dealers "may bid[] for their proprietary accounts," including in jointly underwritten or managed auctions. (JA 413-14; JA 222-23 (*In re Bear, Stearns & Co. Inc.*, 2006 SEC LEXIS 1246).) The SEC has also approved of a collective process through which broker-dealers have developed model ARS disclosures. (JA 311, 313 (Sec. Indus. and Fin. Mkts. Assoc., *Best Practices for Broker-Dealers of [ARS]*, May 31, 2006 Expos. Draft ("[SIFMA] appreciates the time and effort taken by the SEC staff to review these Best Practices")).) Such joint conduct "would inherently require some level of communication amongst broker-dealers." (JA 413-14 (citing *In re Bear, Stearns*, 2006 SEC LEXIS 1246).) The SEC has approved of such conduct in numerous releases,[8] and by doing so, "must have considered the possibility of prohibiting it," but instead decided to "allow[] such interactions amongst broker-dealers to continue." (JA 413-14.)

[8] JA 222 (*In re Bear, Stearns & Co. Inc.*, 2006 SEC LEXIS 1246); JA 231 (*In re Deutsche Bank Trust Co. Am.*, 2007 SEC LEXIS 30 (Jan. 9, 2007)); JA 237 (*In re Citigroup Global Markets, Inc.*, 2007 SEC LEXIS 944 (May 7, 2007)); JA 243 (*In re First Southwest Co.*, 2008 SEC LEXIS 1214 (May 27, 2008)).

Such permitted communications present the risk of actual conflict between securities and antitrust regulation of ARS. While such communications are permitted by the SEC, they also could be construed as evidence of anticompetitive conduct prohibited by antitrust law. As this Court observed in *Short Sale*, it would be "a lot to expect a broker 'to distinguish what is forbidden from what is allowed,' so that the broker exchanges just so much information as required" to carry out the permissible joint management of ARS auctions, or joint communication concerning customer bids or permissible disclosures, "but not an iota more—or suffer treble damages." 588 F.3d at 137 (quoting *Billing*, 551 U.S. at 280). Moreover, as the Supreme Court observed in *Billing* and this Court observed in *Short Sale*, the very same conduct—such as communications regarding support bids in jointly managed auctions, or secondary market transactions between brokers—could be construed by a jury as evidence of either permissible communication in aid of the market or prohibited antitrust conspiracy.

Because of the practical difficulty in drawing such lines, and the risk of engaging in permissible conduct giving rise to inferences of impermissible anticompetitive activity, brokers would have "'an incentive . . . to curb their permissible exchange of information and thereby harm the efficient functioning'" of the ARS market. (JA 414-15 (quoting *Short Sale*, 588 F.3d at 138)); *see also Billing*, 551 U.S. at 282. Broker-dealers would have an even greater incentive to

steer well clear of activity permitted and encouraged by the SEC if such activity could expose them to antitrust claims to be tried before "nonexpert juries" in different courts across the country with the attendant risk of unpredictable and inconsistent results.

Plaintiffs' primary response to the District Court's conclusion that these circumstances created an actual conflict is to argue that Plaintiffs know better than the SEC whether joint conduct is conducive to the efficient functioning of ARS markets. Plaintiffs dispute that the joint activity among ARS broker-dealers that the SEC permits, and which the Complaint acknowledges occurs (JA 35 ¶ 58), "is vital or necessary to the efficient functioning of the ARS auctions." (Opening Br. at 25.) As Plaintiffs argue, "[h]ere, there is no evidence that communications among ARS broker-dealers, *even though permitted by the SEC*, are required or otherwise necessary to the efficient functioning of the ARS market." (Opening Br. at 27 (emphasis added).) There is of course no basis in *Billing* or securities law for limiting the SEC's power to the regulation of practices that some unspecified authority—let alone private plaintiffs—deems "necessary" to securities markets, whatever that concept might mean. Plaintiffs' argument demonstrates that they have missed one of the fundamental points of *Billing*: it is for the SEC, not for lay juries or antitrust plaintiffs, to determine whether a practice is conducive to the

efficient functioning of the securities markets, and where the SEC has made such a determination, antitrust law must yield.

Equally meritless is Plaintiffs' claim that there is no possibility for confusion or chilling effects here because "[a] jury could easily distinguish between joint activity of two or more defendant broker-dealers about the auction an issuer hired them to manage, and joint activity and communications among all the defendant broker-dealers concerning all the other auctions, most of which they had not been hired to manage." (Opening Br. at 28). But if lay antitrust juries are left to determine whether permissible exchanges between broker-dealers relating to jointly managed auctions, or any other permissible communications between broker-dealers, reflect or relate to an allegedly impermissible agreement or information-sharing between those broker-dealers, joint broker communications and practices sanctioned by the SEC could be severely chilled.[9]

ii. Potential Conflict

Billing made clear that the possibility for potential future conflict between securities and antitrust regulation is also relevant to the preclusion

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[9] Plaintiffs' references to cases purportedly showing that complex line-drawing is unnecessary in certain circumstances are all beside the point because none of those cases arises under the securities laws. It is irrelevant to this case whether or not it is difficult to distinguish anticompetitive exchanges from communications among competitors that are permissible under the tax laws or the commodities laws. (Opening Br. at 26-27 (citing *In re Western States Wholesale Natural Gas Antitrust Litig.*, 661 F. Supp. 2d 1172 (D. Nev. 2009); *Municipal Derivatives*, 700 F. Supp. 2d 378).)

analysis. This Court in *Short Sale* devoted a separately-titled section of its opinion to analyzing "potential conflict." 588 F.3d at 138. Likewise, the District Court below concluded that "it is reasonable to expect that the SEC may permit further collective action or joint bidding by broker-dealers to restore liquidity to the ARS market," and the potential for conflict between such joint arrangements and antitrust regulation was significant to its preclusion analysis. (JA 414.) Yet, in their opening brief to this Court, Plaintiffs relegate their discussion of the potential conflicts between antitrust and securities law to a footnote. (Opening Br. at 32 n.15.) It is easy to see why. The potential for conflict between SEC regulation of ARS and antitrust enforcement is profound.

If, as the District Court predicts, the SEC decides to permit joint broker-dealer conduct to return liquidity to ARS auctions, offer temporary lending solutions to holders of illiquid securities, create a secondary market for ARS, or otherwise restructure these securities, the SEC would have to allow broker-dealers some room for communication about the possibility of *not* participating in such arrangements—a conversation that would be nearly indistinguishable from the purportedly anticompetitive conduct alleged in the Complaints. (JA 414.) It would only harm investors, and impair the efficiency of the capital markets, if broker-dealers were deterred from participating in such potentially SEC-sanctioned activity by the threat of antitrust liability.

Plaintiffs' only response to this argument is to denounce it as "speculative." (Opening Br. at 32 n.15.) If that is so, it is speculation recommended by the Supreme Court. In *Billing*, the Supreme Court asked "who but the SEC itself" could predict whether it might *reverse* a current rule, thereby causing a conflict with antitrust law. 551 U.S. at 281. It was precisely the difficulty of predicting the SEC's future course that led the Supreme Court to counsel deference and preclusion. Similarly here, it should be for the SEC to determine if and when it will expressly endorse broader cooperation and communications among ARS broker-dealers, including to help revitalize the ARS market. That possibility is hardly remote or theoretical. While there is no requirement in *Billing* or *Short Sale* that a potential regulatory change must somehow have been foreshadowed in past regulatory history to be cognizable under *Billing*, as Plaintiffs incorrectly suggest, the SEC has already expressly permitted joint broker-dealer management of ARS auctions and broker-dealer collaboration on investor disclosures. Given the SEC's expressed concern over the current situation of ARS investors, it is no great leap to imagine that it may support further cooperation among broker-dealers to restore liquidity to ARS markets.

iii. Unusually Small Need for Private Antitrust Enforcement

Preclusion is further warranted when the "enforcement-related need for an antitrust lawsuit is unusually small." *Billing*, 551 U.S. at 283. As the

District Court correctly concluded, that need is unusually small here for two reasons. *First*, "the SEC has thoroughly exercised its authority to regulate the ARS market, including an ongoing investigation into the collapse of the market in February 2008." (JA 416.) The SEC's investigations have, to date, resulted in numerous settlements under which Defendants have repurchased billions of dollars of ARS held by investors.[10] In pursuing these investigations, the SEC was, as always, statutorily "'required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations.'" (JA 416 (quoting *Billing*, 551 U.S. at 283 (citing 15 U.S.C. § 77b(b))).)

Second, as *Billing* says, there is a "diminished need for antitrust enforcement" where investors and issuers "may bring lawsuits and obtain damages under the securities law." 551 U.S. at 283-84. As the Court below observed, "dozens of securities lawsuits regarding ARS broker-dealer conduct were filed against virtually all Defendants before these antitrust actions were filed." (JA 416; JA 416 n.4 (citing twenty-eight cases).) Many of those securities cases allege virtually the same conduct that the Complaints here allege.[11] As the Supreme

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10 *See, e.g.*, JA 251 (testimony of SEC Director of Enforcement Thomsen referencing settlements against four broker-dealers making available over $40 billion in liquidity to customers); *see also* JA 258-90 (SEC Releases and Litigation Release announcing settlements with numerous broker-dealers).

11 *See, e.g.*, *Wedgewood Tacoma LLC v. Citigroup Inc.*, No. 1:08-4360 (S.D.N.Y. Compl. filed May 8, 2008) ("[O]n February 13, 2008, a stunning 87% of all ARS auctions suddenly failed when Citigroup and all of the other major broker-dealers abruptly refused

Court said in *Billing*, to permit an antitrust suit to proceed in such circumstances risks circumventing congressionally mandated procedural requirements governing securities litigation, as enacted in the Private Securities Litigation Reform Act and other legislation. 551 U.S. at 284. As the Court below concluded, Plaintiffs' antitrust claims resemble just such a "securities complaint in antitrust clothing." (JA 417.)

B. THIS COURT CAN AFFIRM THE DISTRICT COURT'S DECISION ON THE GROUNDS THAT PLAINTIFFS HAVE FAILED TO PROPERLY PLEAD CONSPIRACY OR INJURY

Although the District Court did not reach Defendants' other arguments for dismissal—which were fully briefed below—this Court has the "ability to affirm on grounds different from those relied upon by the district court." *Fisher v. JPMorgan Chase & Co.*, 303 F. App'x 979, 981 (2d Cir. 2008); *see also Adirondack Transit Lines, Inc. v. United Transp. Union, Local 1582*, 305 F.3d 82, 88 (2d Cir. 2002); *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 63-64 (2d Cir. 1997).

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to continue to prop up the auctions. . . . Consequently, the entire ARS market, totaling approximately $330 million, shut down virtually instantaneously and completely, with ARS investments becoming illiquid almost overnight."); *Silverstein v. TD Ameritrade Holding Corp.*, No. 1:08-5467 (D. Neb. Compl. filed June 17, 2008) ("[O]n or about February 13, 2008, the broker-dealers supporting the ARS market simply stopped participating in ARS auctions and walked away entirely.").

1. The Complaints Fail to Plead a Violation of Section 1 of the Sherman Act

Alternatively, the District Court's dismissal should be affirmed for the independent reason that the Complaints fail to plead a violation of Section 1 of the Sherman Act.

a. The Complaints Do Not Adequately Allege an Agreement Under *Twombly* and *Iqbal*

To withstand a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint alleging an antitrust conspiracy must contain an "independent allegation of actual agreement among" defendants, or "enough factual matter (taken as true) to suggest that an agreement was made." *Twombly*, 550 U.S. at 556, 564. The alleged facts must not only be consistent with an inference of conspiracy, but also "render a § 1 conspiracy plausible." *Id.* at 556; *see also In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007) (*Twombly* "require[s] enough facts to 'nudge [plaintiffs'] claims across the line from conceivable to plausible'") (quoting *Twombly*, 550 U.S. at 570) (alteration in original). As the Supreme Court has stated, "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. "[L]abels and conclusions" and "naked assertion[s] devoid of further factual enhancement" are not enough. *Id.* (internal quotation marks omitted).

Under this pleading standard, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point in time does not supply facts adequate to show illegality." *Twombly*, 550 U.S. at 556-57; *see also DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999) ("[A] court is not required to accept such terms [as "conspiracy" or "agreement"] as a sufficient basis for a complaint.").

Despite the Complaints' allegations of a grand and long-standing conspiracy by Defendants in the "purchase, sale, and underwriting" of ARS (JA 35 ¶ 111, JA 69 ¶ 111), Plaintiffs now claim that the antitrust violation they allege "is confined to the broker-dealers' collusion to simultaneously exit the ARS market" in February 2008. (Opening Br. at 7 n.3.) However, far from saving the Complaints from dismissal under *Twombly*, Plaintiffs' narrowed allegation only moves the Complaints further away from meeting the basic pleading requirements for an antitrust conspiracy.

At most the Complaints (and Plaintiffs' retooled claims) allege what *Twombly* expressly held was insufficient to state a claim: parallel conduct and a "bare assertion of conspiracy." *Twombly*, 550 U.S. at 556. The Complaints plead no facts showing any "actual agreement" to restrain trade in ARS between any two

or more Defendants, let alone facts reflecting the alleged agreement among all Defendants to simultaneously withdraw support from ARS auctions. Plaintiffs offer no specifics on the time or place such an agreement was initiated, coordinated or orchestrated. Nor do they allege a single meeting, phone call or conversation in which some or all Defendants discussed the supposed conspiracy. And Plaintiffs point to no document, e-mail or other communication that plausibly suggests a coordinated effort to simultaneously abandon ARS auctions (much less a massive conspiracy to swindle ARS investors and/or issuers over a nearly five-year period).[12]

In place of particularized allegations of an agreement, the Complaints offer only conclusory incantations of a "conspiracy," a "collusive course," a "coordinated boycott," "joint" conduct and the like; these terms or some variation of them are repeated no fewer than twenty-seven times throughout each Complaint. (*See, e.g.*, JA 35 ¶ 8, JA 69 ¶ 8; JA 35 ¶ 70, JA 69 ¶ 69; JA 35 ¶ 80, JA 69 ¶ 79.) Once these conclusory terms are excised from the Complaints, Plaintiffs are left with nothing more than vague allegations based on their characterizations of two e-mails, each of which is *internal* to one Defendant. As alleged, one e-mail refers to

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[12] Furthermore, the majority of Defendants (specifically, UBS AG, JPMorgan Chase & Co., Citigroup Inc., Merrill Lynch & Co., Inc., Morgan Stanley, Bank of America Corp., Wachovia Corporation, The Goldman Sachs Group, Inc., Royal Bank of Canada, and Deutsche Bank AG) are not proper parties to these actions, because those entities did not act as underwriters or dealers of auction rate securities.

"discussions with citi" regarding student loan ARS, although the Complaints do not say anything further about these alleged discussions. (JA 35 ¶ 92; JA 69 ¶ 91.) The other e-mail, as alleged, refers to a conversation with a person from another broker-dealer "where the latter talked about the problems his company was facing in the auction rate securities market and what steps it was taking," as well as what another broker-dealer was doing. (JA 35 ¶ 92; JA 69 ¶ 91.)

Tellingly, Plaintiffs do not—because they cannot—allege that these e-mails reflect an actual agreement or suggest that the few conversations alleged were the consequence of, or a step toward, any agreement. In fact, other e-mails referenced in the Complaints actually negate an inference of conspiracy. For example, Plaintiffs allege that an officer of one Defendant sent an e-mail to its CEO stating: "Watch our competitors closely; if they stop supporting auctions, we have much better freedom to stop [supporting auctions]." (JA 35 ¶ 91; JA 69 ¶ 90.) Plaintiffs also allege that an employee in the research department of another Defendant sent an e-mail to his boss noting that "[w]e've had 3 parties confirm that Lehman is dropping out of the auction business." (JA 35 ¶90; JA 69 ¶ 89.) These alleged communications show that the Defendants had no pre-existing agreement or understanding that they would cease supporting auctions simultaneously. At most, these communications show certain Defendants' awareness of or interest in one another's conduct. But, as the *Twombly* Court expressly recognized, the

interdependence of firms making competitive decisions is not a conspiracy and does not violate the antitrust laws. *See Twombly*, 550 U.S. at 553-54.

Instead, Plaintiffs allege only in the vaguest terms that "Defendants kept up lines of communication with each other during this period in order to engage in such collective action." (JA 35 ¶ 92; JA 69 ¶ 91.) But because there is nothing to suggest (and Plaintiffs do not allege) that any of these undefined communications related to a planned simultaneous withdrawal of support from auctions, they are irrelevant to Plaintiffs' claim. Nor is there any basis for inferring that any of these communications was improper; as described above, there are many legitimate reasons why Defendants might communicate about ARS.[13]

Plaintiffs' hopelessly vague allegations of internal communications involving two Defendants thus fail to provide "any independent allegation of actual agreement" between them, let alone between any of the other fourteen Defendants as to whom Plaintiffs plead nothing.[14] *Twombly*, 550 U.S. at 564. At most,

[13] Competitors in many industries participate in trade associations where they may communicate about matters of common concern, such as problems facing the industry and steps to address those problems. As *Twombly* recognized, however, the mere participation in an industry trade association does not yield an inference of improper inter-firm communication. *See* 550 U.S. at 567 n.12.

[14] The two internal e-mails referenced in the Complaints not only fail to suggest any agreement between any two Defendants—they also fail to discharge Plaintiffs' obligation to describe *each* Defendant's role in the alleged conspiracy. *See Twombly*, 550 U.S. at 565 n.10 (noting that "a defendant seeking to respond to plaintiffs' conclusory allegations

Plaintiffs have alleged "the fact of meetings between persons engaged in competing businesses," which does not create an inference of conspiracy. *United States v. Taubman*, 297 F.3d 161, 166 (2d Cir. 2002); *see also, e.g.*, *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75, 79 (2d Cir. 1980) ("A mere showing of close relations or frequent meetings between the alleged conspirators, however, will not sustain a plaintiff's burden absent evidence which would permit the inference that those close ties led to an illegal agreement."); *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 53 (3d Cir. 2007); *Kreuzer v. Am. Acad. of Periodontology*, 735 F.2d 1479, 1488 (D.C. Cir. 1984).

b. The Complaints Fail To Allege Facts Permitting a Plausible Inference of a Conspiracy from Parallel Conduct

Courts have long recognized that competitors' individual decisions to take similar actions based on knowledge of what others have done or are doing—*i.e.*, "conscious parallelism"—are not in themselves unlawful. *Twombly*, 550 U.S. at 553-54 (conscious parallelism is a "common reaction of 'firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence

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in the § 1 context would have little idea where to begin" where the pleadings "furnishe[d] no clue as to which of the four [defendants] (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place"); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 436 (6th Cir. 2008) ("Generic pleading, alleging misconduct against defendants without specifics as to the role each played in the alleged conspiracy, was specifically rejected by *Twombly*"); *In re Elevator Antitrust Litig.*, 502 F.3d at 50-51 (general allegations "without any specification of any particular activities by any particular defendant . . . . do [] not supply facts adequate to show illegality") (internal citations and quotation marks omitted).

with respect to price and output decisions'") (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)); *see also Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028, 1032-33 (8th Cir. 2000) ("Evidence that a business consciously met the pricing of its competitors does not prove a violation of the antitrust laws."); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 135 (3d Cir. 1999) ("[I]f a firm's motivation is merely to meet rival prices, it would constitute only interdependence."). When allegations of parallel conduct are made in support of a Section 1 claim, "they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *See Twombly*, 550 U.S. at 557. This is because parallel conduct alone, while possibly "consistent" with conspiracy, is "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." (*Id.*)

Plaintiffs here allege nothing more than parallel conduct. But such allegations do not more plausibly suggest the existence of an unlawful agreement than they do lawful, independent conduct. In fact, the Complaints allege nothing to suggest that Defendants' decisions to support auctions, and later to cease that practice, were anything but the product of "natural, unilateral reaction[s] of each company" to the disintegrating economic conditions that affected all ARS

participants uniformly. *Arista Records LLC v. Lime Group LLC*, 532 F. Supp. 2d 556, 578-79 (S.D.N.Y. 2007) (internal quotation marks omitted). The Complaints themselves admit that (1) the failure of any ARS auctions would be detrimental to each Defendant individually, (2) the increasing financial-market instability was well-known, and (3) each Defendant individually was risking capital to purchase ARS into its own inventory to prevent failures:

- "It was known in and throughout the market that [a] perception that the auction market for auction rate securities was anything but liquid would cause investors to exit the market, and would therefore be extremely detrimental to any Defendants' [sic] ability to profit from the market. Thus, no Defendant could afford to, or could afford for any other Defendant to, indicate or signal to investors that the auction rate securities market was anything other than highly liquid." (JA 35 ¶ 66; JA 69 ¶ 65);

- "[T]he market for auction rate securities began to falter with the beginning of the credit crisis in 2007." (JA 35 ¶ 7; JA 69 ¶ 7);

- "Financial institutions, such as Defendants, began reporting billions of dollars in losses," allegedly prompting each Defendant to begin "purchasing large numbers of auction rate securities into their own inventories to ensure the auctions did not fail." (JA 35 ¶ 81; JA 69 ¶ 80); and

- Defendants were risking increasing amounts of their own capital in their own auctions. (JA 35 ¶ 93; JA 69 ¶ 92.)

Assuming the truth of these allegations, each Defendant had a strong, independent economic incentive to support auctions until market conditions were such that no individual Defendant could sensibly continue risking its own capital to maintain liquidity. It is also consistent with the alleged nature of the ARS market that broker-dealers, acting independently out of economic self-interest, would have

monitored the behavior of their competitors and ceased to support auctions when others did. Under the Complaints' allegations, the failure of a critical mass of auctions would have "signal[ed] to investors that the auction securities market was anything but liquid," prompting "investors to exit the market." (JA 35 ¶ 66; JA 69 ¶ 65.) In those circumstances, the rational course for each broker-dealer, acting independently, would have been to cease supporting auctions as well, rather than committing ever-escalating amounts of its own capital. No preceding agreement can be inferred from parallel conduct under these circumstances. Rather, these allegations show, at most, only that firms independently made decisions based upon the same set of information, a circumstance that does not support an antitrust conspiracy claim. *See Twombly*, 550 U.S. at 553-54; *see also id.* at 557 ("[W]ithout that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory.").

As seen, the documents cited in the Complaints cannot be plausibly read as evidence of an agreement rather than independent decision-making. For example, the Complaints allege that one Defendant noted "our peers are working feverishly to restructure and to unload paper to institutions" and how that Defendant "also needed to do its own unloading." (JA 35 ¶ 92; JA 69 ¶ 91.) The Complaints further allege that the same Defendant discussed whether it "should join the competitors . . . in failing auctions of student ARCs [auction rate

certificates]."[15] (JA 35 ¶ 92; JA 69 ¶ 91.) These allegations show only that this Defendant was permissibly monitoring what its competitors were doing—something that would be peculiar *not* to see in a competitive market. *See, e.g.*, *Blomkest Fertilizer*, 203 F.3d at 1034-35 (holding that action "to verify a price on a *completed* sale" fell "far short of excluding the possibility of independent action") (emphasis in original); *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988, 996 (4th Cir. 1990) ("The fact that . . . an employee reports a competitor's pricing policy to his home office and the two companies charge similar prices for their products, without more, cannot support an inference that the two competitors entered into an agreement to share prices."). E-mails cited in the Complaints—suggesting that Defendants were aware of each other's conduct and in some instances followed others' leads in making decisions—show nothing more than a common reaction to an unprecedented financial crisis and do not render Plaintiffs' claim of a conspiracy more plausible than independent conduct.

The allegations in the present case stand in stark contrast to the allegations this Court recently examined in *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314 (2d Cir. 2010). In that case, the Court identified pricing decisions by the defendants which, in the absence of an agreement, would

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[15] This discussion allegedly took place on February 12, 2008 (JA 35 ¶ 92, JA 69 ¶ 91), *after* certain broker-dealers had failed auctions (*see, e.g.*, JA 35 ¶ 90, JA 69 ¶ 89 (confirming Lehman Brothers auction failures in January 2008)), which belies the allegation that Defendants conspired to simultaneously withdraw their support for ARS auctions.

not have been rational or profitable in a competitive market. *Id.* at 324, 327. Thus, the allegations in *Starr*, "taken together, place[d] the parallel conduct in a context that raise[d] a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* at 323 (internal citation and quotation marks omitted). In the present case, however, given the context of the Plaintiffs' own allegations regarding the deteriorating ARS market conditions (JA 35 ¶¶ 7, 66, 81, 93; JA 69 ¶¶ 7, 65, 80, 92), each Defendant's decision to stop supporting auctions for ARS was consistent with its own self-interest and would not have required an agreement to make that decision rational or profitable.

In his concurring opinion in *Starr*, Judge Newman emphasized the importance of the context in which defendants' alleged parallel conduct occurred. *See* 592 F.3d at 328. In analyzing *Twombly*, Judge Newman concluded that, given the historical context surrounding the telecommunication industry and the defendants' actions, it was "entirely understandable" for the *Twombly* Court to have rejected an allegation of parallel conduct as sufficient to permit an inference of agreement. *Id.* at 329. *See also Iqbal*, 129 S. Ct. at 1950 ("Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."). Similarly in the present case, the context of a global financial liquidity and credit crisis in which the demand for

ARS was swiftly and severely declining (JA 35 ¶¶ 7, 81; JA 69 ¶¶ 7, 80), provides ample reason to reject Plaintiffs' attempt to characterize the Defendants' independent actions to cease supporting auctions as parallel conduct supporting a plausible inference of a conspiracy.

2. The District Court Decision Should Be Affirmed Because Neither Complaint Pleads Antitrust Injury

A private antitrust complaint must adequately allege not only a violation of the antitrust laws—which Plaintiffs have not done, as discussed above—but also "antitrust injury," *i.e.*, "'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc.*, 467 F.3d 283, 290 (2d Cir. 2006) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). Specifically, a private plaintiff must allege that its loss "stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990) (emphasis in original). If a complaint lacks "any allegation as to how market-wide competition [is] affected, the complaint fails to allege a claim on which relief may be granted." *Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 245 (2d Cir. 1997).

In this case, the Complaints allege that ARS purchasers were harmed when they were "left with illiquid assets that they cannot either reinvest or use for

their intended business purpose." (*See* JA 35 ¶ 116, JA 69 ¶ 116.) Additionally, ARS issuers allege that they "were obligated to pay a higher interest rate than they would have been required to pay had the auctions not failed." (JA 69 ¶ 8.) With respect to the alleged cause of these purported injuries, Plaintiffs have made clear that the "antitrust violation alleged in the Complaints is confined to the broker-dealers' collusion to simultaneously *exit the ARS market*," while the other allegations of collusive support bidding and misrepresentations regarding ARS are merely "context." (Opening Br. at 7 n.3 (emphasis added); *see also id.* at 33, 40; Hr'g Tr. at 18-19, JA 430.) According to the Complaints, this supposed "exit" or "withdrawal" can be explained only as an alleged agreement to "refuse[ ] to continue to support the [ARS] auctions," which had become unviable because "the number of buyers was insufficient to prevent auction failure" without Defendants' support. (*See* JA 35 ¶ 8, JA 69 ¶ 8; *see also* JA 35 ¶¶ 94, 96, 112, 113(d), 114(B), 125(E); JA 69 ¶¶ 93, 95, 112, 113(d), 114(B), 125(E).)[16]

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[16] While Plaintiffs must plead that Defendants violated the antitrust laws and that this *antitrust violation* caused their purported injuries, the Complaint's own allegations refute the very idea that any conduct (anticompetitive or otherwise) on the part of Defendants caused Plaintiffs' purported injuries. Plaintiffs admit that: the "market for auction rate securities began to falter with the beginning of the credit crisis in 2007," (JA 35 ¶ 7, JA 69 ¶ 7); "demand for auction rate securities by corporate and institutional clients was declining," (JA 35 ¶ 81; JA 69 ¶ 80); and "auctions began to fail *as legitimate demand for auction rate securities virtually dried up*," (JA 35 ¶ 82; JA 69 ¶ 81 (emphasis added); *see also* JA 35 ¶ 7, JA 69 ¶ 7 (noting "increasing lack of genuine market demand")). Consequently, according to Plaintiffs' own allegations, the purported illiquidity and auction failures resulted from a "legitimate" decline in demand for ARS, and the sole effect of any purported "conspiracy" which allegedly included support bidding would have been to forestall—rather than to cause—those failures.

Defendants' decision to no longer support an economically unviable auction process, however—even if, as alleged, that decision was reached collectively—has nothing to do with competition or the antitrust laws. *See, e.g., Johnson v. Univ. Health Servs., Inc.*, 161 F.3d 1334, 1338 (11th Cir. 1998) (defendants' "decision not to subsidize [plaintiff] is not the type of injury that the antitrust laws were intended to prevent"); *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 293 (5th Cir. 1988) ("It is a natural part of a competitive market that products, firms, and—sometimes—entire sectors of the economy fail. A plaintiff does not have a claim under the rule of reason simply because others refuse to promote, approve, or buy its products.").

Plaintiffs' allegations do not fit within any recognized theory of *antitrust* liability for which the effect on competition would be evident—*e.g.*, bid rigging,[17] price fixing,[18] or market allocation. *See Billing*, 551 U.S. at 286

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[17] In a bid-rigging case, competitors purportedly agree not to compete against one another and instead to fix the outcome of a given auction such that a particular competitor wins that auction. Here, the Complaints do not even allege that Defendants compete in ARS auctions (nor is it clear how they would do so or how a Defendant would "win"), much less that Defendants agreed to fix the outcome of one or more auctions in any competitive sense.

[18] Other than several conclusory, boilerplate references to prices, the Complaints do not allege any facts that Defendants collectively decided to set interest rates at any given level in a particular auction or across auctions. (*See, e.g.*, JA 35 ¶ 74; JA 69 ¶ 73 ("[B]roker-dealers collectively had also set artificial 'market' rates at levels they had chosen."); JA 35 ¶ 112, JA 69 ¶ 112 (Defendants acted "to raise, fix, stabilize, and maintain at artificially high levels the prices at which Defendants sold auction rate securities").) In any event, Plaintiffs have now clarified that any purported injury

(Stevens, J., concurring) (noting that alleged conduct "may have enabled the underwriters to divert some of the benefits of the offerings from the issuers to themselves, thus breaching the agents' fiduciary obligations to their principals. But if such an injury did occur, it is not an 'antitrust injury' giving rise to a damages claim by investors"). Indeed, Plaintiffs fail to identify the nature—let alone the reduction—of any "competition" among the Defendants that was affected by the purported agreement to exit the ARS market. *Cf. Brunswick*, 429 U.S. at 489 (holding that "injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation").

At oral argument in the District Court on Defendants' motion to dismiss the Complaints, counsel for Plaintiffs asserted that their theory was premised on an alleged "concerted refusal to deal" among the Defendants. (Hr'g Tr. at 33-34, JA 430; *see also* JA 35 ¶ 8, JA 69 ¶ 8 (referring to purported conspiracy as "boycott").) But to "prevail on a group boycott or refusal to deal claim, a plaintiff must demonstrate that the defendant intends to restrain competition, or to enhance or expand his monopoly, and has acted coercively." *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 73 (2d Cir. 1988). The Complaints nowhere allege that Defendants conspired with one

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resulted only from Defendants' alleged collective withdrawal from the ARS market, and not from any alleged agreements as to ARS pricing.

another to exclude anyone (such as another broker-dealer) from the ARS market to expand their own collective market share, or how an alleged agreement to *exit* the ARS market otherwise may have harmed *competition* or caused antitrust injury to Plaintiffs. Indeed, Plaintiffs allege just the opposite—that Defendants each independently recognized the ARS market was failing and conspired to coordinate their withdrawal in order to limit their individual losses.

Rather than alleging conduct that would support any antitrust injury, Plaintiffs have attempted to take allegations of purported securities fraud and transform them into allegations of an antitrust conspiracy simply by including antitrust jargon. But a complaint does not plead antitrust injury if the alleged injury flows solely from purportedly fraudulent conduct—or the cessation of such fraudulent conduct—that does not harm competition. *See Summey v. Ford Motor Credit Co.*, 449 F. Supp. 132, 139 (D.S.C. 1976) (dismissing Section 1 claim because "sole thrust of plaintiffs' claim is that they were misled," and "it is clear that defendants' alleged conduct was neither aimed at nor had the effect of restricting competition"), *aff'd*, 573 F.2d 1306 (4th Cir. 1978); *see also Bunker Ramo Corp. v. United Bus. Forms, Inc.*, 713 F.2d 1272, 1284-85 (7th Cir. 1983) (dismissing Section 1 claim because "[p]laintiff has not alleged any anticompetitive effect arising from the defendants' conduct," which was "more

akin to a scheme to defraud than a price-fixing scheme”).[19] Here, Plaintiffs allege no injury “flowing from a *reduction in competition* caused by Defendants’ alleged use of deception and false or misleading statements.” *Fair Isaac Corp. v. Experian Info. Solutions Inc.*, 645 F. Supp. 2d 734, 753 (D. Minn. 2009) (emphasis in original); *see Santana Prods. Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 132 (3d Cir. 2005) (declaring fraud allegations “irrelevant” to alleged antitrust violation “because ‘deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned’” (citation omitted)).

[19] Allegations of fraud *may* be part of a purported scheme to violate the antitrust laws *only if* an injury to competition is otherwise pleaded, which Plaintiffs have not done, as described above. *See, e.g.*, *Int’l Travel Arrangers, Inc. v. W. Airlines, Inc.*, 623 F.2d 1255, 1268 (8th Cir. 1980) (use of misleading advertising to maintain monopoly).

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's dismissal of the Complaints.

Dated: November 9, 2010
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Pursuant to the type-volume requirements of Fed. R. App. P. 32(a)(7)(B), this principal brief contains 13,242 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Respectfully submitted,

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