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 Civ. 6221 (KPF)

PRIME BROKER DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR JOINT MOTION TO DISMISS ALL CLAIMS

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PRELIMINARY STATEMENT

Plaintiffs' opposition fails to cure the fatal pleading defects identified by Defendants, including the most fundamental defect: the alleged conspiracy, viewed as a whole, is implausible. While Plaintiffs attempt to downplay the lending relationships that make stock loans ill-suited for anonymous exchange trading, they nonetheless concede that such trading is not possible without clearing brokers willing to clear stock loans on behalf of borrowers and lenders. (Opp'n at 13.) Although "[t]here are many more clearing brokers than prime brokers" (*id.*), Plaintiffs do not contend that *any* of the "over sixty brokerage firms with stock lending clearing privileges" (AC ¶ 154 n.36) elected to act as clearing brokers for stock loans or that Defendants prevented them from doing so. Nor do Plaintiffs explain how Defendants could have executed the alleged conspiracy at EquiLend board meetings in the presence of agent-lenders whose clients stood to be harmed. Instead, Plaintiffs suggest that agent-lenders "may have been" aligned with Defendants (Opp'n at 27), sheer speculation that their own allegations contradict.

Plaintiffs do not point to any allegations that satisfy the criteria for pleading an antitrust conspiracy. Plaintiffs purport to identify direct evidence of conspiracy, but merely cite a handful of mundane allegations that do not reflect any action taken by Defendants in furtherance of an alleged group boycott. They also do not plead any meaningful parallel conduct by each Defendant. Rather, all of the alleged conduct is fully consistent with "rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007). Such conduct is "not—at all—suggestive of conspiracy." *In re Interest Rate Swaps Antitrust Litig.* ("*IRS*"), 261 F. Supp. 3d 430, 475 (S.D.N.Y. 2017).

Plaintiffs' opposition also cannot obscure that almost all of their substantive allegations relate to legitimate joint-venture conduct by EquiLend and its directors. Plaintiffs try to spin this conduct into a *per se* antitrust violation, but they have no cogent response to the controlling case

law holding that joint-venture conduct is analyzed under the rule of reason. Contrary to their suggestion, Plaintiffs fail to allege the elements of a rule-of-reason claim.

Plaintiffs likewise fail to defend their standing to sue under the antitrust laws: their alleged injury is unduly speculative inasmuch as the clearing brokers needed for all-to-all trading were not available. Plaintiffs' efforts to distinguish the dismissal of the pre-2013 claim in *IRS* for lack of antitrust standing on exactly this ground are unavailing. *See* 261 F. Supp. 3d at 494.

Finally, Plaintiffs do not deny that most of their core factual allegations fall outside the Clayton Act's four-year limitations period. With respect to their attempt to toll the statute of limitations, Plaintiffs' opposition identifies no allegations that plead the elements of fraudulent concealment with the particularity required by Rule 9(b). Accordingly, their pre-2013 claims (the bulk of the Amended Complaint (the "Complaint")) should be dismissed as untimely.

ARGUMENT

I. PLAINTIFFS FAIL TO ALLEGE A PLAUSIBLE ANTITRUST CONSPIRACY.

A. Plaintiffs' Opposition Demonstrates That Their Conspiracy Theory Is Facially Implausible.

As Defendants showed in their opening brief, an alleged conspiracy orchestrated at EquiLend board meetings to block anonymous exchange trading is implausible because the marketplace lacked the necessary clearing brokers to support such trading, agent-lenders participate on EquiLend's board, and loaned securities can be recalled at any time. None of the explanations and excuses offered by Plaintiffs for these defects in their conspiracy theory imported from other markets is supported by well-pled facts.

First, Plaintiffs do not dispute that there is no clearing mandate for stock loans, that OCC's bylaws require lenders and borrowers to rely on OCC clearing members to clear their trades, and that none of the 60-plus clearing members at OCC elected to enter the business of

clearing stock loans for third parties. Unlike the post-2013 time period in *IRS*, there was no regulatory mandate that "willed . . . into being" the clearing infrastructure necessary to support all-to-all trading. 261 F. Supp. 3d at 494. As a result, the clearing arrangements needed to sustain such trading never emerged for stock lending. Plaintiffs' failure to allege otherwise is fatal to their claims. *See In re Actos End-Payor Antitrust Litig.*, 848 F.3d 89, 98 (2d Cir. 2017) (dismissing antitrust claim as "implausible because it rests on a necessary premise that is not supported by well-pleaded factual allegations"). Faced with this reality, Plaintiffs are reduced to arguing that clearing would be possible *if* Defendants (or any of the other firms with clearing privileges) entered the business of clearing stock loans. (Opp'n at 13.) Yet Plaintiffs offer no plausible explanation as to why Defendants, absent a regulatory mandate, should have acted against their economic self-interest by forgoing their larger and more profitable role as prime brokers for the "modest fee[s]" that clearing brokers earn. (*Id.* at 13-14.) Nor do Plaintiffs explain why, if "provid[ing] access to the OCC" made rational business sense (*id.* at 13), *none* of the other 60 firms with clearing privileges entered the business of clearing stock loans for others (AC ¶ 154 n.36). As the infrastructure needed for Plaintiffs' alternative trading environment was "not yet in place," the conspiracy is facially implausible. *IRS*, 261 F. Supp. 3d at 465.

Second, Plaintiffs offer no plausible explanation as to how Defendants could have perpetrated the alleged conspiracy in plain view of the large agent-lenders—BlackRock, Northern Trust and State Street—that sit on EquiLend's board and represent many of the conspiracy's purported victims. Instead, Plaintiffs now speculate that agent-lenders "were also entrenched in the market and may well have their own incentives to preserve the status quo." (Opp'n at 27.) Plaintiffs urge the Court to accept this newly minted and unpled speculation because "[n]othing in the Complaint says otherwise" (*id.*), but, in fact, the Complaint alleges that

agent-lenders *supported* the alleged boycott victims. (*See* AC ¶ 165 ("[N]umerous agent lenders supported AQS."); *id.* ¶ 251 ("BNY Mellon, State Street, and Northern Trust[] met with SL-x personnel and acknowledged the price transparency and other benefits the platform would bring to the market."); *id.* ¶ 252 ("Andrew Clayton (Global Head of Securities Lending at Northern Trust) expressed interest in SL-x . . . ."); *id.* ¶ 261 ("Data Explorers had multiple contracts with agent lenders . . . .").) If any agent-lenders were part of the alleged conspiracy, Plaintiffs should have pled that allegation in their 139-page Complaint. *See Muhammad v. Oliver*, 547 F.3d 874, 880 (7th Cir. 2008) ("The longer and more detailed a complaint is, the more compelling the inference that any omission from it was deliberate and should bind the plaintiff.").

Third, Plaintiffs dismiss the dynamics and market realities of stock lending that make trust and credibility in lending relationships critically important as mere "technical arguments" that "defy some basic facts." (Opp'n at 24.) But the three paragraphs of the Complaint cited by Plaintiffs that supposedly plead the market's readiness for anonymous trading merely describe features of SL-x, a non-operational platform that was never intended to offer all-to-all trading. (*Id.* at 23-24 (citing AC ¶¶ 179-80, 271).) Plaintiffs further assert that the risk of premature recall of loans of "hard-to-borrow" stocks "could easily be accounted for with a variance in the risk premium" (*id.* at 24), without providing a supporting citation or explaining how such a risk premium would be possible. Finally, Plaintiffs say that Defendants ignore that "AQS was developed by industry insiders, who knew the market, and won the support of [other] entities." (*Id.*) Yet those "insiders" and other AQS investors would not have been the first to anticipate incorrectly market or regulatory evolution on central clearing. AQS lobbied the SEC to "encourag[e] . . . a central counterparty model" in the hopes that regulators would require the clearing infrastructure necessary to support all-to-all trading. (Quadriserv Comment Letter at 2

(June 19, 2009), https://www.sec.gov/comments/s7-30-08/s73008-126.pdf (cited at AC ¶ 91 n.17).) In addition, most of the alleged statements of "support" for AQS do not identify whether these "supporters" favored a modest "broker-to-broker" platform or a more ambitious all-to-all platform that purportedly would revolutionize the stock lending business. (*See* Opp'n at 24; AC ¶¶ 155, 157, 160, 162-63.) Plaintiffs cannot simply wish away an obvious barrier to all-to-all stock lending based on bare assertions that AQS had some "supporters."

B. Plaintiffs Do Not Adequately Allege Direct Evidence of a Conspiracy.

Plaintiffs' suggestion that "this is the rare case where Plaintiffs have uncovered direct evidence" of conspiracy falls flat. (Opp'n at 11.) *First*, Plaintiffs' supposed "evidence" does not qualify as "direct evidence"—"evidence that is *explicit* and *requires no inferences* to establish the proposition or conclusion being asserted." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 324 n.23 (3d Cir. 2010) (emphases added) (citation omitted). They point to nothing like the paradigmatic example of a "recorded phone call in which two competitors agreed to fix prices at a certain level." *Mayor & City Council of Balt., Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013). Plaintiffs' reliance on *In re Text Message Antitrust Litigation*, 630 F.3d 622 (7th Cir. 2010), is misplaced. In finding no direct evidence, the court noted that such evidence "usually take[s] the form of an admission by an employee of one of the conspirators[] that officials of the defendants had met and agreed explicitly on the terms of a conspiracy." *Id.* at 628. Here, Plaintiffs offer, at best, "an inference from circumstantial evidence," *id.* at 629, and nothing that comes close to an admission of an explicit agreement to boycott AQS, SL-x or Data Explorers.

Second, Plaintiffs' allegations of purported direct evidence relate to presumptively lawful rule-of-reason agreements, not *per se* unlawful boycott agreements. According to Plaintiffs, the conspiracy "primarily concerns an agreement among the Prime Broker Defendants about what they would do *outside* of their joint venture." (Opp'n at 33.) But *every* piece of supposed direct

evidence pertains to vague statements related to that joint venture and does not reflect a group boycott agreement. (*Id.* at 11-12.) Plaintiffs' so-called "smoking gun" consists of a purported statement by an EquiLend director who worked in JPMorgan's European agent-lender business, referencing "a 'general agreement among [the] directors' of EquiLend 'that industry advances should be achieved from within EquiLend.'" (AC ¶ 239.) This supposed reference to a "general agreement" among *EquiLend*'s directors—including directors appointed by agent-lenders—to innovate through *EquiLend* is nowhere near a "direct" or "explicit" admission of a *per se* unlawful boycott agreement. *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 225 (3d Cir. 2011). An agreement among the directors of a joint venture to support that venture rather than its competitors would be perfectly lawful (*see* MTD at 37-41), and would not even provide *circumstantial* evidence of an unlawful group boycott. *See In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 369-70 (S.D.N.Y. 2016) (allegations that defendants participated in a narrow and lawful agreement "cannot support the broad [antitrust conspiracy] alleged").

Plaintiffs also claim that Karl Bishti of Credit Suisse, another EquiLend director (AC ¶ 309), declined to invest in SL-x, supposedly stating that "no industry change would happen without the '*cooperation*' of EquiLend." (Opp'n at 11 (quoting AC ¶ 241).) This alleged statement at most reflects an EquiLend director's support of that lawful joint venture, not direct evidence of a conspiracy. Plaintiffs further concede that Bishti purportedly made this alleged statement when SL-x lacked an operational platform in the United States and no other prime broker supported it. (*See* AC ¶¶ 20, 253, 268.) It would not be surprising that Bishti would lack interest in investing in such a venture when Credit Suisse already had invested in EquiLend. *See Twombly*, 550 U.S. at 569 ("[F]irms do not expand without limit and none of them enters every market that an outside observer might regard as profitable . . . .").

Plaintiffs claim that Thomas Wipf of Morgan Stanley "admitted" in January 2016 that he and William Conley of Goldman Sachs "agreed to 'act together to get a hold of this thing.'" (Opp'n at 12 (citing AC ¶ 296).) According to Plaintiffs, this statement is direct evidence that Morgan Stanley and Goldman Sachs agreed with each other, and then "secured the agreement of the other Prime Broker Defendants," to "purchase AQS" through EquiLend in August 2016. (*Id.*) Even assuming that a vague allegation about "this thing" is direct evidence of an agreement that EquiLend should purchase AQS, any such agreement would be presumptively lawful and would not provide a basis for inferring a separate *unlawful* agreement to boycott AQS. *See infra* Argument II. Moreover, an alleged meeting in January 2016—seven years after the conspiracy supposedly began—cannot possibly serve as direct evidence of a conspiracy beginning in 2009.

Finally, Plaintiffs' unadorned speculation that there might be unidentified emails "on Defendants' servers" purportedly instructing EquiLend's CEO not to "break rank" is not direct evidence of a conspiracy. (Opp'n at 11-12.) This vague reference to "emails" is not explicit evidence from which no further inference is required. *See Burtch*, 662 F.3d at 225. And despite Plaintiffs' repeated reliance on colorful statements likening EquiLend to "the mafia run by five crime families" (Opp'n at 11), Plaintiffs' opposition fails to identify any facts connecting those statements to any boycott of anonymous exchanges (MTD at 20-21).

C. Plaintiffs Continue To Rely on Impermissible Group Pleading.

Plaintiffs cite *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 738 F. Supp. 2d 1011 (N.D. Cal. 2010), for the proposition that "[c]ourts routinely allow" pleadings that do not make defendant-by-defendant allegations. (Opp'n at 30.) But Plaintiffs omit the end of the sentence they quote, which states that courts "require plaintiffs 'to make allegations that plausibly suggest that *each Defendant* participated in the alleged conspiracy.'" 738 F. Supp. 2d at 1019 (emphasis added) (citation omitted). As a result, "the dispositive issue[] . . . as to individual defendants[]

[is] whether it is adequately pled that they '*in their individual capacities*, consciously committed themselves to [a] common scheme designed to achieve an unlawful objective.'" *IRS*, 261 F. Supp. 3d at 478 (emphasis added) (quoting *AD/SAT, a Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999)). Indeed, "*Twombly* makes clear that at the pleading stage . . . *each defendant* is entitled to know how he is alleged to have conspired, with whom and for what purpose." *In re Aluminum Warehousing Antitrust Litig.*, 2015 WL 1344429, at *2 (S.D.N.Y. Mar. 23, 2015) (emphasis added). Plaintiffs do not satisfy that standard.

D. Plaintiffs Fail To Identify Adequate Allegations of Parallel Conduct.

In the handful of pages of the opposition that discuss Plaintiffs' allegations of parallel conduct (Opp'n at 13-14, 16), Plaintiffs do not come close to showing that the Complaint adequately pleads parallel conduct by each Defendant from which a conspiracy plausibly may be inferred. Instead, Plaintiffs reference allegations that (i) describe conduct by Defendants that was more divergent than parallel, (ii) baldly assert that Defendants "boycotted the three platforms" (*id.* at 14), and (iii) amount, at most, to mere inaction.

***Data Explorers*.** Plaintiffs do not identify any alleged parallel conduct related to Data Explorers. The closest they come is their assertion that Defendants entered into "distribution agreements" with DataLend "containing identical restrictions" on DataLend's use of data. (*Id.*) But common contractual provisions with a common counterparty are not suggestive of conspiracy. *In re Elevator Antitrust Litig.*, 502 F.3d 47, 51 (2d Cir. 2007) ("Similar contract terms can reflect similar bargaining power and commercial goals (not to mention boilerplate); similar contract language can reflect the copying of documents that may not be secret[.]"). Prime brokers have good reason to insist independently on provisions restricting the use of their own proprietary data. *AFMS, LLC v. UPS*, 2011 WL 13128436, at *16 n.122 (C.D. Cal. Nov. 23, 2011) (no need for antitrust defendants to share proprietary information with outsiders).

SL-x. Plaintiffs contend that Defendants "pressured major market participants . . . to stay off the SL-x platform" and "refused to support SL-x's 'softer' and 'cooperative' approach, which would have given Defendants a 'seat at the table' in the development of SL-x." (Opp'n at 14 (citing AC ¶¶ 18, 219-27, 251-52).) These generalized allegations are a far cry from the Second Circuit's example of parallel conduct that "might be sufficient" under *Twombly*—*i.e.*, "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernable reason." *Citigroup*, 709 F.3d at 137. Plaintiffs also do not deny that SL-x lacked an operational platform in the United States, such that "there was little urgency to conspire against it." *IRS*, 261 F. Supp. 3d at 471.[1]

AQS. Plaintiffs admit that multiple Defendants joined, used or invested in AQS (MTD at 25-26), thus conceding that Defendants' AQS-related conduct was divergent (Opp'n at 16). Citing *Anderson News, LLC v. American Media, Inc.*, 680 F.3d 162 (2d Cir. 2012), Plaintiffs argue that "conspirators do not always behave identically" (Opp'n at 16), but that case is inapposite. In *Anderson News*, the plaintiff alleged a conspiracy to drive it out of business after it announced a new distribution surcharge. 680 F.3d at 191. Although the Second Circuit noted the defendants' "varied" initial responses to the surcharge, it discounted that variation because, "notwithstanding their responses initially, some *two weeks later every defendant . . . acted, within a span of three business days, to cut [the plaintiff] off*." *Id.* (emphasis added). Here, by contrast, certain Defendants continued to transact with AQS for *years* after the start of the alleged conspiracy in 2009. In fact, two years into the supposed conspiracy, BofAML continued

[1] Plaintiffs assert that SL-x was "ready, willing, and able to offer anonymous, centrally cleared stock lending" in 2012. (Opp'n at 25.) Plaintiffs elsewhere concede, however, that SL-x had no plans to offer direct trading between borrowers and lenders, first approached OCC for access to central clearing in 2013 and never launched a platform in the United States. (AC ¶¶ 178, 179, 233, 235, 253, 268.) Plaintiffs instead allege that SL-x's platform in *Europe* "permitted central clearing" of certain foreign stocks. (*Id.* ¶ 178.)

to make "equity investments" in and place up to "$1 billion of notional loans each day" on AQS. (AC ¶¶ 205-07.)[2] Morgan Stanley continued to use AQS for certain stock loan transactions until 2015—six years into the alleged conspiracy—and "publicly advocated central clearing to [its] customers." (*Id.* ¶¶ 285, 296 n.51, 380(a).) And contrary to Plaintiffs' assertion that "Morgan Stanley (and its counterparts) imposed unnecessary conditions on their clearing connections" (Opp'n at 3), there are absolutely *no* allegations that Morgan Stanley or any other Defendant had anything to do with OCC's clearing rules (*see* AC ¶¶ 148 & n.32, 149).

Plaintiffs also assert that "Credit Suisse, JP Morgan, Morgan Stanley, and UBS each demanded in separate meetings that AQS become a '*broker-only platform*.'" (Opp'n at 13 (quoting AC ¶ 210).) Plaintiffs do not allege when those meetings supposedly occurred, who participated in them or what specifically was said, and they cite no support for their assertion that this allegation is sufficient to plead parallel conduct, particularly when the Complaint does not allege the time period over which the supposedly similar remarks were made. *Cf. IRS*, 261 F. Supp. 3d at 475 (alleging that four defendants made exact same demand on exact same day).

Furthermore, any statement by Defendants that AQS should operate as a "broker-only platform" would be unremarkable because broker-dealers were the only entities with access to OCC and thus the only entities able to trade on AQS. Plaintiffs attempt to dismiss this requirement as a mere technicality, stating that AQS "designed the platform to enable 'borrowers and lenders to interact directly with each other (*via a clearing broker* which provided access to the OCC).'" (Opp'n at 13 (quoting AC ¶ 154).) Plaintiffs do not allege, however, that any of the "over sixty brokerage firms with stock lending clearing privileges" elected to enter the clearing-

[2] BofAML's daily placement of up to $1 billion of notional loans was a meaningful sum given Plaintiffs' suggestion that Quadriserv was "immediately popular" and "by 2005 had 'more than $2 billion of open stock loan transactions.'" (Opp'n at 5 (quoting AC ¶ 143).)

broker business. (AC ¶ 154 n.36.) Without clearing brokers to provide access to OCC, AQS necessarily remained a "broker-only platform." A vague allegation that certain Defendants recognized this reality is not suggestive of conspiracy. *Twombly*, 550 U.S. at 554 (no inference should be drawn from parallel conduct consistent with "common perceptions of the market").

Lastly, Plaintiffs assert that their parallel-conduct allegations mirror those in *In re Credit Default Swaps Antitrust Litigation*, 2014 WL 4379112 (S.D.N.Y. Sept. 4, 2014). While Defendants disagree with that decision's reasoning, that case, unlike this one, at least involved allegations that the defendants (i) initially agreed to deal with the alleged target of a purported conspiracy, and then (ii) "abruptly and simultaneously" refused any further dealings and (iii) jointly refused to license essential intellectual property to the alleged target. *Id.* at *10-11. No comparable allegations exist here, and no inference of conspiracy may be drawn from conduct that "is nothing more than the continuation of preexisting [business] patterns." *RxUSA Wholesale, Inc. v. Alcon Labs., Inc.*, 661 F. Supp. 2d 218, 231 (E.D.N.Y. 2009).

E. None of Plaintiffs' Proffered "Plus Factors" Withstands Scrutiny.

As a purported "plus factor," Plaintiffs contend that "[t]he Complaint details a high-level of inter-Defendant communications." (Opp'n at 17.) But allegations of "EquiLend meetings," "dinners and industry conferences and events ostensibly on behalf of EquiLend," and one-off dinners and meetings involving representatives of Defendants (*see, e.g.*, AC ¶¶ 124, 202-03, 211, 223, 294, 312) do not create a plausible inference of conspiracy in an industry in which inter-broker communications are commonplace. *Cf. United States v. Apple, Inc.*, 952 F. Supp. 2d 638, 655 n.14 (S.D.N.Y. 2013) (inter-firm communications suggestive of conspiracy only if they "represent[] a departure from the ordinary pattern"), *aff'd*, 791 F.3d 290 (2d Cir. 2015). Plaintiffs' references to routine communications "simply are not enough plausibly to allege a 'high level' of interfirm communications." *Citigroup*, 709 F.3d at 140.

Plaintiffs also claim that Defendants shared a "common motive to preserve their supracompetitive profits." (Opp'n at 18.) Because every participant in every industry seeks high profits, allegations of a profit motive fail to supply a plus factor. *See In re Baby Food Antitrust Litig.*, 166 F.3d 112, 133 (3d Cir. 1999) ("[I]f . . . the defendants had a motive to achieve higher prices, 'then every company in every industry would have such a motive.'").

Plaintiffs further assert that "it would have been in the self-interest of many of the Prime Broker Defendants to support the platforms to avoid the risk of being left behind" (Opp'n at 18), but they "do not plead concrete facts suggesting that [Defendants] took any material risk by sitting tight and waiting to see if the new platforms attracted sufficient support to survive." *IRS*, 261 F. Supp. 3d at 475 n.23. Although Plaintiffs insist that "at least one self-interested . . . Defendant would have seized the opportunity to take part in SL-x" (Opp'n at 19), Plaintiffs ignore that SL-x lacked central clearing and was not even operational in the United States (*see* AC ¶¶ 20, 253, 268). No Defendant would have "take[n] market share from its competitors" by investing in a non-operational platform. (Opp'n at 19.) Plaintiffs further argue that Defendants "acted against their economic self-interest when they refused to provide clients with access to AQS" because, "[w]ithout the assurance that their competitors would act similarly, this approach would have been very risky." (*Id.* at 18.) But Plaintiffs fail to allege that any of the numerous *non-defendant* prime brokers supported AQS, including Deutsche Bank—a top-five prime broker with more reported clients than both BofAML and UBS. (*See* AC ¶ 323 & n.63.)

F. Plaintiffs' Opposition Confirms the Implausibility of Their Claim Against BofAML.

Plaintiffs do not deny that BofAML, throughout the relevant period, had a multi-million-dollar ownership stake in Quadriserv and also routed up to $1 billion in transactions to AQS *each day*. (MTD at 35; AC ¶ 207.) Under these circumstances, only especially strong allegations

could allege plausibly that BofAML joined a conspiracy to destroy the very platform in which it was a substantial owner and active trading partner. No such allegations exist here.

Plaintiffs argue that BofAML's supposed "withdrawal of meaningful support" for AQS plausibly demonstrates that it joined the purported conspiracy in 2011. (Opp'n at 22.) Yet Plaintiffs concede, as they must, that BofAML never "withdrew" a single dollar of its investment and that BofAML continued to route substantial order flow to AQS throughout its existence. Nor do they cite a single case supporting the counterintuitive suggestion that declining to invest further in an allegedly failing enterprise evidences antipathy toward that enterprise, let alone participation in an agreement to boycott it.

The *IRS* court's decision not to dismiss the conspiracy claim against RBS is of no help to Plaintiffs. (*Id.* at 22-23.) There, the court was not persuaded that RBS's mere "agree[ment] to trade [on] or provide liquidity to" a trading platform "for a short period" was sufficient to overcome other allegations that RBS agreed to participate in a boycott. 261 F. Supp. 3d at 456-58. In complete contrast here, Plaintiffs acknowledge that BofAML had a large ownership stake in Quadriserv and actually traded on AQS *throughout the relevant period*. (AC ¶ 207.) To the extent *IRS* is instructive, it is with respect to the dismissal of all claims against HSBC because the allegations failed to show that HSBC "did anything specific *to further the conspiracy*." 261 F. Supp. 3d at 483 (emphasis added). Precisely the same is true for BofAML here.

The opposition's few remaining references to BofAML only confirm Plaintiffs' pleading failure. Plaintiffs assert that BofAML arranged a meeting of the "five families" in September 2009 after another Defendant "threatened" that BofAML should "reverse" its support of AQS. (Opp'n at 26.) But whatever happened at this meeting—and Plaintiffs admit they "do not (yet) know" (*id.*)—BofAML indisputably did not join an alleged boycott or bow to any alleged threat.

To the contrary, Plaintiffs acknowledge that BofAML "strong[ly]" supported AQS in 2009 and thereafter, investing millions of dollars in AQS through 2011 and promoting AQS to customers (AC ¶¶ 157, 205), and even concede that BofAML was *left out* of the alleged "*separate secret meeting*" in September 2009 where others purportedly "agreed to oppose and disparage AQS" (Opp'n at 27). Such allegations refute (rather than support) any inference that BofAML was part of any conspiracy.

II. PLAINTIFFS FAIL TO SALVAGE THEIR CLAIM BASED ON THE EQUILEND JOINT VENTURE.

Unable to dispute seriously that EquiLend is a lawful joint venture that includes, among other participants, three large agent-lenders, Plaintiffs contend that "[t]he Complaint primarily concerns an agreement among . . . Defendants about what they would do *outside* of their joint venture." (*Id.* at 33.) To the contrary, Plaintiffs' antitrust claim primarily rests on allegations regarding EquiLend that are entirely consistent with lawful joint-venture conduct: EquiLend's introduction and pricing of DataLend, EquiLend's rejection of a merger with SL-x, EquiLend directors' support of the joint venture, and EquiLend's purchase of SL-x's intellectual property and AQS. (*See* MTD at 40-42.) Plaintiffs' arguments that such joint-venture conduct is *per se* unlawful are unavailing, and they fail to plead a rule-of-reason claim.

A. Defendants' Participation in EquiLend and EquiLend Directors' Support of the Joint Venture Are Subject to the Rule of Reason.

Plaintiffs fail to plead that EquiLend is anything other than a lawful joint venture that acted consistent with competitive business strategy. Although Plaintiffs say that EquiLend's "trading platform is widely considered to be 'archaic' and 'entrenched'" (Opp'n at 35 (quoting AC ¶ 123)), they do not even attempt to argue that EquiLend "was an illegitimate shell that offered no efficiency enhancements and served only to mask concerted conduct," *IRS*, 261 F. Supp. 3d at 468, and they concede that its platform offers "operational efficiency" (AC ¶ 316).

Plaintiffs appear to concede that "internal decisions of a legitimate joint venture about what products to offer and on what terms" are subject to the rule of reason (Opp'n at 35), but they never explain why the conduct here—EquiLend's creation and pricing of DataLend, decision not to merge with SL-x, and purchases of SL-x's intellectual property and AQS—should be treated differently. *See IRS*, 261 F. Supp. 3d at 467 (rule of reason applies to "creation of the joint venture itself, its business focus, its product selection, and its pricing"). Plaintiffs instead advance several meritless arguments as to why well-established case law governing joint ventures should not apply.

To start, Plaintiffs criticize Defendants for "arguing that certain individual allegations involving EquiLend, taken in isolation, should be analyzed under the rule of reason." (Opp'n at 31.) As a practical matter, however, a court cannot examine a claim as a whole without first analyzing its individual allegations. *See United States v. Coplan*, 703 F.3d 46, 63 (2d Cir. 2012) ("[W]e examine the evidence with respect to each alleged objective of the conspiracy in some detail before considering the conspiracy 'as a whole.'"). The rule that a complaint should be assessed as a whole "does not stand for the unworkable proposition that business conduct that does not offend the antitrust laws may violate the Sherman Act once it is combined with other lawful business conduct." *Eatoni Ergonomics, Inc. v. Research in Motion Corp.*, 826 F. Supp. 2d 705, 710 (S.D.N.Y. 2011) (Section 2 case).

IRS illustrates the proper approach. After addressing the plaintiffs' pre-2013 allegations of "parallel conduct," the court examined the allegations related to Tradeweb—the joint venture that was the "centerpiece" of the pre-2013 claim. 261 F. Supp. 2d at 463, 465. It concluded that those allegations should be evaluated under the rule of reason and that the plaintiffs had failed to plead such a claim. *Id.* at 468-69. The court then turned to the "plaintiffs' other allegations" and

alleged "plus factors," before finally considering "[a]ll allegations" as a whole. *Id.* at 470-72. This Court should follow the same approach here. The allegations related to EquiLend do not state a claim under the rule of reason, and the Complaint's other allegations fail to plead a plausible group boycott.

In addition, the cases Plaintiffs cite in support of *per se* treatment are easily distinguished. (Opp'n at 32, 36.) In *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314 (2d Cir. 2010), the court recognized that the rule of reason applies to a lawful joint venture. *Id.* at 325-27. The court nevertheless permitted the conspiracy claim to proceed because the plaintiffs challenged the legality of the joint ventures and adequately pled a rule-of-reason claim. *Id.* at 326-27. Plaintiffs do neither here. Moreover, *Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745 (10th Cir. 1999), and *In re Fresh & Process Potatoes Antitrust Litigation*, 2012 WL 3067580 (D. Idaho July 27, 2012)—also cited by Plaintiffs—did not even address whether joint-venture conduct should be judged under the rule of reason. And in *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015), the Second Circuit recognized that the rule of reason applies "in connection with some kind of potentially efficient joint venture," but, unlike here, "there was no joint venture" in that case. *Id.* at 326.

Plaintiffs further suggest that *per se* treatment is warranted here because Defendants are not "a 'single firm' in the stock loan market," but rather "separate, horizontal competitors." (Opp'n at 34.) Although EquiLend "joins together independent centers of decisionmaking," *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 195-96 (2010), that simply means that Section 1 applies, not that Defendants' participation in EquiLend is subject to the *per se* rule. Contrary to Plaintiffs' suggestion, there is no requirement that joint-venture participants cease to compete in all markets related to their joint venture for the rule of reason to apply. *See Broad.*

Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 6, 24 (1979) (joint price setting for "blanket license" "subject[] to" "rule of reason" even though "individual copyright owners" continued to license works separately).

B. Plaintiffs Fail To Allege a Rule-of-Reason Claim.

"Under the rule of reason analysis, 'the plaintiff bears the burden of showing that the alleged [agreement] produced an adverse, anti-competitive effect within a relevant . . . market.' Satisfying this burden includes a demonstration of defendants' market power." *See IRS*, 261 F. Supp. 3d at 467 (citation omitted). Plaintiffs do not adequately plead these elements, and they are wrong that rule-of-reason claims "cannot be resolved on the pleadings." (Opp'n at 40.) Courts regularly dismiss such claims at the pleading stage. *See, e.g.*, *Madison 92nd St. Assocs., LLC v. Courtyard Mgmt. Corp.*, 624 F. App'x 23, 28-29 (2d Cir. 2015); *Abbott Labs. v. Adelphia Supply USA*, 2017 WL 5992355, at *5-6 (E.D.N.Y. Aug. 10, 2017).

Plaintiffs argue that they have adequately alleged that stock lending in the United States is a relevant antitrust market. (Opp'n at 39 (citing AC ¶¶ 391-93).) Market definition, however, must take into account where the joint venture competes, not merely where the joint-venture participants compete. *IRS*, 261 F. Supp. 3d at 469 ("there are no allegations in the [complaint] defining [the joint venture's] product or geographic market"). Plaintiffs do not allege that EquiLend competes with Defendants in the stock-loan market or had "any presence . . . in *any* market." *Id.* In addition, the three conclusory paragraphs of the Complaint cited by Plaintiffs (AC ¶¶ 391-93)—totaling less than half of a page—do not adequately plead a market for stock lending. *See Chapman v. N.Y. State Div. for Youth*, 546 F.3d 230, 237 (2d Cir. 2008) ("[T]o survive a Rule 12(b)(6) motion to dismiss, an alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes—analysis of the interchangeability of use or the cross-elasticity of demand, and it must be plausible.").

Making the same analytical error that they make on market definition (Opp'n at 39-40), Plaintiffs fail to plead any facts regarding the joint venture's market power. *IRS*, 261 F. Supp. 3d at 469 ("there are no allegations . . . defining [the joint venture's] market share or market power"). And Plaintiffs fail to plead that any of the EquiLend-related conduct had an "*actual* adverse effect on competition." *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 317 (2d Cir. 2008). Rather than plead facts that would enable the Court to balance alleged anticompetitive effects with countervailing procompetitive benefits, Plaintiffs simply assert that Defendants' conduct "clearly did not make the market *more* competitive." (Opp'n at 40; *see also* AC ¶ 389.)

Although Plaintiffs assert that the rule-of-reason analysis can "be truncated in this case" (Opp'n at 39), this Court should decline that invitation because the alleged conduct here was not "obviously anticompetitive." *See IRS*, 261 F. Supp. 3d at 469 n.19 ("The limited facts pled regarding Tradeweb's strategic direction following the Dealers' acquisition of control . . . make it impossible, even on a quick look, to balance the pro-competitive benefits and anti-competitive harms, of that course."). Under any analysis, however, Plaintiffs' allegations as to the various categories of EquiLend-related conduct do not state a rule-of-reason claim.

1. EquiLend's Creation and Pricing of DataLend. Plaintiffs contend that EquiLend created DataLend to "kill" Data Explorers. (Opp'n at 36.) They also challenge Defendants' "distribution agreements" with DataLend and DataLend's low prices. (*Id.* at 36-37.) But Plaintiffs nowhere explain how the creation of a new service, with superior data and lower prices, to *compete* with an incumbent in the marketplace violates the antitrust laws under the rule of reason. *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").

2. EquiLend's Decision Not to Merge with SL-x and Its Directors' Support of the Joint Venture. Plaintiffs characterize SL-x's "proposed . . . merger with EquiLend as a desperate effort to stay in business" after William Conley of Goldman Sachs, an EquiLend board member, told SL-x that EquiLend's directors supported market evolution through their joint venture. (Opp'n at 37.) This argument makes no chronological sense: SL-x proposed the merger nearly four years before its failure. (AC ¶¶ 221, 272.) In any event, Plaintiffs' spin is not enough to plead that a joint venture's rejection of a merger proposal was unlawful under the rule of reason. Likewise, Plaintiffs cannot plead an antitrust claim simply by alleging "that SL-x tried to secure the support of individual Prime Broker Defendants, after the merger was declined, and they each refused," choosing instead to support EquiLend. (Opp'n at 37.) To the extent that participants in a joint venture decide to foster innovation through that venture rather than competing with it, those decisions are reviewable under the rule of reason, not the *per se* rule. *See supra* Argument I.B (discussing allegations related to EquiLend directors from JPMorgan and Credit Suisse). Plaintiffs wholly fail to plead the elements of a rule-of-reason claim with respect to any alleged agreement among EquiLend directors to support EquiLend over SL-x.

3. EquiLend's Purchases of SL-x's Intellectual Property and AQS. Plaintiffs concede that, "considered in isolation," EquiLend's purchases of certain SL-x assets and AQS *after* those businesses had already failed do not violate the rule of reason. (Opp'n at 38.) They instead assert that, "[c]onsidered within the Complaint as a whole, they strongly confirm the intent and purpose of Defendants' boycott." (*Id.*) Such argument is no substitute for well-pled allegations stating a claim under the rule of reason. Although Plaintiffs contend that EquiLend's purchases were "irrational," they do not explain why buying supposedly valuable intellectual property and a trading platform at fire-sale prices is anything other than rational. (*See id.*)

III. PLAINTIFFS' OPPOSITION CONFIRMS THAT THEIR ALLEGATIONS OF INJURY ARE TOO SPECULATIVE TO CONFER ANTITRUST STANDING.

In arguing that their alleged injury is not unduly speculative, Plaintiffs assert that "Defendants boycotted and effectively destroyed three platforms that each offered different ways forward in the stock loan market." (*Id.* at 43.) This categorical assertion is insufficient to create antitrust standing. As an initial matter, one of the three supposedly boycotted firms—Data Explorers—was not, and did not aspire to become, a "platform." (*See* AC ¶ 10.) Plaintiffs thus do not separately address Data Explorers, instead lumping it together with SL-x.

Conceding that neither SL-x nor Data Explorers "offer[ed] all-to-all trading," Plaintiffs argue that those firms nevertheless "would have increased efficiency and price competition and transparency in the market in different ways from AQS." (Opp'n at 43.) Such vague allegations of "greater price transparency and competition" (*id.* at 42) are insufficient to confer standing. Despite Plaintiffs' assertion that "[t]here is nothing speculative about the injury suffered by borrowers and lenders" (*id.* at 41), the Complaint does not identify the damages borrowers and lenders supposedly suffered from the purported loss of Data Explorers and SL-x. The Complaint instead principally argues that an electronic, all-to-all trading platform like AQS's would have resulted in better prices. (*See* AC ¶¶ 332-45.) But that contention does not apply to Data Explorers (a pricing service) and SL-x (a non-operational platform that lacked central clearing in the United States and did not plan to offer anonymous trading). (*See* MTD at 44.)

As to AQS, Plaintiffs admit that its platform could not have succeeded without clearing brokers to provide borrowers and lenders with access to central clearing. (Opp'n at 13-14.) Although Plaintiffs allege that "over sixty brokerage firms" have "stock lending clearing privileges" (AC ¶ 154 n.36), they do not dispute that *none* of those clearing members even today has elected to enter the business of clearing stock loans for others. Without clearing brokers to

provide access to central clearing, AQS's attempt to offer an all-to-all platform was doomed to fail. That places this case squarely within the holding of *IRS*, which rejected antitrust standing because "it [was] 'entirely uncertain' that, absent the scheme, the necessary infrastructural preconditions for anonymous all-to-all trading . . . would have developed." 261 F. Supp. 3d at 494. Plaintiffs argue that *IRS* is distinguishable because it turned on the "finding that certain preconditions for plaintiffs' asserted damages did not exist" before 2013. (Opp'n at 44.) But the same is true here: clearing brokers were a necessary "precondition" to the success of AQS's all-to-all platform, and their absence cannot be attributed to the alleged scheme.[3]

In response, Plaintiffs cite *In re DDAVP Direct Purchaser Antitrust Litigation*, 585 F.3d 677, 689 (2d Cir. 2009), but that case rested on the uncontroversial conclusion that generic drug competition lowers prices. By contrast, Plaintiffs here rely on mere speculation that three nascent firms, two of which did not offer the prospect of all-to-all trading, would have altered the entire business of stock lending and produced lower prices industrywide.

IV. PLAINTIFFS HAVE NO ANSWER TO THE STATUTE OF LIMITATIONS.

Plaintiffs' antitrust claim is time-barred insofar as it seeks damages from conduct that allegedly first caused injury before August 16, 2013. None of Plaintiffs' contrary arguments has merit, and Plaintiffs do not separately address the timeliness of their unjust-enrichment claim.

A. Plaintiffs Misstate the Law of Accrual.

Plaintiffs argue that they may "rely on conduct prior to August 2013 . . . to recover for injuries suffered inside the applicable antitrust limitations window." (Opp'n at 49-50.) In so arguing, Plaintiffs assert that "accrual occurs—and the limitations period runs—not from when the defendant *acts*, but rather when *the injury occurs*." (*Id.* at 50.) It is well-settled, however,

[3] Contrary to Plaintiffs' puzzling assertion (Opp'n at 44 n.10), Judge Engelmayer did not reconsider that ruling. *See* Order No. 13, *IRS*, No. 16-md-2704, ECF No. 251.

that a Section 1 claim accrues when "the defendant commits an act that injures the plaintiff." *Hinds Cty., Miss. v. Wachovia Bank N.A.*, 620 F. Supp. 2d 499, 519 (S.D.N.Y. 2009). As soon as a plaintiff suffers *any* injury from an allegedly wrongful act, its Section 1 claim—for that initial injury and all future injuries caused by the act—accrues. As a result, "[a]n overt act committed more than four years prior to the filing of the complaint whose effects were first felt outside the limitations period . . . usually will not support a cause of action even if the effects persist into the limitations period." *In re Nine W. Shoes Antitrust Litig.*, 80 F. Supp. 2d 181, 191-92 (S.D.N.Y. 2000). In arguing otherwise, Plaintiffs cite *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (Opp'n at 50), but that case involved a Section 2 monopolization claim subject to "different accrual rules." *Rite Aid Corp. v. Am. Express Travel Related Servs. Co.*, 708 F. Supp. 2d 257, 264 (E.D.N.Y. 2010).

Here, much of the supposedly wrongful conduct—including the alleged boycott of Data Explorers and the bulk of Plaintiffs' SL-x allegations (MTD at 45-46)—occurred outside the limitations period. According to Plaintiffs' allegations, this conduct caused contemporaneous injury, well before August 2013. (*See, e.g.*, AC ¶¶ 179, 188, 219, 257, 265.) Because this alleged conduct and the initial injury occurred more than four years before the original complaint was filed, the statute of limitations bars any recovery of damages caused by that conduct—even damages supposedly incurred during the limitations period.

B. Plaintiffs' Efforts To Defend the Sufficiency of Their Fraudulent-Concealment Allegations Fail.

Plaintiffs argue that they "satisfy the pleading standard for tolling of the Clayton Act's statute of limitations." (Opp'n at 45.) To the contrary, their allegations on all three elements of fraudulent concealment—concealment, ignorance and diligence—fall short under Rule 9(b). Plaintiffs cannot avoid the statute of limitations simply by arguing that Defendants raise "fact-

specific issues." (*Id.* at 49.) Courts regularly reject tolling arguments at the pleading stage based on inadequate fraudulent-concealment allegations. *See, e.g.*, *In re Merrill Lynch Ltd. P'ships Litig.*, 154 F.3d 56, 60 (2d Cir. 1998).

1. Concealment. Plaintiffs' principal argument is that "[c]onspiracies among competitors . . . are regularly recognized to be inherently self-concealing." (Opp'n at 45.) Yet Plaintiffs ignore that the alleged conspiracy is essentially the same as the conspiracy alleged in *IRS*, where the court rejected the argument "that the Dealers' pre-2012 scheme was 'self-concealing.'" 261 F. Supp. 3d at 488. The court reasoned that "[o]n plaintiffs' theory"—the same theory here—the failure of an all-to-all platform to emerge "occurred in plain sight and in contrast to the market's expectations." *Id.* Although Plaintiffs try to distinguish *IRS* on the ground that "Defendants' ownership and direction of Trade[web] was 'visible'" (Opp'n at 47), Defendants' ownership and direction of EquiLend was also visible. Nor can Plaintiffs distinguish *IRS* by arguing that "there are specific allegations [here] that Defendants conspired in secret" (*id.*), as the plaintiffs made the same allegations in *IRS*. 261 F. Supp. 3d at 488.

Plaintiffs contend that "[e]ven if the conspiracy was not self-concealing," they have adequately alleged affirmative acts of concealment by Defendants. (Opp'n at 46.) Plaintiffs make absolutely no effort, however, to identify which of these supposed acts of concealment occurred before August 2013 and which acts are pled with the particularity required by Rule 9(b). Instead, they simply cite a list of paragraphs of the Complaint with no explanation whatsoever. (*Id.*) Plaintiffs cannot rely on a purported code name and meetings from 2015 and 2016 (*e.g.*, AC ¶¶ 21, 293-301, 374) to plead fraudulent concealment before 2013, and they cannot rely on generic allegations of "private" meetings (*e.g.*, *id.* ¶¶ 11-12, 34, 123-24, 211, 254, 312, 373-74) to plead "affirmative concealment" under Rule 9(b). Although Plaintiffs point to

supposed misrepresentations by Defendants, they make no effort to show that they have adequately alleged that any of those statements were fraudulent. *See In re Publ'n Paper Antitrust Litig.*, 2005 WL 2175139, at *3 (D. Conn. Sept. 7, 2005) (holding that allegations of fraudulent misrepresentations were insufficient because there was no indication which defendants made the statements, to which customers, when they were made or what was said).

Any claim of affirmative concealment also is defeated by Plaintiffs' own allegations that a wide variety of market participants knew of the boycott because of Defendants' supposed threats. Plaintiffs contend that Defendants threatened hedge funds and agent-lenders that supposedly supported the boycotted firms. (*See* Opp'n at 14.) They also assert that AQS, SL-x and Data Explorers themselves were aware of the conspiracy. (*See, e.g.*, *id*. at 37 (Goldman Sachs "bluntly told" SL-x that Defendants would permit market evolution only via EquiLend); AC ¶ 200 (AQS learned of alleged conversation between Goldman Sachs and Bank of America); *id.* ¶ 255 (Data Explorers informed that EquiLend had plans to "kill" Data Explorers).) And many of the alleged conspiratorial discussions supposedly occurred at EquiLend board meetings (*e.g.*, *id.* ¶ 312) also attended by large agent-lenders. Under Plaintiffs' theory of the case, Defendants did not "conceal[] the existence" of the alleged group boycott; they overtly enforced it through widespread threats. *Nine W. Shoes*, 80 F. Supp. 2d at 192.

2. Ignorance. Plaintiffs also fail to plead that they remained ignorant of their claims until some point in the limitations period. Given Plaintiffs' "premise that only a plot can explain the missing [all-to-all] platforms, [Plaintiffs] had every basis, in real time, to smell a rat" and suspect wrongdoing. *IRS*, 261 F. Supp. 3d at 489. Plaintiffs respond that, "[i]f it was known that Defendants were colluding, AQS and SL-x would not have spent years of effort and millions of dollars, or amassed the support of industry participants and market regulators." (Opp'n at 48.)

But the allegation that AQS and SL-x attracted support and investments in 2009 and 2010 does not mean that Plaintiffs "did not possess *any* information about the conspiracy [before 2013] that would have given rise to inquiry notice." *In re Processed Egg Prods. Antitrust Litig.*, 2012 WL 6645533, at *3 (E.D. Pa. Dec. 20, 2012) (emphasis added). And Plaintiffs' attempt (Opp'n at 48) to downplay the 2009 *Global Custodian* article prominently quoted in their own Complaint (AC ¶ 125 & n.28) by arguing that "it provides no *specific facts* relating to the *misconduct alleged*" is unpersuasive. The article at least put Plaintiffs on inquiry notice. (MTD at 49.)

3. Diligence. Plaintiffs point to their boilerplate allegation that they "monitor[ed] their investments and news about the stock loan market." (Opp'n at 48.) Such an allegation, which could be made in any case, is inadequate. (MTD at 50.) Plaintiffs also assert that "a plaintiff's diligence is often satisfied by allegations of a defendant's concealment." (Opp'n at 49.) Even if Plaintiffs' concealment allegations did satisfy Rule 9(b), this argument still would fail because it effectively reads the diligence requirement out of existence. *See Hinds Cty.*, 620 F. Supp. 2d at 521 ("This standard is problematic because it allows the allegations required to satisfy the first prong of fraudulent concealment to also satisfy the third prong."). Plaintiffs further contend that their "hundred-plus page Complaint . . . is itself evidence of adequate diligence." (Opp'n at 49.) But they never explain what supposedly happened during the limitations period that prompted the investigation or why the "investigation by counsel" (*id.* at 47) could not have occurred before 2013. Without this information, "it is impossible to discern whether Plaintiffs could or should have discovered [their claim] within the limitations period." *In re Magnesium Oxide Antitrust Litig.*, 2011 WL 5008090, at *25 (D.N.J. Oct. 20, 2011).

CONCLUSION

For the foregoing reasons, all claims, including Plaintiffs' claim for unjust enrichment, which they address only in a footnote (Opp'n at 50 n.13), should be dismissed with prejudice.

March 30, 2018

Respectfully submitted,

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