UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IOWA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, *et al.*,

Plaintiffs,

-against-

BANK OF AMERICA CORPORATION, *et al.*,

Defendants.

No. 17-cv-06221 (KPF)

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF EQUILEND HOLDINGS LLC, EQUILEND LLC, AND EQUILEND EUROPE LIMITED'S MOTION TO DISMISS

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On behalf of the EquiLend defendants – EquiLend Holdings LLC, EquiLend LLC, and EquiLend Europe Limited – we thank the Court for affording us an opportunity to submit this supplemental brief in support of dismissal under Rule 12 of the Federal Rules of Civil Procedure.

EquiLend joins in the joint motion to dismiss and memorandum of law filed on behalf of the prime broker defendants and agrees that the Amended Complaint fails to state a claim against any defendant. We write separately to explain why the allegations pertaining to EquiLend describe nothing more than lawful business activities. They do not indicate that EquiLend joined any sort of antitrust conspiracy, and they cannot provide a basis under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) to infer that EquiLend violated the antitrust laws. We also write separately to explain the basis for EquiLend Europe's motion to dismiss for lack of personal jurisdiction.

I. The Allegations Relating to EquiLend Are Insufficient Under *Twombly*

The Amended Complaint's 139 pages repetitiously describe various events affecting the stock lending business over the past decade. The sufficiency of a complaint should not, however, be judged by the number of facts alleged, the number of times they are repeated, or the conclusory statements used by a plaintiff to characterize them. It is the nature of those facts, whether one or one thousand, that matters. In order to pass muster under *Twombly*, a complaint must allege facts that plausibly suggest EquiLend joined a conspiracy to boycott.

As an initial matter, the Amended Complaint for the most part fails to identify specific conduct by each EquiLend entity. Rather, it conflates the three entities together and often with their co-defendants as a group. But collective allegations against a family of affiliated entities do not satisfy plaintiffs' burden to plead the individual participation of each entity in the alleged conspiracy. *Concord Assocs., L.P. v. Entm't Props. Tr.*, No. 12 Civ. 1667 (ER), 2014 WL

1396524, at *24-25 (S.D.N.Y. Apr. 9, 2014). Thus, the Amended Complaint should be dismissed on this ground alone. (Because the Amended Complaint conflates the three EquiLend entities and fails to provide notice of what each entity is alleged to have done, we refer generally to EquiLend throughout this brief unless otherwise indicated.)

Even with its group pleading, the Amended Complaint contains no allegation of a communication in which EquiLend agreed to boycott any entity. Two of the Amended Complaint's 398 paragraphs allege statements made to EquiLend's CEO, Brian Lamb, by unnamed individuals. *See* Amended Complaint ¶¶ 16 (alleging that unspecified communications may "indicate" that Mr. Lamb was instructed by unnamed individuals not to "break ranks"), 124 (alleging that Mr. Lamb was instructed by unnamed individuals to "advance an agenda"). But both of these alleged statements are vague, and there are no facts pleaded to support a plausible inference that these statements were an invitation to boycott, much less any facts supporting any agreement on the part of Mr. Lamb or EquiLend to do so. These two allegations do not provide direct evidence that EquiLend agreed to a boycott.

Plaintiffs must therefore rely on an inference of agreement from other things EquiLend is alleged to have done. For all its bluster, the Amended Complaint essentially says four things about EquiLend: (1) EquiLend Board of Directors meetings supposedly served as a forum for prime brokers to conspire; (2) EquiLend purchased AQS after it had largely failed to gain traction as a stock lending platform; (3) EquiLend declined to join forces with SL-x and later purchased patents from the SL-x bankruptcy estate; and (4) EquiLend created and aggressively marketed DataLend, a low-priced service that provides market data to prime brokers and agent lenders.

Like the parallel conduct at issue in *Twombly*, these allegations are "just as much in line with a wide swath of rational and competitive business strategy" as they are with an unlawful agreement. 550 U.S. at 554; *see also LLM Bar Exam, LLC v. Barbri, Inc.*, 16 Civ. 3770 (KPF), 2017 WL 4280952, at *20 (S.D.N.Y. Sept. 25, 2017) (finding no inference of conspiracy where conduct "'made perfect business sense', 'there are obvious alternative explanations for the facts alleged,' or the alleged facts 'suggest competition at least as plausibly as [they] suggest anticompetitive conspiracy'") (internal quotation omitted).

A. Board Meetings Do Not Provide a Basis for a Claim Against EquiLend

EquiLend is a joint venture formed in 2001 by both prime brokers and agent lenders, which operates a platform for trading and post-trade services. Amended Complaint ¶¶ 122, 261 n.45, 305, 378. EquiLend Holdings LLC is the parent company in which prime brokers and agent lenders have equity interests; EquiLend LLC and EquiLend Europe are operating subsidiaries for the United States and Europe respectively. Amended Complaint ¶ 88. As both a registered broker dealer and an alternative trading system, EquiLend is subject to regulation and oversight by both the SEC and FINRA.[1] Representatives from the prime brokers who are defendants in this case, as well as representatives from agent lenders who are aligned with the putative class members, sit on EquiLend's Board of Directors.[2]

[1] *See Alternative Trading Systems with Form ATS on File with the SEC as of April 7, 2017*, https://www.sec.gov/foia/ats/atslist0217.pdf; *EquiLend LLC Annual Audited Report* (July 19, 2017), https://www.sec.gov/Archives/edgar/vprr/1700/17004388.pdf; *EquiLend FINRA BrokerCheck Report*, https://files.brokercheck.finra.org/firm/firm_119107.pdf. *See also* Securities Exchange Act of 1934 § 15(b)(8), 15 U.S.C. § 78o (requiring broker dealer membership in a national securities association such as FINRA).

[2] Information about the membership of EquiLend's Board of Directors is publicly available on EquiLend's website at http://www.equilend.com/about/. The agent lenders who currently have representatives on EquiLend's Board are BlackRock, Northern Trust, State Street, and J.P. Morgan, which has an agent lender business as well as a prime broker business. The Chairman of the Board is a representative from an agent lender.

Without describing what was said at any particular meeting, plaintiffs allege that EquiLend Board meetings served as a "forum" for the prime broker defendants to coordinate a group boycott. *See, e.g.*, Amended Complaint ¶¶ 12, 123. But alleging in conclusory terms that prime brokers may have had inappropriate discussions while they were gathered for EquiLend Board meetings cannot provide a basis for a claim against EquiLend.

Judge Engelmayer recently rejected a similar claim, brought by the same class counsel, against a trading platform in *In re Interest Rate Swaps Antitrust Litigation*, 261 F. Supp. 3d 430, 486 (S.D.N.Y. 2017) ("*In re IRS*"). The plaintiffs there alleged that Tradeweb Board meetings were the "principal forum" at which the defendant owners held "'secret conspiratorial discussions' 'under the cover of a supposedly lawful and independent enterprise' so as 'to coordinate their conduct.'" *Id.* at 485. Judge Engelmayer concluded that "even if there had been a well-pled allegation that the Dealers used a Tradeweb board meeting to plot an aspect of the boycott, that would not implicate Tradeweb." *Id.* at 486. The same analysis applies here but with even greater force: unlike Tradeweb, EquiLend has shareholders and Board members who are aligned with the putative class.

B. Purchasing AQS Was Consistent with Rational Business Strategy

Plaintiffs allege that EquiLend purchased AQS in 2016. Amended Complaint ¶ 300. But acquiring another company, even a competing company, is not evidence of joining a conspiracy. It is normal business conduct that happens every day in corporate America. In the same year that EquiLend purchased AQS, for example, 1,832 merger and acquisition transactions were notified to the U.S. antitrust agencies.[3] As the federal antitrust agencies have stated, "[t]he vast majority

[3] Fed. Trade Comm'n & U.S. Dep't of Justice, Joint Hart-Scott-Rodino Annual Report for Fiscal Year 2016 (2017), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014_fy_2016_hsr_report_final_october_2017.pdf. During that same year, the

of mergers pose no harm to consumers, and many produce efficiencies that benefit consumers in the form of lower prices, higher quality goods or services, or investments in innovation." Fed. Trade Comm'n & U.S. Dep't of Justice, *Commentary on the Horizontal Merger Guidelines* (2006).

Plaintiffs themselves acknowledge that EquiLend had good reason to acquire AQS. As the Amended Complaint explains, EquiLend purchased AQS to broaden its offerings to customers. By "providing seamless access to OCC's Market Loan Program," EquiLend would give customers "unprecedented access to central clearing services." Amended Complaint ¶ 300 & nn.52-53.

The Amended Complaint alleges no facts suggesting that the AQS acquisition was made pursuant to a boycott conspiracy. AQS still operates today and the Amended Complaint alleges no actions taken by EquiLend to shut down the platform.[4] The Amended Complaint alleges only that EquiLend should have "capitalized on the valuable assets and technology that it purchased for material consideration from AQS . . . by further developing these assets for its own use or licensing them for use to third parties, in either case in exchange for increased revenues." *Id.* ¶ 315.

There is nothing in the law, however, that obligates EquiLend to change an existing business model to suit plaintiffs or "develop" an acquired company in any particular way. And plaintiffs' assertion that EquiLend did not maximize revenues is both conclusory and

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federal antitrust authorities took enforcement action in only 22 transactions, *id.* at 2, meaning that some 99% of notified transactions raised no concerns.

[4] Though not alleged in the Amended Complaint, we note for the Court's information that the AQS website is alive and well at https://www.tradeaqs.com/, and describes the services currently available from the company. *See also* AQS, FINRA BrokerCheck Report, CRD No. 147941 (2017), https://files.brokercheck.finra.org/firm/firm_147941.pdf (reporting that Automated Equity Finance Markets, Inc. (AQS) currently operates as a "securities lending marketplace where . . . members transact with a central counterparty and transactions are cleared by OCC").

speculative. (As an aside, companies generally do not seek to maximize revenues. They seek to maximize profits.) Plaintiffs' disapproval of EquiLend's business strategy cannot be a basis for inferring a conspiracy. *See In re Citric Acid Litig.*, 191 F.3d 1090, 1101 (9th Cir. 1999) ("Courts have recognized that firms must have broad discretion to make decisions based on their judgments of what is best for them and that business judgments should not be second-guessed even where the evidence concerning the rationality of the challenged activities might be subject to reasonable dispute.").

C. Declining to Combine with SL-x and Later Purchasing SL-x's Patents out of Bankruptcy Were Consistent with Rational Business Strategy

Plaintiffs allege that EquiLend did not "join forces with" and did not entertain the possibility of being purchased by SL-x. Amended Complaint ¶¶ 223, 314. But there is nothing out of the ordinary about these facts. Just as companies often make acquisitions, so too do they often turn down offers to combine. It is revealing that plaintiffs simultaneously argue that combining with another company (AQS) and not combining with another company (SL-x) are both evidence of an antitrust conspiracy. Under plaintiffs' view of the law, EquiLend can be condemned if it does and condemned if it doesn't.

There also is nothing suspicious about EquiLend's acquisition of patents from the SL-x bankruptcy estate. Plaintiffs do not allege, nor could they in good faith, that other potential buyers were prevented from acquiring those patents. Any other potential buyer could have stepped in at any time during the bankruptcy process and made its own bid, but apparently no one ever successfully did. Moreover, plaintiffs do not allege that EquiLend paid some sort of predatorily high price for SL-x's patents. To the contrary, the alleged price of £500,000 is trivial compared to the size of the stock lending business alleged in the Amended Complaint. *See id.* ¶¶

91 (value of securities on loan was $1.75 trillion in 2015), 6 (defendants earn $9 billion per year in fees).

Plaintiffs suggest that there is something suspicious about the fact that EquiLend allegedly "put the patents on the shelf." *Id.* ¶ 272. Given that SL-x operated in the same general space as EquiLend, however, the Court can infer that SL-x's patents had the potential to be used against EquiLend. It is not at all suspicious that a company might acquire patents to prevent patent trolls or others from using them to claim a right to royalties. *See*, *e.g.*, Paul Scola, *Reducing Exposure to Patent Trolls*, Risk Management (May 2, 2016) (advising companies to proactively purchase potentially overlapping patents as a risk management strategy). Nor is it suspicious that EquiLend has not publicly announced that it is making any particular use out of its acquired patents. Patent owners have no duty to use or license their intellectual property. *See SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1206 (2d Cir. 1981). EquiLend's acquisition of SL-x's patents is an innocuous fact.

D. Creating DataLend Was Consistent with Rational Business Strategy

Plaintiffs make the far-fetched assertion that EquiLend's creation of a data product called DataLend – which has competed aggressively against the leading supplier in the market, Data Explorers – is evidence that EquiLend was part of the boycott conspiracy alleged by plaintiffs. It would stretch *Twombly* beyond recognition to hold that introducing a new product and marketing it vigorously is more consistent with conspiracy than it is with the "wide swath of rational and competitive business strategy" that cannot support an inference of conspiracy. 550 U.S. 554.

Allegations that EquiLend "directly engage[d] with the customers who had already signed up with Data Explorers," "agreed to provide [its customers] directly with data similar to that being provided by Data Explorers, but at very little cost or, in some cases, virtually for free," and "had plans to 'kill' Data Explorers," Amended Complaint ¶¶ 255, 259, 261, show only the

type of vigorous competition that the antitrust laws are designed to promote. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) ("cutting prices in order to increase business often is the very essence of competition"); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989) ("[A] desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition."). Absent predatory conduct under Section 2 of the Sherman Act, which has not been alleged in this case, introducing a new product and competing aggressively cannot violate the antitrust laws. *See*, *e.g.*, *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 998-1003 (9th Cir. 2010) ("[P]roduct introduction must be alleged to involve some associated conduct which constitutes an anticompetitive abuse or leverage of monopoly power, or a predatory or exclusionary means of attempting to monopolize the relevant market, rather than aggressive competition on the merits.") (internal quotations omitted).

Plaintiffs' disagreement with the terms of DataLend's customer contracts, Amended Complaint ¶ 257, also does not push DataLend into the realm of unlawful conspiracy. The distribution agreements entered into with prime broker defendants regarding the use of broker trading data are bilaterally-negotiated contracts. *Id.* To the extent they include similar provisions that prohibit disclosure of that prime broker's data to lender or borrower customers, *id.*, it is because each prime broker had good reason to independently insist upon them. *AFMS, LLC v. United Parcel Service Co.*, No. CV 10-05830 MMM, 2011 WL 13128436, at *16 n.122 (C.D. Cal. Nov. 23, 2011) (finding that antitrust defendants were not obligated to share proprietary information with outsiders).

As plaintiffs allege, moreover, full disclosure of price data "would expose the breadth of the price gap between borrowers and lenders—the gap from which dealer profits were drawn."

Amended Complaint ¶ 186. Plaintiffs themselves recognize that this is something no prime broker would want to see happen. Nothing more can be inferred from these contracts than independent market incentives on the part of the prime brokers to protect their proprietary information and a service supplier wanting to accommodate its customers' needs.

Finally, plaintiffs do not allege, nor could they in good faith, that Data Explorers was driven out of the market or that it is anything other than a vibrant competitor today. EquiLend's creation of DataLend provides no basis for an inference of conspiracy.

E. The Agreement EquiLend is Alleged to have Joined Should be Reviewed Under the Rule of Reason

There is an additional reason to dismiss the Amended Complaint. Even if the Court finds that it can infer from the business conduct described above that EquiLend joined an agreement with the prime brokers to refrain from using other trading platforms or data services (what plaintiffs call a boycott), such an agreement should be reviewed under the rule of reason, not the *per se* rule that is the sole basis for plaintiffs' claim. That is, a factfinder would have to balance the procompetitive and anticompetitive effects of the alleged agreement and determine whether on balance it harms competition. *See In re IRS*, 261 F. Supp. 3d at 468.

The alleged agreement in this case amounts to an exclusive dealing arrangement between EquiLend and its owner/customers. Exclusive dealing agreements have long been evaluated under the rule of reason. *See Elec. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 243 (2d Cir. 1997) (vertical exclusive dealing agreements are generally subject to a rule of reason analysis); *see also Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n,* 357 F.3d 1, 8 (1st Cir. 2004) ("[I]t is widely recognized that in many circumstances [exclusive dealing arrangements] may be highly efficient—to assure supply, price stability, outlets, investment, best efforts or the like—and pose no competitive threat at all."); Phillip E. Areeda &

Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1814 (2013) ("[A] buyer or group of buyers may make a supplier's investment more secure by guaranteeing a market or by guaranteeing a larger market, justifying a larger investment."). Similarly, any challenge to EquiLend's formation or business activities would be judged under the rule of reason standard. *See* Joint Mem. of Law 37-38.

The Supreme Court has cautioned that "the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue . . . and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886-87 (2007). The courts do not have sufficient experience with restrictive agreements between trading platforms and their owner/customers to conclude that they are almost always on balance anticompetitive.

To the contrary, it has long been recognized that restrictive agreements between owner/customers and trading platforms can be on balance procompetitive. For example, shortly after the formation of the online airline ticket platform Orbitz, the Antitrust Division of the United States Department of Justice investigated an agreement among its five airline owners and 40 other airlines – which collectively had a large share of the market for air travel – that prevented those airlines from offering lower fares on competing online platforms. Not only did the Justice Department apply a rule of reason analysis to this restrictive agreement, it concluded that the arrangement was lawful.[5] Similarly, in a recent case challenging restrictive agreements between American Express and the thousands of merchants that participate in its credit card network, the Second Circuit applied a rule of reason analysis and held that the government had

[5] *See* Statement by Assistant Attorney General R. Hewitt Pate Regarding the Closing of the Orbitz Investigation (July 31, 2003), https://www.justice.gov/archive/atr/public/press_releases/2003/201208.htm.

failed to meet its burden of proving that those agreements are anticompetitive. *See United States v. American Express Co.*, 838 F.3d 179, 196, 207 (2d Cir. 2016). Although the case is currently before the Supreme Court, no party is arguing that a *per se* standard should be applied.

The rule of reason applies here. Plaintiffs do not allege sufficient facts to make out a rule of reason case. Such a claim would require allegations of a geographic market, a product market, market power in that market, and anticompetitive effects. *In re IRS*, 261 F. Supp. 3d at 467-69 (rejecting a similar challenge to conduct by a joint venture for failure to plead facts supporting a rule of reason claim). The Amended Complaint alleges none of this and, thus, it should be dismissed.

II. There is No Personal Jurisdiction Over EquiLend Europe

The Amended Complaint should also be dismissed as to EquiLend Europe for lack of personal jurisdiction. *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1781 (2017).

EquiLend Europe has no meaningful connection to the United States, let alone one sufficient to confer jurisdiction. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 761-63 (2014). As plaintiffs acknowledge, the company is incorporated in the United Kingdom and Wales and has its headquarters in London. Amended Complaint ¶ 88; Declaration of Laurence J. Marshall dated January 24, 2018 ("Marshall Decl.") ¶ 2. It has no office, employees, assets, or bank accounts in the United States, and does not serve clients located in the United States. Marshall Decl. ¶ 3. Plaintiffs allege no conduct by EquiLend Europe, much less any suit-related conduct, in the United States.

Plaintiffs' allegation that SL-x met with employees of the prime broker defendants while they served as directors of EquiLend or EquiLend Europe, Amended Complaint ¶ 229, is

insufficient to confer jurisdiction. Plaintiffs do not allege that these meetings took place in the United States, or that the directors even participated as agents of EquiLend Europe. *See In re Processed Egg Prods. Antitrust Litig.*, 821 F. Supp. 2d 709, 753 (E.D. Pa. 2011) (plaintiffs "must allege facts sufficient to demonstrate the agents were acting with the apparent authority"). To the contrary, the Amended Complaint indicates that the directors were acting as representatives of the prime broker defendants. *See* Amended Complaint ¶ 225 (stating that these meetings occurred because SL-x was "trying to court the prime broker defendants *individually*") (emphasis added).

Likewise, an allegation that EquiLend Europe has some officers or directors who reside in the United States or serve functions for EquiLend's U.S. entities, s*ee id.* ¶ 90, is insufficient to create personal jurisdiction since nothing in the Amended Complaint links those individuals to any challenged conduct by EquiLend Europe. *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014) (specific jurisdiction depends on "the relationship among the defendant, the forum, and the litigation") (quotations omitted); *see also In re Aluminum Warehousing Antitrust Litig.*, 90 F. Supp. 3d 219, 238-39 (S.D.N.Y. 2015) (finding that the allegation that officers of company presumed to be subject to personal jurisdiction in the U.S. held positions at foreign parent did not create personal jurisdiction over foreign parent).

Under these circumstances, haling EquiLend Europe into court in New York would be improper. *Bristol-Myers Squibb*, 137 S. Ct. at 1780-81. It is also inconsistent with due process and traditional notions of fair play and substantial justice. *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal.*, 480 U.S. 102, 113 (1987); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

CONCLUSION

The Supreme Court observed in *Twombly* that discovery in antitrust cases can be expensive and burdensome, and noted that "something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." 550 U.S. at 557-58 (internal quotations omitted). EquiLend should not be subjected to the *in terrorem* effect of antitrust discovery in this case. It is a small company that devotes its time and resources to operating and improving a trading platform that is valued by its customers.[6] The Amended Complaint alleges nothing more than normal business conduct that one would expect from a company of this nature. Allowing an antitrust class action to proceed against EquiLend would distract the company, drain its resources, and undermine the interests of competition and the putative class members whose best interests plaintiffs purport to represent.

For the reasons discussed above and those set forth in the joint brief adopted by EquiLend herein, the Court should dismiss with prejudice all claims against EquiLend Holdings LLC, EquiLend LLC, and EquiLend Europe Limited.

[6] EquiLend has received numerous accolades from industry participants over the years, including for example awards from a popular financial publication in 2016 and 2017 for Best Trading Platform and Best Data Provider. *See International Securities Finance Survey 2017*, Global Investor Group, https://globalinvestorgroup.com/articles/3688644/international-securities-finance-2017-awards-winners-announced; *International Securities Finance Survey 2016*, Global Investor Group, https://globalinvestorgroup.com/articles/3587775/equity-lending-and-fixed-income-lending-surveys-2016-results.

Dated: January 26, 2018

Respectfully submitted,

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