No. 11-13254-BB

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

COMPUCREDIT HOLDINGS CORPORATION,

Plaintiffs-Appellants,

v.

AKANTHOS CAPITAL MANAGEMENT, LLC, ET AL.,

Defendants-Appellees.

On appeal from the United States District Court
for the Northern District of Georgia

EN BANC BRIEF OF *AMICI CURIAE* LOAN SYNDICATIONS AND TRADING ASSOCIATION, MANAGED FUNDS ASSOCIATION, AND SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES AKANTHOS CAPITAL MANAGEMENT, LLC, ET AL.

Moses Silverman
Aidan Synnott
Daniel A. Crane
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

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Attorneys for *Amici Curiae* Loan Syndications and Trading Association, Managed Funds Association, and Securities Industry and Financial Markets Association

CompuCredit Holdings Corporation v. Akanthos Capital Management LLC, et al.,
Docket No. 11-13254-BB

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1, *amici curiae* Loan Syndications and Trading Association, Managed Funds Association, and Securities Industry and Financial Markets Association hereby certify that, in addition to the persons named in the parties' certificates of interested persons, the following individuals or entities may have an interest in the outcome of this litigation:

1. Loan Syndications and Trading Association (*amicus*)
2. Managed Funds Association (*amicus*)
3. Securities Industry and Financial Markets Association (*amicus*)
4. Moses Silverman (attorney)
5. Aidan Synnott (attorney)
6. Daniel A. Crane (attorney)

Moses Silverman

STATEMENT PURSUANT TO FED. R. APP. P. 29(C)(5)

Pursuant to Fed. R. App. P. 29(c)(5), *amici curiae* Loan Syndications and Trading Association, Managed Funds Association, and Securities Industry and Financial Markets Association hereby certify that neither party's counsel authored this brief in whole or in part, and that no persons other than the *amici curiae*, their members, or their counsel contributed any money that was intended to fund preparing or submitting this brief.

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I.
IDENTITY OF *AMICI CURIAE* AND INTEREST IN THE CASE

The Loan Syndications and Trading Association ("LSTA") is a not-for-profit trade association that represents a broad and diverse membership involved in the origination, syndication, and trading of commercial loans. Its 318 members include commercial banks, investment banks, broker-dealers, mutual funds, insurance companies, fund managers, and other institutional lenders, as well as services providers and vendors. LSTA works to foster the development of policies and practices designed to promote just and equitable market principles and facilitate transactions in loans. Since 1995, LSTA has developed standardized practices, procedures, and documentation to enhance market efficiency, transparency, and stability.

The Managed Funds Association ("MFA") is a not-for-profit organization established to enable investors in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA represents the global alternative investment industry and its investors by advocating for sound industry practices and policies that foster efficient, transparent, and fair capital markets. MFA members help pension plans, university endowments, charitable organizations, qualified individuals, and other institutional investors to diversify their investments, manage risk, and generate attractive returns. Collectively, MFA members manage over $850 billion in assets. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, and North America.

The Securities Industry and Financial Markets Association ("SIFMA") brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association ("GFMA").

The interest of *amici* in this case lies in their desire to prevent the creation of a new legal rule contrary to the established principles of antitrust law that could upset the settled expectations and practices of their members and other lenders and corporate borrowers in the market for bank debt and corporate bonds. As described in more detail in the argument that follows, CompuCredit's proposed rule, though superficially tailored, would threaten to freeze all pre-bankruptcy coordination among creditors for existing debt, and to forbid as per se illegal a long-established, near-universal creditor behavior that benefits not only creditors but also borrowers, businesses, and the economy as a whole. Such a restriction would increase the costs of credit and could dramatically constrict credit for all businesses. As a consequence, businesses will be less able to raise needed capital to hire new workers, make new investments, or undertake new projects. Those consequences inevitably will have a chilling effect on the economy as a whole.

II.
STATEMENT OF THE ISSUES

Where a borrower has contractually agreed to repayment of a debt on given terms, is it a per se violation of Section 1 of the Sherman Act for holders of the debt instruments to coordinate their dealings when the borrower seeks to redeem the debt on terms more favorable to itself than those contractually agreed?

III.
SUMMARY OF THE ARGUMENT

CompuCredit borrowed money and then sought to redeem its debts through a tender offer on terms far more favorable to itself than those contractually agreed. Appellees, who were purchasers of distressed debt, allegedly agreed among themselves not to accept CompuCredit's tender offer for less than par value. Consistent with the two circuit court precedents on point, the panel ruled that such post-contact coordination among creditors was not the sort of "restraint of trade" with which Section 1 of the Sherman Act is concerned. The Sherman Act is concerned with competition in open markets, not with the performance of existing contractual obligations.

In this *en banc* rehearing, CompuCredit urges the Court to adopt a radical and unprecedented rule that post-contract coordination by creditors on a borrower's tender offer is per se illegal under Section 1 of the Sherman Act under *Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). Such a rule would run contrary to the longstanding principle that the Sherman Act regulates restraints of trade in open markets, not the performance of existing contractual obligations. It would render potentially illegal a wide variety of coordinating activities by a wide variety of creditors, including banks and other lending institutions.

The consequences of such a decision would be severe for credit markets and the economy as a whole. Coordination among creditors plays an indispensable role in facilitating smooth management of debts, maintaining financial liquidity necessary to business investments and operations, and keeping interest rates low. Committees of creditors are a common feature of out-of-court restructurings and play a critical role in bankruptcy proceedings; and a united creditors group is vital in ensuring that an issuer can successfully resolve its debt-related difficulties pursuant to an efficient and orderly process. The draconian rule of per se illegality proposed by CompuCredit would render illegal many clearly procompetitive practices that benefit not only borrowers like CompuCredit but the economy and society as a whole.

CompuCredit's proposed rule should be rejected in favor of the sensible approach followed by the panel and other circuits.

IV.
ARGUMENT

A. Coordination by Creditors Concerning Preexisting Debt Obligations Facilitates Smooth Functioning of Credit Markets and Helps to Maintain Low Interest Rates

The extension of credit to businesses is essential to the functioning of the American economy, and a contraction of credit would undermine its health. As the Congressionally appointed Financial Crisis Inquiry Commission found, during the credit squeeze that resulted from the 2008-09 financial crisis, employers found it "tougher to borrow to meet payrolls and to expand inventories." Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report* 389 (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf. As businesses faced a credit crunch, they laid off employees. "Without jobs, people could no longer afford their house payments" and were forced into default or foreclosure, and the "surge in foreclosed and abandoned properties dragged home prices down still more." *Id.* at 389-90. "The credit squeeze in financial markets cascaded throughout the economy," not only making it harder for businesses to borrow but also contributing to rising unemployment, increased foreclosures, and a depressed housing market, with disastrous effects for the economy and society as a whole. *See id.* at 389-97.

When credit markets function properly, the forms of available credit are myriad. The members represented by the respective *amici* are primarily interested in the extension of corporate loans and the purchase and sale of corporate loans and corporate bonds.

The scale of business operations in the American economy requires individual borrowers to access credit from multiple sources. Some businesses choose to issue bonds, which are usually tradable in secondary markets. Secondary market trading of bonds is crucially important to the national economy, because the availability of a secondary market makes the bonds more liquid, which in turn drives down their interest rate. According to statistics compiled by SIFMA, the outstanding corporate debt market in the U.S. surpassed $8 trillion as of the first quarter of 2012. Corporate bond issuance exceeded $1 trillion in 2011, with an average daily trading volume for that year of $20.6 billion. *See Statistics and Data Pertaining to Financial Markets and the Economy*, SIFMA, http://www.sifma.org/research/statistics.aspx (last visited June 27, 2012). *See also* Michael MacKenzie & Nicole Bullock, *Wall Street's Looming Finance Vacuum*, Fin. Times, June 20, 2012, *available at* http://www.businessspectator.com.au/bs.nsf/Article/Wall-Street-markets-banks-debt-liquidity-UBS-Goldm-pd20120620-VEST8?opendocument&src=rss (estimating the size of the U.S. corporate debt market at $8 trillion, with over 80,000 separate bond issues).

An important source of credit for medium-sized or larger businesses is corporate loans, but of a different character than the conventional bilateral bank credit facility. Given the magnitude of the financial investments required by many business borrowers and the concomitant magnitude of the risks to lenders, a single bank is often unable to satisfy the full borrowing needs of its clients. Hence, most corporate lending today happens through syndication agreements among a number of banks and institutional lenders, each of which extends credit and therefore obtains rights and protections in the management of the debt. Like bonds, these debt instruments are tradable on the secondary market, which makes them less expensive on the primary market. The modern syndicated lending market gives rise to a fast, efficient, and flexible distribution network that is able to finance leveraged transactions in large volumes. In addition, the more lenders there are in a financial system, the lower the likelihood of systemic risks triggered by the solvency problems of any given lender. Broad dispersion of corporate credit across numerous investors makes the financial system safer. According to the Shared National Credit Review, in 2011, syndicated loans in the United States provided $2.5 trillion in financing to U.S. companies, comprising 8,030 credit facilities to approximately 5,400 corporate borrowers representing a broad range of industries. *See* Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, *Shared*

National Credits Program 2011 Review 4-5, 11 (Aug. 2011). The face value of the distressed and defaulted debt market was $1.46 trillion as of the end of 2011. Edward I. Altman & Brenda J. Kuehne, *Special Report on Defaults and Returns in the High-Yield Bond Market: First Quarter 2012 Review*, New York University Salomon Center, Stern School of Business (May 1, 2012), 3, *available at* http://www.scotlandgroup.com/2012altmanupdate.pdf.

These two longstanding realities of the credit market—the substantial amounts of bond issuance and corporate loan syndication, both with secondary market trading—have inevitably resulted in a fragmentation of credit, which in turn has raised questions as to how creditors can effectively coordinate their actions. Opportunistic, ill-advised, or premature action by any one creditor can jeopardize the interests of all other creditors, as well as the debtor. Hence, many credit instruments not only permit but indeed require collective agreement on major actions affecting the creditors' common interests. For example, it is common for corporate bond indentures to contain a so-called "no-action clause" that bars bondholders from pursuing certain legal remedies against the debtor unless at least 25 percent of the creditors agree on the remedy and provide uniform direction to the indenture trustee. *See generally* Marcel Kahan, *Rethinking Corporate Bonds: The Trade-Off Between Individual and Collective Rights*, 77 N.Y.U. L. Rev. 1040, 1050-51 (2002) (explaining the no-action clause and citing decisions from various jurisdictions holding a variety of creditor claims barred by a no-action clause). Likewise, with credit agreements, changes in material terms such as maturity dates, interest rates, or release or modification of covenants often require majority or unanimous agreement by all creditors. These contractual provisions are the result of bargaining between creditors and debtors—born not of a conspiracy among aligned interests but of negotiation between opposing interests in an open market.

Without the ability to coordinate, holdout by one creditor can harm the interests of other creditors and the debtor. For example, in certain situations it is preferable to avoid bankruptcy, and the creditors' collective decision to forgive a portion of the debtors' debt would stave off bankruptcy, maintain the debtor's going concern and goodwill, and maximize the creditors' collective recovery; but a single creditor may, by insisting on full payment of its debt on its original terms, effectively force the debtor into bankruptcy to the detriment of all concerned.

Given these problems, cooperation and coordination among creditors is often essential to efficient debt management. The Bankruptcy Code recognizes this necessity by enabling joint action through creditors committees, *see* 11 U.S.C. § 1102, which have played an indispensable role in corporate bankruptcies for decades.

But joint action is also necessary outside of bankruptcy. Absent coordination, creditors might harm both their own interests and those of the debtor by unilaterally taking legal actions that could force debtors into bankruptcy, which may not be to anyone's advantage. *See* Ali M. Stoeppelwerth, *United We Stand: Antitrust Aspects of Collaboration Among Corporate Bondholders*, 67 Business Lawyer 393, 396 (2012). Where out-of-court workouts are preferable to bankruptcy, creditors may negotiate among themselves to resolve debt management issues and avoid bankruptcy, thus protecting the interests of shareholders, employees, and customers of the debtor. *See* Tomotaka Fujita, *Criteria for Good Laws of Business Association: An Outsider's View*, 2 Berkeley Bus. L.J. 39, 48 (2005) ("Why, then, are private workouts useful? Again the obvious answer is to save 'bankruptcy costs,' which are a dead weight loss caused by the use of the formal bankruptcy procedure."); Glenn W. Merrick, *Problems and Opportunities During Hard Times in the Minerals Industry: An Overview of Restructuring*, 19A Rocky Mtn. Min. L. Inst. 1, 2-3 (1986) (reviewing the advantages of a private workout over "bankruptcy/foreclosure/litigation," including that "workouts tend to: (i) be more flexible, (ii) preserve higher asset values, and (iii) be less expensive," that they benefit debtors because "(a) management retains control of the business, (b) the debtor avoids the 'stigma' of foreclosure/bankruptcy, and (c) the debtor's principals may avoid/defer liability on personal guarantees," and that they also benefit creditors by achieving more certainty and guarantees of payment).

Such creditor-coordinated out-of-court workouts can sometimes be so markedly advantageous over the formal bankruptcy process that they are actually encouraged by the Bankruptcy Code and the judges tasked with interpreting it. *See* Hon. Conrad B. Duberstein, *Out-of-Court Workouts*, 1 Am. Bankr. Inst. L. Rev. 347, 347-51 (1993). Even where bankruptcy is inevitable, creditors may negotiate a pre-packaged bankruptcy that may reduce the costs and uncertainties of bankruptcy and enable the debtor's expeditious emergence from bankruptcy. *See id.* at 365 (reviewing the advantages of pre-packaged bankruptcy, including the debtor's ability to do away with "a prolonged and expensive proceeding" by obtaining a lower percentage of creditor approval).

Prohibiting or discouraging collaboration among existing creditors would have unfortunate effects not only for creditors but also for debtors and society as a whole. Given the fragmentation of credit and the associated collective action problems, the initial terms of credit—including interest rates—are significantly affected by creditors' ex ante expectations about their ability to coordinate with other creditors ex post. If creditors are unable to manage collective action risks through coordination with other creditors, the risks of extending credit will increase, and interest rates with them. *See* John C. Coffee, Jr.

& William A. Klein, *Bondholder Coercion: The Problem of Constrained Choice in Debt Tender Offers and Recapitalization*, 58 U. Chi. L. Rev. 1207, 1224 (1991) (explaining that if bondholders are unable to act collectively to renegotiate the terms of bonds outside of bankruptcy, the cost of capital will increase).

The negative effects are not limited to secondary markets. Primary market creditors, such as initial bond purchasers, view selling their debt instruments in a secondary market as an important means of managing their risk portfolios and mitigating potential losses when the borrower becomes financially distressed. If courts impose restrictions on debt holder coordination in secondary markets, secondary market purchasers will likely be less inclined to purchase the debt instruments for loans extended by primary market lenders and the bonds held by initial bond purchasers, which will in turn increase the risk to primary market lenders and purchasers and hence increase primary market interest rates. The primary and secondary markets are thus economically inseparable.

In sum, the efficient operation of credit markets requires extensive coordination among existing creditors in both primary and secondary markets. Any antitrust rule deterring such cooperation would produce significant negative effects throughout the economy.

B. The Panel Followed Well-Established Precedent in Holding that Creditor Coordination Regarding Preexisting Debt Obligations Is Not an Antitrust Violation

Reflecting an uncontested line of cases outside this circuit, the panel drew a sensible line of demarcation between collusion on *new* credit and collaboration among creditors of *existing* debt. *CompuCredit Holdings Corp. v. Akanthos Capital Mgmt., LLC*, 661 F.3d 1312, 1315 (11th Cir. 2011). As the panel explained, "CompuCredit was not in the same position as a normal buyer of goods or services; instead it wished to pay back the money it already owed (at a price below par value but at or above market value). Defendants' choice to reject this offer and seek full par value is not the same as a boycott intended to raise future sales prices." *Id.*

The panel's decision was consistent with every decision of which we are aware. In *United Airlines, Inc. v. U.S. Bank N.A.*, 406 F.3d 918 (7th Cir. 2005), the Seventh Circuit rejected the claim that coordination among a group of existing creditors to recover the full amount of the debt was an antitrust violation. Judge Easterbrook explained that "[n]egotiating discounts on products *already* sold at competitive prices is not a form of monopolization." *Id.* at 925. "Competition comes at the time loans are made; cooperation in an effort to collect as much as possible of the amounts due under competitively determined contracts is not the sort of activity with which the antitrust laws are concerned." *Id.* at 1052.

Similarly, in *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039 (2d Cir. 1982), the Second Circuit rejected the argument that coordination by indenture trustees amounted to price fixing. It held that the lenders faced a "common breach of the indenture agreements by [the borrower] and their seeking to arrive at, and arriving at, a common position as to that breach is not anti-competitive." *Id.* at 921.

Finally, in *Falstaff Brewing Corp. v. New York Life Ins. Co.*, 513 F. Supp. 289 (N.D. Cal. 1978), a borrower alleged that it was forced to pay more interest on its existing debt because of collusion among its lenders. The district court found no antitrust violation, observing that the existing lenders "were not competing with the banks or other institutions to offer or to supply Falstaff with more credit, but were attempting to secure that credit which they had already extended, the terms of which had already been negotiated. This is in fact the very opposite of price-fixing." *Id.* at 293.

These decisions reflect a common understanding that coordination by existing creditors on the repayment of existing debt does not fall into the antitrust domain. This is not, as CompuCredit argues, a question of immunity from antitrust law for hedge funds or an exception from some general principle of law. Nor is it a question of the creditors agreeing on a set price for selling their debt instruments to potential third party purchasers. Rather, the courts' unanimous view reflects a proper understanding of first principles of antitrust law—that the Sherman Act preserves competition in *open* markets, but does not regulate the manner in which *existing* contractual obligations are performed. Once the parties have entered into a contract that specifies their obligations, subsequent wrangling between the parties over their respective performance obligations falls outside the antitrust domain. Preventing a debtor from reneging on an existing contract is not an antitrust offense.

Articulating a first principle of antitrust, the Supreme Court explained in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979), that "[t]he essence of the antitrust laws is to ensure fair price competition in an open market." *See also Fed. Trade Comm'n v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966) (describing the "central policy" of the Sherman and Clayton Acts as maintaining the freedom of purchasers to buy in "open markets"). The antitrust laws protect the integrity of market competition for the benefit of buyers and sellers (in this case of debt) who are seeking the most advantageous terms of dealing when they enter into contracts or transactions. However, once parties form lawful contracts, they are no longer operating in "open markets" with respect to their counterparties. They have made commitments, and the antitrust laws do not police the performance of those commitments. *See Reisner v. General Motors Corp.*, 671 F.2d 91, 100 (2d Cir. 1982) ("The antitrust laws were 'not designed to police the performance of private contracts . . . ."); *see also Unijax, Inc. v. Champion Int'l, Inc.*, 683 F.2d 678, 684 n.12 (2d Cir. 1982) (explaining that parties try to get simple contract and fraud claims into federal court under the guise of antitrust violations); *Classic Cheesecake Co., Inc. v. JPMorgan Chase Bank, N.A.*, 546 F.3d 839, 846 (7th Cir. 2008) (holding that exploitation of bilateral monopoly in performance of contracts is not an antitrust problem); *Finnegan v. Campeau Corp.*, 722 F. Supp. 1114, 1117 (S.D.N.Y. 1989) ("The antitrust statute was framed to preserve normal competitive forces in interstate markets against unreasonable inhabitation . . . not . . . to police the performance of private contracts.") (citation omitted).

Consistent with these precedents, in *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207 (11th Cir. 2002), this Court held that the economic power that one party to a contract derives over the other party is not the "market power" with which the antitrust laws are concerned. The Court cautioned that considering post-contract power to be market power in an antitrust sense would mean that "any exclusive dealing arrangement, output or requirement contract, or franchise tying agreement would support a claim for violation of antitrust laws." *Id.* at 1221. By the same token, accepting CompuCredit's argument here would transform routine coordination by existing creditors into "boycotts" or "price fixing agreements."

The line of demarcation between new and existing debts adopted by the panel and the other courts outside of this Circuit is workable and sound. Antitrust law has no interest in enabling borrowers to renege on their loans and negotiate more favorable terms than they contractually agreed. The loan terms established in a competitive market are those on which both creditors and debtors are entitled to insist. Any disappointment a debtor faces when it cannot renegotiate its debts on the terms it prefers because of creditor coordination is not antitrust injury—"injury of the type the antitrust laws were intended to prevent." *Palmyra Park Hosp., Inc. v. Phoebe Putney Mem'l Hosp.*, 604 F.3d 1291, 1299 (11th Cir. 2010) (citation omitted).

CompuCredit's proposed rule not only ignores these first principles of antitrust law, it also undermines the ancient and veritable policy in favor of upholding freely negotiated and lawful private contracts. *See, e.g.*, *Smith v. The Ferncliff*, 306 U.S. 444, 450 (1939) ("Where a contract stipulation is not clearly opposed to public policy it should be upheld, as it is the agreement of the parties."); *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) ("The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts."); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989) (holding that courts should "enforce privately negotiated agreements to arbitrate, *like other contracts*, in accordance with their terms") (emphasis added); *Ireland v. Craggs*, 56 F.2d 785, 787 (5th Cir. 1932) (noting "the fundamental public policy that men full grown and of sound mind may not, while holding to the benefits of a contract, escape its burdens"). In this case, the alleged coordinated efforts are no more than an attempt to enforce a standing contract—where there is not even a claim that the contract was in any way unfairly procured or unconscionable. To permit a contracting party to renege on its contract by successfully enjoining all coordinated efforts to uphold it would effectively disable the enforcement of debt holders' loan contracts, because, as previously explained, such contracts are not amenable to effective enforcement by a single debt holder. *See supra* 8-11. Ultimately, lenders who have lost faith in the inviolacy of their contracts would be less willing to lend to businesses.

C. The Radical Rule of Per Se Illegality Proposed by CompuCredit Would Have Drastic Effects Throughout Credit Markets and Should Be Rejected

1. CompuCredit's Proposed Rule Could Not Be Limited to Institutional Investors in Secondary Markets

Apparently recognizing that its proposed rule of per se illegality would be a radical departure from precedent, CompuCredit argues that the rule should be limited to a narrow circumstance—coordination in response to a borrower tender offer by purchasers of distressed bonds "with respect to unmatured and undefaulted notes actively traded on a secondary market." (En Banc Br. of

Appellant at 12.) CompuCredit's plea for a narrowly tailored, contextually sensitive per se rule misunderstands the whole point of per se rules. Application of the per se rule cannot be so limited, permitting conduct when it is to CompuCredit's liking but prohibiting the same conduct when it is not. A per se rule, by definition, is categorical.

First, there is no logical basis to apply CompuCredit's draconian rule only to bonds or hedge funds. For antitrust purposes, there is no conceptual difference between coordination by bondholders or hedge funds and coordination by banks or other lenders. The per se rule applies categorically to types of agreements, not to particular industries or industry actors. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 100 n.21 (1984) (observing that per se rule applies categorically to horizontal price and output reduction agreements "without inquiry into the special characteristics of a particular industry"). Nor is there any economic difference between the functions of coordination in the two contexts. Rather, coordination serves the crucial function of enhancing long-run liquidity in both cases. *See supra* 5-12. CompuCredit's proposed principle would extend to all borrowing-lending situations and cover coordination by creditors of all sorts, including commercial and investment banks, savings and loans, real estate lenders, and other institutional or personal lenders.

Second, there is no logical basis to apply the proposed rule of per se illegality only to creditors who acquired their debt instruments in secondary markets or at a discount from the par value of the instrument. The legal rights of secondary market purchasers are entirely derivative of those of the primary market purchasers, as the assignee of a debt instrument stands in the shoes of the original holder. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Physicians Injury Care Ctr., Inc.*, 427 Fed. Appx. 714, 719 (11th Cir. 2011) ("An assignment is a transfer of all the interests and rights to the thing assigned. The assignee . . . stands in the shoes of the assignor . . . ") (citation omitted).

Further, a rule prohibiting coordination by just secondary market purchasers would be unworkable because, as previously described, the primary and secondary markets are economically inseparable. *See supra* 12. In many instances, debt instruments are held in part by original purchasers and in part by assignees who purchased them in secondary markets. It would make no sense to allow coordination by the group of original purchasers but prohibit coordination by the secondary market purchasers. In other instances, a party acquires debt instruments from the issuer or lender, then sells and buys more of them on the secondary market. Such a party is both a primary and secondary market participant, and CompuCredit's rule would also be unworkable with respect to it. In sum, the line between primary and secondary markets for financial instruments is indistinct, and any attempt to separate them by a rule of per se illegality would fly in the face of economic reality and create nonsensical distinctions. A party's status as an original or secondary market purchaser has no bearing on the antitrust issues. As emphasized in *United Airlines*, *Sharon Steel*, *Falstaff*, and the panel opinion, the critical distinction is between negotiation by existing creditors and collusion by parties competing to extend credit.

Finally, the fact that a secondary market may be "active" has no bearing on the antitrust issues. There is no support in the jurisprudence nor any logical basis for applying the per se rule in high-velocity but not low-velocity markets, and there exists no ready measure for defining an "active" market.

In sum, a rule of per se illegality for coordination by debt holders in active secondary markets would necessarily mean a rule of per se illegality for coordination by all existing creditors.

2. Extension of *Superior Court Trial Lawyers* to Existing Creditor Coordination Would Make a Variety of Clearly Beneficial Practices Illegal Per Se

CompuCredit urges the Court to adopt the rule of per se illegality of *Fed. Trade Comm'n v. Superior Court Trial Lawyers*, 493 U.S. 411 (1990), which applies to price fixing agreements and horizontal group boycotts.[1] Such a ruling

[1] Application of the per se rule in *Superior Court Trial Lawyers* turned on the fact that the trial lawyers were engaging in price fixing, not that their behavior could be characterized in some way as a "group boycott." The Supreme Court has limited

would be a radical departure from existing precedent, which considers coordination by existing creditors not even a subject of antitrust scrutiny under the rule of reason, much less a per se illegal offense. Moreover, the proposed rule would be incapable of discriminating between forms of creditor coordination that clearly benefit both debtors and creditors and society as a whole and those that draw objection from debtors. It would threaten to sweep all creditor coordination into a stark rule of illegality.

The per se rule is a blunt instrument which courts apply only when they "have had considerable experience with the type of restraint at issue." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). Per se offenses are "so unlikely" to have procompetitive justifications in any particular case that the court "adhere[s] to the rule of law that is justified in its general application." *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 351 (1982). When a practice is labeled per se illegal, the plaintiff need not prove a relevant market, market power, or anticompetitive effects and the defendant may not rebut

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the reach of the horizontal group boycott per se rule to circumstances where firms with market power organize boycotts directed against their competitors. *Fed. Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985). In *Superior Court Trial Lawyers*, the Supreme Court "emphasize[d] that this case involves not only a boycott but also a horizontal price-fixing arrangement—a type of conspiracy that has been consistently analyzed as a *per se* violation for many decades." 493 U.S. at 436 n.19.

the plaintiff's showing by proving that the restraint was justified by procompetitive purposes or effects. *See Maricopa*, 457 U.S. at 351 ("The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some."); *United States v. Giordano*, 261 F.3d 1134, 1142 (11th Cir. 2001) (defendant in per se case not entitled to argue that agreement was justified by procompetitive purposes) (*citing United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 218 (1940)). Hence, in order to condemn a practice as per se illegal, courts must have a high degree of confidence that the practice is almost always pernicious. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.,* 485 U.S. 717, 723 (1988) ("[P]er se rules are appropriate only for conduct that is manifestly anticompetitive, that is, conduct that would always or almost always tend to restrict competition and decrease output.") (citations and quotation marks omitted).

In many circumstances, borrowers benefit as much as creditors from creditor coordination on the management of existing debts. For example, many debt instruments permit a majority of creditors to modify the instrument to the borrower's advantage without having to obtain the consent of every single creditor. Coordination among creditors is often necessary to secure such modifications. Similarly, as Judge Easterbrook observed in *United Airlines*, extending the coverage of antitrust law to pre-bankruptcy creditor coordination would make illegal the common practice of pre-packaged bankruptcy. 406 F.3d at 925. As previously mentioned, coordination among creditors to address numerous issues in the debtor-creditor relationship is not only a longstanding fundamental practice in the orderly resolution of widely distributed debts, it is deeply ingrained in the credit agreements themselves. For instance, in bond agreements, indenture trustees are obligated to coordinate disparate groups of bondholders to resolve debtor-creditor disputes. In bank loan agreements, administrative agents serve a similar organizational function. CompuCredit's proposed per se rule would not only undermine the way market participants have functioned for decades, it would upset the obligations of trustees and administrative agents in trillions of dollars of corporate credits.

Even in debtor tender offer cases like this one, creditor coordination is often in the interest of the debtor. Suppose that instead of agreeing not to tender below par—as alleged by CompuCredit—the debt holders had agreed among themselves to take a substantial "haircut" on the amount CompuCredit owed them. In that case, the debtor might be quite pleased that the debt holders had coordinated.

The per se rule is incapable of distinguishing between "reasonable" creditor coordination that benefits debtors and "unreasonable" coordination that is detrimental to their interest. The per se rule is categorical. It condemns entire classes of agreement without parsing the ones that happen to be beneficial from those that are unlawful. *See United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609-10 (1972) (finding irrelevant in per se case district court's findings that horizontal market division among small and medium sized grocery retailers stimulated interbrand competition with larger chain stores). If it is per se illegal for creditors to agree not to accept a tender offer, it is equally illegal for creditors to agree to accept one, since both variations are equally an agreement among competitors on price.

The Supreme Court has cautioned against applying the per se rule to categories of agreements that in many instances may have procompetitive applications. In *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979), CBS challenged as per se illegal the BMI and ASCAP performing rights organizations' practice of offering blanket licenses of copyrighted works. Despite arguing that blanket licensing was a form of price fixing, CBS actually wanted ASCAP and BMI to continue a form of blanket licensing, only to do so at standard per-use rates within negotiated categories of use. The Second Circuit accepted CBS's argument that blanket licensing was per se illegal price fixing, but then tried to fashion an injunctive remedy that would permit the defendants to continue offering blanket licensing with some restrictions and modifications. *Id.* at 7 n.10. The Supreme Court rejected this approach. It noted that "[t]he Court of Appeals would apparently not outlaw the blanket license across the board but would permit it in various circumstances where it is deemed necessary or sufficiently desirable." *Id.* at 17 n. 27. However, held the Court, "the *per se* rule does not accommodate itself to such flexibility and . . . the observations of the Court of Appeals with respect to remedy tend to impeach the *per se* basis for the holding of liability." *Id.* at 17. By the same token, application of the per se rule to creditor coordination would not allow for flexible accommodation when the particular creditor coordination at issue was procompetitive.

Coordination among existing creditors on the management of their commonly held debt clearly is not the sort of "restraint of trade" that always or almost always has anticompetitive effects. Applying the per se rule would make illegal, without exception, many clearly procompetitive practices that benefit debtors and society as a whole.

V.
CONCLUSION

The order of the district court granting dismissal of the complaint should be affirmed.

Dated: June 29, 2012

Respectfully submitted,

Moses Silverman
Aidan Synnott
Daniel A. Crane
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Attorneys for *Amici Curiae* Loan Syndications and Trading Association, Managed Funds Association, and Securities Industry and Financial Markets Association

CERTIFICATE OF COMPLIANCE

Notice is hereby given that *amici curiae* Loan Syndications and Trading Association, Managed Funds Association, and Securities Industry and Financial Markets Association have complied with Rule 32(a)(7)(B), Fed. R. App. P. This brief herein is proportionately spaced, has a typeface of 14 points, and contains 5,941 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: June 29, 2012

Moses Silverman

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed via Federal Express Priority Overnight this 29th day of June, 2012 to:

Emmet J. Bondurant
Frank M. Lowrey IV
Jason J. Carter
Michael A. Caplan
BONDURANT, MIXSON & ELMORE, LLP
1201 W. Peachtree St., NW
Suite 3900
Atlanta, GA 30309
404-881-4100

K. Craig Wildfang
Randall Tietjen
Christopher W. Madel
ROBINS, KAPLAN, MILLER & CIRESI, LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
612-349-8500

Attorneys for Plaintiff-Appellant CompuCredit Holdings Corporation

Karen B. Bragman
Kevin B. Getzendanner
Heather Smith Michael
Arnall Golden Gregory LLP
222 South Ninth Street
Suite 2100
Atlanta, Georgia 30363
404-873-8654

Jeff I. Ross
Harry N. Niska
Ross & Orenstein, LLC
171 17th Street, NW
Suite 470
Minneapolis, MN 55402
612-436-9801

Lisa L. Heller
Robins, Kaplan, Miller & Ciresi, LLP
1201 Peachtree Street
Suite 2200
Atlanta, GA 30309
404-760-4300

Attorneys for Defendants-Appellees Akanthos Capital Management, LLC, et al.

I further certify that an original and 20 copies of the brief were filed on this day via Federal Express Priority Overnight to John Ley, Clerk of Court, U.S. Court of Appeals for the 11th Circuit, 56 Forsyth St., N.W., Atlanta, Georgia 30303.

By: ______________________
Moses Silverman