No. 11-13254

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COMPUCREDIT HOLDINGS CORPORATION,
Plaintiff-Appellant,

v.

AKANTHOS CAPITAL MANAGEMENT, LLC, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia, Civ. No. 11-117
Before the Honorable Timothy C. Batten

EN BANC BRIEF OF AMICUS CURIAE THE CREDIT ROUNDTABLE IN SUPPORT OF DEFENDANT-APPELLEE, AKANTHOS CAPITAL MANAGEMENT, LLC

ALI M. STOEPPELWERTH
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
202-663-6000

Counsel for Amicus Curiae The Credit Roundtable

June 29, 2012

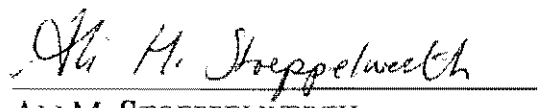
Case No. 11-13254-BB

CompuCredit Holdings Corp. v. Akanthos Capital Management, LLC, *et al.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. Rule 26.1-1, Amicus Curiae The Credit Roundtable certifies that, in addition to the persons and entities named in the parties' certificates of interested persons, the following individuals or entities have or may have an interest in the outcome of this case:

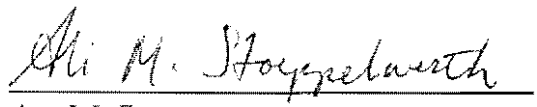
1. The Credit Roundtable, Amicus Curiae
2. Stoeppelwerth, Ali M., counsel for Amicus Curiae The Credit Roundtable



ALI M. STOEPPELWERTH

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

Pursuant to Fed. R. App. P. 29(c)(5), Amicus Curiae The Credit Roundtable hereby certifies that neither party's counsel authored this brief in whole or in part, and that no persons other than the Amicus Curiae, its members, or its counsel contributed any money that was intended to fund preparing or submitting this brief.



ALI M. STOEPPELWERTH

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

---

* Authorities on which we primarily rely are marked with asterisks.

STATUTES AND LEGISLATIVE MATERIALS

OTHER AUTHORITIES

TABLE OF RECORD REFERENCES IN THE BRIEF

Brief Page No.		Docket No.
7, 8, 9, 16, 19	Order Granting Motion for Judgment on the Pleadings	120

INTEREST OF THE CREDIT ROUNDTABLE

The Credit Roundtable ("CRT") was formed in 2007 by a group of large institutional fixed-income managers. It currently has thirty member firms which include investment advisors, insurance companies, pension funds, and mutual funds, representing more than $3.5 trillion of fixed-income assets under management. The object of CRT's efforts is to benefit all bond market participants through increased transparency, efficiency and liquidity. Its primary mission is to advocate for and facilitate improvements in the market for investment-grade corporate bonds by, among other things, strengthening bondholder covenant protections and promoting reforms in the underwriting and distribution of new issues, as well as in the tender offer and consent process.

The issue presented in the *en banc* petition is of extraordinary concern to CRT members. Holders of corporate bonds regularly encounter circumstances in which market developments or issuer actions threaten their ability to obtain the consideration they are entitled to under a bond indenture. Often the only avenue available to bondholders in this situation to prevent losses to their clients is to work together to protect their contractual rights.

No doubt reflecting the societally beneficial effects of such collaboration, no U.S. court or enforcement agency has ever suggested that joint action by bondholders for purposes of protecting their interests in pre-existing debt

instruments could violate the antitrust laws. On the contrary, the only cases in which the issue has been raised – and despite decades of corporate bond issuance there are just three of them – have all dismissed the issuer's antitrust claims as "of little substance," "bordering on the frivolous" or "thin to the point of invisibility." Nevertheless, the appellant here not only disputes the validity of those clear precedents, but contends that any coordination among bondholders with respect to debt that has not yet matured or is in default constitutes a *per se* violation of the Sherman Act – even if it occurs in connection with litigation aimed at enforcing the bondholders' legal rights.

Such a radical re-interpretation of the applicability of U.S. antitrust laws to collective bondholder activity would be profoundly harmful and disruptive to the credit markets. Current prices for corporate debt reflect an expectation on the part of purchasers that, in the event of a coercive tender or exchange offer, consent solicitation or other action by a corporate issuer that threatens to reduce (or wipe out) the value of their investment (by, for example, eliminating protective covenants in the indenture), they will be able to communicate and coordinate with other bondholders to protect their common interests without running afoul of the Sherman Act.[1] A ruling for CompuCredit would remove this potential check on

[1] As explained by one commenter, there are "various methods by which issuers may seek to restructure the terms of their public and private debt securities outside the context of bankruptcy." Ford Lacy & David M. Dolan, *Legal Aspects*

the power of issuers to take actions that impair lenders' contractual rights, and likely result in an increased cost of capital for firms seeking financing through bond issuance. In addition, the specter of *per se* antitrust liability for the conduct challenged here would undoubtedly have a chilling effect on all sorts of communication and cooperation among bondholders – *e.g.*, work-out arrangements that permit an issuer in distress (but not yet insolvent or in default) to restructure its debt without resorting to bankruptcy – that benefit not only creditors *and* issuers, but consumers generally. The CRT therefore urges this Court to affirm the district court's judgment below.

STATEMENT OF THE ISSUES

Whether the district court correctly held that collective action by creditors aimed at protecting their interests in pre-existing debt does not harm competition and therefore cannot violate Section 1 of the Sherman Act.

---

of Public Debt Restructurings: Exchange Offers, Consent Solicitations and Tender Offers, 4 DePaul Bus. L.J. 49, 71 (1991). These methods can include: "(1) exchange offers, pursuant to which newly issued debt and/or equity securities are offered to bondholders in full or partial exchange for their existing debt claims; (2) consent solicitations, in which consents are solicited from bondholders for the adoption of amendments to the indenture …, often in exchange for the issuer's payment of a consent fee …; and (3) cash tender offers, whereby issuers seek to repurchase all or a portion of their outstanding bonds, usually at less than face value," and subject to other restrictions that may be viewed as coercive. *Id*.

SUMMARY OF ARGUMENT

As explained in the district court's and panel's decisions, the sequence of events leading up to this case involves an issuer in financial distress announcing an intention to take actions that would substantially reduce its remaining assets and a group of holders of the issuer's promissory notes deciding to take collective action to protect their investment. That collective action included filing a lawsuit under the Uniform Fraudulent Transfer Act (UFTA) in order to try and prevent the dissipation of the issuer's assets, rejection of a tender offer by the issuer at prices substantially below the par value of their notes and a settlement demand in connection with the UFTA litigation that the issuer redeem the notes at par.

Given that this sort of joint bondholder response to issuer actions that threaten their rights in pre-existing debt securities has been common for decades and – in the rare instances where it has been challenged – has consistently been found not to violate the antitrust laws, one would have expected CompuCredit's complaint here to have been dismissed at the pleading stage. And so it was, by the district court below – a decision a panel of this Court then affirmed. But, despite these firm rejections of its antitrust theories, CompuCredit now contends that the district court's ruling cannot stand because it was based on an unwarranted extension of the implied-immunity doctrine which, if endorsed by this Court,

would effectively remove conduct that amounts to *per se* illegal price-fixing and a joint boycott from the reach of the Sherman Act.

CompuCredit's final effort to rescue its antitrust claims should be rejected. The district court's decision was *not* based on – and in fact nowhere mentions – the implied immunity doctrine. Rather, the court faithfully followed the rationale of the only three courts previously to rule on the applicability of the Sherman Act to bondholder collaboration relating to outstanding debt and found that because such conduct actually benefits, rather than harms, consumers, it cannot constitute an antitrust violation. This conclusion is bolstered by a review of the provisions and legislative history of the Trust and Indenture Act which, contrary to CompuCredit's assertions, reflect Congress's approval of and intent to facilitate coordination among bondholders for the protection of their common interests.

As noted above, given the almost total absence of challenges to this sort of conduct – and the clear holdings of the only three cases in which such claims were made – bondholders routinely engage in various forms of collaboration aimed at preserving the value of their investments. A ruling adopting CompuCredit's position that collective bondholder activity in these circumstances is *per se* unlawful unless the relevant bonds have matured or are in default would be a radical departure from existing precedent and likely chill a broad range of

collaboration and communication that currently benefits all participants in the credit markets.

The judgment below should be affirmed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT BONDHOLDER COLLABORATION CONCERNING PRE-EXISTING DEBT DOES NOT VIOLATE SHERMAN ACT §1

A. The District Court's Ruling Was Properly Based on an Absence of Anticompetitive Effects, Not Implied Immunity

In an attempt to salvage their antitrust claims and distinguish this case from the uniform precedents that have characterized similar complaints as "border[ing] on the frivolous," CompuCredit now contends on appeal that the district court's decision below was based solely on the ground that combinations involving holders of corporate notes are impliedly immune from the Sherman Act. CompuCredit En Banc Br. at 6, 33. Accordingly, CompuCredit urges, unless the decision is reversed, "this Court will [be] the first and only Circuit to rule, in the absence of any countervailing statutory scheme, that price fixing and group boycotts by holders of corporate notes and other debt instruments who are horizontal competitors … are exempt" from antitrust scrutiny. *Id.* at 12.

CompuCredit's portrayal of the district court's decision is wholly without foundation. References to implied immunity or exemption appear nowhere in the

opinion and, not surprisingly, there are no citations to any of the seminal Supreme Court cases discussing the implied-immunity doctrine.[2] Instead, the district court relied almost exclusively on the only appellate cases to have considered application of the antitrust laws to bondholder collaboration relating to pre-existing debt: *United Airlines, Inc. v. U.S. Bank N.A.*, 406 F.3d 918 (7th Cir. 2005) and *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 103 (2d Cir. 1982). Neither of these cases mentions implied exemptions – on the contrary, their rejections of the antitrust claims at issue rested upon a determination that the plaintiffs *could not establish a fundamental element of a Section 1 claim*: injury to competition.

In considering Appellees' ("Noteholders") motion for judgment on the pleadings, the district court recounted that CompuCredit's antitrust counts "allege that Defendants have unreasonably restrained trade by 'inflating the price at which CompuCredit *can extinguish its debt* by purchasing these Notes.'" R-120 at 7 (emphasis added). In particular, CompuCredit asserted that "Defendants' joint demand that CompuCredit repurchase their notes at par" and "agreement to boycott the January 28, 2010 tender offer" qualified as "anticompetitive [acts]" in furtherance of the conspiracy. *Id.* at 7-8.

---

[2] *See, e.g., Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 127 S. Ct. 2383 (2007); *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 95 S. Ct. 2427 (1975).

Contrasting this sort of alleged concerted action aimed at "collect[ing] as much as possible of the amounts due under competitively determined contracts," *id.* at 15, with the cases advanced by CompuCredit which "involved creditors who agreed about whether or on what terms to extend credit *in the future*,"[3] the district court was persuaded by the rationale adopted by the courts in *Sharon Steel* and *United Airlines, i.e.*, that collective activity by creditors in connection with an outstanding loan – the terms of which have previously been set – does not violate the Sherman Act because there is no threat of harm to consumers. *See* R-120 at 14-15 (citing *United Airlines*, 406 F.3d at 921; *Sharon Steel*, 691 F.2d at 1052). In fact, the district court further agreed with the Second and Seventh Circuits that this type of collective activity is actually *procompetitive*, rather than anticompetitive, "because 'by reducing [the] losses to creditors and the transaction costs resulting from bankruptcy, such activity reduces the costs … of doing business, all of which is to the consumer's advantage.'" R-120 at 14 (quoting *Sharon Steel*, 691 F.2d at 1052). And, far from announcing a blanket exemption for bondholder conspiracies, as CompuCredit asserts, the district court explicitly acknowledged

---

[3] R-120 at 11 (emphasis added). The cases CompuCredit relied on were *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S. Ct. 1925 (1980) (per curiam) and *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 89 S. Ct. 1252 (1969). In *Catalano*, the defendants agreed that they would discontinue extending short-term credits to the plaintiffs in the future. 446 U.S. at 648, 100 S. Ct. at 1928. In *Fortner*, the Sherman Act violation involved a tying agreement with respect to future loan contracts. 394 U.S. at 509, 89 S. Ct. at 1261-1262.

"that debtors *are* sometimes permitted to bring antitrust claims against creditors" – just not in situations where the creditors are acting jointly in order "to maximize their ability to collect on an *outstanding debt*." R-120 at 11 (emphases added).

B. Every Other Court to Consider the Issue Has Correctly Concluded that Bondholder Collaboration in Connection with Pre-Existing Debt Is Procompetitive and Societally Beneficial

As the district court correctly observed, the courts in *Sharon Steel* and *United Airlines* rejected the plaintiffs' antitrust claims on the basis of determinations that (1) the prices and other terms of the agreement that was the target of the bondholder collaboration had already been fixed, so there could be no injury to competition, and (2) by reducing bondholder incentives to protect their individual interests through unilateral action that may be detrimental to all bondholders, as well as to the issuer, coordination among creditors was procompetitive and beneficial to the economy at large. R-120 at 14-15. The only other court to address this question came to the same conclusion. *See Falstaff Brewing Corp. v. New York Life Ins. Co.*, 513 F. Supp. 289 (N.D. Cal. 1978). Both grounds for these three holdings are indisputably correct and should be endorsed by the Eleventh Circuit.

In all three of the antitrust cases challenging bondholder collaboration, the crux of the issuer's complaint was that the joint conduct raised the cost for it to redeem or extinguish an outstanding obligation and therefore constituted unlawful

price-fixing or a joint boycott. *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 521 F. Supp. 104, 116 (S.D.N.Y. 1981), *aff'd*, 691 F.2d 1039 (2d Cir. 1982); *Falstaff*, 513 F. Supp. at 293; *United Airlines*, 406 F.3d at 921. Inevitably, the "anticompetitive harm" alleged to result from the joint conduct was that the debtor ended up having to pay more than it would have absent the coordination. *See, e.g.*, *Falstaff*, 513 F. Supp. at 293. But the courts have consistently looked beyond the plaintiffs' "price-fixing" or "joint boycott" labels and concluded that the relevant price competition in debt instruments comes at the time the securities are issued, so that joint activity by bondholders aimed ensuring repayment of an obligation they have already purchased cannot amount to the "fixing" of any relevant price. *See United Airlines*, 406 F.3d at 921 ("Competition comes at the time loans are made; cooperation in an effort to collect as much as possible under competitively determined contracts is not the sort of activity with which the antitrust laws are concerned"); *Sharon Steel*, 521 F. Supp. at 116-117 (Since "[t]he price paid by [the plaintiffs] for credit under the [i]ndentures was fixed [when] the [i]ndentures were issued" and defendants' collaboration was aimed "merely [at trying] to [e]nsure that the credit previously extended … would be repaid," plaintiffs' price-fixing claims failed as a matter of law); *Falstaff*, 513 F. Supp. at 293 (this kind of joint bondholder action "is in fact the very opposite of price-fixing").[4] As a result, the

[4] *Cf. Newman v. Universal Pictures*, 813 F.2d 1519, 1522 (9th Cir. 1987)

courts have found no competitive harm in these situations – even where, as here, the issuer contends that it could have paid less to reduce its debt obligations if it had been able to negotiate with the bondholders individually. *See United Airlines*, 406 F.3d at 921; *Falstaff*, 513 F. Supp. at 293 (dismissing as "of little substance" plaintiffs' argument that creditor cooperation in connection with several loan agreements led to its paying a higher rate to discharge its total indebtedness).[5]

Instead of competitive harm, the courts in every one of these opinions emphasized the *procompetitive* effects of permitting bondholders to combine in protecting their rights. In *Falstaff*, for example the bondholder coordination at issue – which resulted in an agreement providing for the pro rata sharing among the lenders of payments received from the issuer – was designed both to preserve their interests and keep the issuer from bankruptcy. 513 F. Supp. at 290-291. The court agreed with the defendants that such arrangements were beneficial because they reduced lenders' incentives to act unilaterally and offered a means of allowing issuers to resolve their financial difficulties short of invoking Chapter 11. *Id.* at

---

(rejecting price-fixing claim and finding no harm to competition where terms of the relevant contract were set prior to advent of alleged conspiracy).

[5] These rulings are also consistent with the well-settled proposition that while the antitrust laws protect competition *for* contracts between private parties, they are "'not designed to police the performance of [such agreements].'" *Reisner v. General Motors Corp.*, 671 F.2d 91, 100 (2d Cir. 1982); *see also Foret v. Point Landing, Inc.*, No. 74-2851, 1976 WL 1326, at *3 (E.D. La. Oct. 1, 1976) (same); *Williams v. Kleaveland*, 534 F. Supp. 912, 920 (W.D. Mich. 1981) ("The antitrust laws are not a high powered version of the laws relating to breach of contract").

293-294 (observing that "[f]or such arrangements to succeed, all the lenders must mutually agree to forebearance and no major lender will commit to such forebearance unless all of them do"). The Second Circuit relied on similar reasoning in concluding that "[j]oint activity by creditors facing a debtor is commonly in the interests of all parties." *Sharon Steel*, 691 F.2d at 1052. The court emphasized that these considerations apply even where the issuer is not insolvent, *id.*, explaining further that "[b]y allowing the parties to various indentures to seek compromise agreements avoiding resort to litigation while protecting all concerned, such collective activity reduces the costs of indenture enforcement and the costs of borrowing." *Id.* at 1052-1053. This relationship between the costs of indenture enforcement and credit terms was also highlighted by the Seventh Circuit, which noted that where lenders are secure in their ability to enforce protective provisions in an indenture – by means of collective action if necessary – credit is likely to be available on "better terms when [firms] shop for financing in the first place." *United Airlines*, 406 F.3d at 924.[6]

[6] Although CompuCredit asserts that the *United Airlines* ruling is irrelevant here because it was a bankruptcy case, the Seventh Circuit's own characterization of the basis for its decision refutes that argument. *See United Airlines, Inc. v. U.S. Bank N.A.*, 409 F.3d 812, 813 (7th Cir. 2005) ("[o]ur view of § 1110 [of the Bankruptcy Code] and our view of the antitrust laws are independent (and independently sufficient) grounds of decision").

The rarity of cases (and the apparent absence of antitrust agency investigations or complaints) addressing this issue no doubt reflects the widespread consensus that bondholder collaboration in connection with pre-existing debt does not have any anticompetitive effects and on the whole benefits consumers and businesses by reducing unnecessary litigation, transaction costs and, ultimately, the cost of capital. And the three courts – from three different circuits – that have confronted antitrust claims in this context have firmly rejected them on the basis of essentially the same rationale. Thus, contrary to CompuCredit's assertion, by affirming the ruling below, this Court would not be creating some radical new precedent, but would instead be aligning itself with the only other circuits to have ruled – and those rulings were plainly correct – on the subject.[7]

II. THE LEGISLATIVE HISTORY AND PROVISIONS OF THE TRUST INDENTURE ACT ALSO SUPPORT AFFIRMANCE

In an attempt to distinguish *Sharon Steel* and demonstrate that the district court's reliance on it was error, CompuCredit emphasizes that the challenged collaboration in that case was between indenture trustees – not individual bondholders – who were "acting pursuant to the Trust Indenture Act,"[8] a statutory scheme supposedly not at issue here. CompuCredit En Banc Br. at 31; *see also id.*

---

7 *See* CompuCredit En Banc Br. at 12.

8 15 U.S.C. §§ 77aaa, *et seq.* ("TIA").

at 27. According to CompuCredit, the TIA "expressly authorizes trustees to act collectively for individual bondholders in the event of a default," and since this case involves neither indenture trustees nor an issuer default, the TIA has no bearing on the legality of the Noteholders' concerted conduct. *Id.* at 31.

CompuCredit is wrong on a number of counts. First, as reflected in the text of the TIA itself, its enactment was prompted by Congress's recognition that "the national public interest and the interest of investors in notes, bonds, [and] debentures … are adversely affected" when investors lack representation of a trustee empowered to protect and enforce their rights *as well as* adequate means of identifying and communicating with each other when those rights are threatened. 15 U.S.C. § 77bbb(a). Thus while one Congressional goal in promulgating the statute was to "insure that indenture security holders would have the services of qualified and disinterested trustees," another equally important objective was to afford them "means by which to communicate with one another *for the purpose of the protection of their common interests.*"[9]

Consistent with this second objective, the TIA does not – as CompuCredit suggests – merely grant authority for trustees to act on behalf of bondholders in the

[9] 69 Am. Jur. 2d *Securities Regulation – Federal* § 807 (2011) (emphasis added). Both the Senate and House reports concerning the TIA state that one of its "primary purposes" was "[t]o provide machinery … whereby [debt security holders] may get together for the protection of their own interests." *See* S. Rep. No. 76-248, at 1 (1939); H.R. Rep. No. 76-1016, at 25 (1939)

event of default, it also contains specific provisions designed to facilitate bondholder communication and cooperation.[10] And in none of the legislative discussions about the importance and means of facilitating bondholder collaboration in connection with outstanding debt is there any suggestion that (1) such conduct could violate the antitrust laws or (2) coordination was permissible or desirable only in the event of an issuer's default or insolvency.[11] Nor is there any indication that in either the TIA's provisions or its legislative

---

[10] The primary provision by which Congress sought to promote bondholder collaboration is Section 312 of the TIA, which requires issuers to provide indenture trustees with the names and addresses of current bondholders at regular intervals and requires trustees, upon bondholders' request, either to facilitate communications among them or explain to the Securities and Exchange Commission why it refuses. The SEC then must decide whether to uphold or overrule the trustee's objection and, if it decides against the trustee, the bondholders' request must be accommodated. *See* 15 U.S.C. § 77lll(b); Stanley E. Howard, *The Trust Indenture Act of 1939*, 16 J. Land & Pub. Util. Econ. 168, 174 (1940) (bondholders list requirement in Section 312 "is designed to facilitate the cooperation of security holders in the protection of their rights").

[11] *See, e.g.*, 84 Cong. Rec. H9511 (daily ed. July 19, 1939) (statement of Sen. Everett Dirksen) ("[M]y notion is that this bill will not be complete unless you say to … bona fide holders of securities that they can come in … and demand as a matter of right that they know who the other security holders are …, and if they want to get together to save … their investments, under the dome of heaven and the law of this country they should not be deprived of what I regard to be that elemental and essential right"); 84 Cong. Rec. S5007 (daily ed. May 2, 1939) (statement of Sen. Alben Barkley) ("This bill requires … [the trustee to] give, upon request, to every bondholder in America a list of other bondholders, so that in the case of *any difficulty*, in case of default, or in case the assets of the corporation are being or have been dissipated, the bondholders may communicate with one another in the formation of protective communities looking toward the taking of legal steps which may be available to them in the protection of their interests") (emphasis added).

history that Congress viewed involvement by the indenture trustee in any bondholder coordination as necessary to remove antitrust concerns.[12] On the contrary, the legislative history of the statute is full of Congressional statements emphasizing the importance of reducing impediments to collective action by bondholders, and nowhere even hints that cooperation which bypasses the indenture trustee altogether might violate the Sherman Act.[13]

A review of the legislative history and provisions of the TIA thus reveals that CompuCredit is entirely mistaken in asserting that (1) the statute relates only to collective activity by indenture trustees on behalf of bondholder groups in the event of an issuer default or insolvency and therefore has no applicability here; and (2) it provides a basis for distinguishing this case from *Sharon Steel*. On the contrary, as the district court observed, the promissory notes that are the subject of this litigation "were issued pursuant to two indentures," R-120 at 2, and the Noteholders' collective action in protection of their common interests is exactly the sort of conduct Congress was aware of and sought to encourage with the TIA. In

---

[12] *See* 84 Cong. Rec. H9524 (daily ed. July 19, 1939) (statement of Sen. Everett Dirksen) ("Unless we make it possible for [debt] holders … to get together and pool their interests and determine what they should do[,] … we will not have gotten at the very root of the problem. The [SEC] realize that fact, as evidenced by the report they made.")

[13] In fact, most bondholder groups are formed without invoking the procedure in Section 312 of the TIA; instead they come together via a more informal process with large investors identifying and contacting each other directly. *See* Ford Lacy & David M. Dolan, *supra* note 1, at 71.

fact, although this Court need not – and the district court did not – reach the question (since it was never raised below), there is a strong argument that the challenged conduct should be found impliedly immune from the antitrust laws because of the incompatibility between the permissive, even encouraging, approach to joint bondholder action Congress established in the TIA and the possibility that a court could find that conduct violative of the Sherman Act. *See Billing*, 551 U.S. at 275-276, 127 S. Ct. at 2392. In any event, the existence of federal legislation that reflects the same recognition of the benefits of bondholder collaboration (and the absence of anticompetitive effects) relied upon by the courts in *Falstaff*, *Sharon Steel* and *United Airlines*, should, at a minimum, support affirmance of the judgment below.

III. REVERSAL OF THE DISTRICT COURT'S DECISION WOULD HAVE PROFOUNDLY NEGATIVE EFFECTS ON BORROWERS, CREDITORS AND CONSUMERS

In the absence of any pronouncements by antitrust authorities or federal courts to the effect that collaboration among bondholders with respect to pre-existing debt even implicates the Sherman Act – much less that it could qualify as a *per se* violation – the formation of formal and informal groups of bondholders in response to issuer actions they perceive may threaten the value of their investments or previously negotiated contractual terms has been a routine occurrence for

years.[14] The odds are often stacked against these efforts, but when they do succeed there are benefits to both issuers and bondholders,[15] as the courts in *Falstaff*, *Sharon Steel* and *United Airlines* recognized.

A ruling by this Court adopting CompuCredit's view that any bondholder collaboration not related to outstanding debt that has matured or is in default

---

[14] *See* Royce R. Barondes, *An Economic Analysis of the Potential for Concern in Consent Solicitations for Bonds*, 63 Fordham L. Rev. 749, 752 (1994) ("recent empirical evidence indicates that bondholders frequently are able to negotiate [jointly] with issuers and obtain better terms"); Marcel Kahan & Bruce Tuckman, *Do Bondholders Lose from Junk Bond Covenant Changes?*, 66 J. Bus. 499, 512 (1993) (reporting that bondholder groups formed in at least twelve of fifty-eight consent solicitations reviewed); Matthew Sheahan, *Debt Holders Know When to Hold 'Em*, Bank Loan Report, Dec. 8, 2008, *available at* http://www.bankloanreport.com (predicting that "[t]he credit markets can expect to see more … investor resistance" to exchange offers, and that issuers "are going to be surprised at how bondholders will rally together to protect their rights").

[15] *See, e.g.*, Sheahan, *supra* note 14 (describing debt exchange offer where reaching agreement with "[a]n ad hoc committee of more than 66% of bondholders" would benefit the company, because it was in danger of default, as well as the bondholders, because absent an agreement they "risk[ed] having the company negotiate a loan deal with banks, which would leave them in a worse position in the capital structure"); Hugh Leask, *Euro Mart Recovery Continues, CMBS Thawing Forecast*, Total Securitization & Credit Inv., Dec. 10, 2010, *available at* 2010 WLNR 25759272 (describing tender offer in which existence of bondholder's committee worked to their advantage by persuading issuer to increase the amount of its offer and issuer benefitted from getting an extension on good terms for its repayment obligations); Lorre Jay, *Debt Exchanges Lowdown*, The Daily Deal, Apr. 6, 2009 *available at* 2009 WLNR 6328646 (reporting that "debt exchanges can provide an opportunity for both issuers and noteholders to benefit" because "[n]oteholders gain improved recoveries" and "[i]ssuers may be able to … extend maturities, while preserving opportunities for increased returns to shareholders" and noting that "[t]he formation of a bondholder committee may increase the likelihood of success of an exchange offer, as the committee provides a vehicle for an issuer to negotiate with a large block of bondholders").

constitutes a *per se* violation of the Sherman Act would therefore be a radical departure from existing precedents and bondholders' current understanding and would likely deter a broad range of communication and cooperation that scores of firms engage in on a regular basis.[16] And, as noted above, the harm from such a decision would not be confined to institutions such as the Noteholders and *amici*. On the contrary, by reducing bondholders' ability to enforce the covenants in their indentures, negotiate with issuers to modify coercive tender and exchange offers, and fashion collective solutions that protect their interests while keeping a distressed issuer out of Chapter 11, a *per se* rule of the sort CompuCredit describes would inevitably increase the cost of capital and reduce the availability of corporate credit – to the eventual detriment of consumers and the economy as a whole.[17]

---

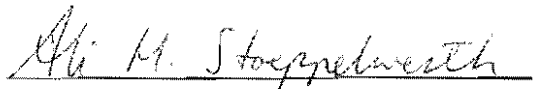
[16] The unprecedented and breathtaking reach of CompuCredit's position is reflected in the injunctive relief it requested in the alternative to a district court order declaring the Noteholders in violation of the Sherman Act: "CompuCredit seeks to enjoin Defendants from taking any coordinated action concerning the price of [its] notes or communicating with each other or third parties regarding CompuCredit's financial condition or breach of any indenture." R-120 at 8.

[17] *See, e.g.*, John C. Coffee, Jr. & William A. Klein, *Bondholder Coercion: The Problem of Constrained Choice in Debt Tender Offers and Recapitalizations*, 58 U. Chi. L. Rev. 1207, 1224 (1991) (explaining that the public policy justifications for encouraging consensual resolutions between issuers and bondholder groups "expand beyond ensuring fairness to bondholders and involve the overall efficiency of the capital market for debt": "[u]ltimately, any increase in the cost of capital because of the law's inability to deter opportunistic behavior [by

CONCLUSION

The order of the district court granting Appellees' motion for judgment on the pleadings should be affirmed.

Respectfully submitted.



ALI M. STOEPPELWERTH
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
202-663-6000

Counsel for Amicus Curiae The Credit Roundtable

June 29, 2012

issuers] or to facilitate collective action [by creditors] represents a dead-weight social loss.").

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 5,094 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(B), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

ALI M. STOEPPELWERTH
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
202-663-6000

Counsel for Amicus Curiae The Credit Roundtable

June 29, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 2012, I caused an original and eighteen copies of the foregoing En Banc Brief of Amicus Curiae The Credit Roundtable to be filed with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by Federal Express overnight courier, postage prepaid.

I also hereby certify that on this 29th day of June, 2012, I caused two copies of the En Banc Brief of Amicus Curiae The Credit Roundtable to be served by Federal Express overnight courier, postage prepaid, on the below-listed addresses, and in Portable Document Format to the below-listed electronic mail addresses:

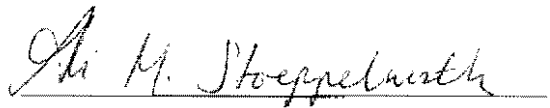
EMMET J. BONDURANT, II
FRANK M. LOWREY IV
JASON J. CARTER
MICHAEL A. CAPLAN
BONDURANT, MIXON & ELMORE, LLP
1201 W. PEACHTREE ST., NW
SUITE 3900
ATLANTA, GA 30339
bondurant@bmelaw.com
lowrey@bmelaw.com
carter@bmelaw.com
caplan@bmelaw.com

K. CRAIG WILDFANG
RANDALL TIETJEN
CHRISTOPHER W. MADEL
E. CASEY BECKETT
ROBINS, KAPLAN, MILLER & CIRESI, LLP
2800 LASALLE PLAZA
800 LASALLE AVENUE
MINNEAPOLIS, MN 55402
kcwildfang@rkmc.com
rtietjen@rkmc.com
cwmadel@rkmc.com
ecbeckett@rkmc.com

LISA L. HELLER
ROBINS, KAPLAN, MILLER & CIRESI, LLP
1201 PEACHTREE STREET
SUITE 2200
ATLANTA, GA 30309
llheller@rkmc.com

KAREN B. BRAGMAN
KEVIN B. GETZENDANNER
HEATHER SMITH MICHAEL
ARNALL GOLDEN & GREGORY LLP
171 17TH STREET, NW
SUITE 2100
ATLANTA, GA 30363
karen.bragman@agg.com
kevin.getzendanner@agg.com
heather.michael@agg.com

JEFF I. ROSS
HARRY N. NISKA
KELLY K. PIERCE
ROSS & ORENSTEIN, LLC
222 SOUTH NINTH STREET
SUITE 470
MINNEAPOLIS, MN 55402
jross@rossbizlaw.com
hniska@rossbizlaw.com
kpierce@rossbizlaw.com



ALI M. STOEPPELWERTH
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000

June 29, 2012