SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK By ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, Plaintiff, -against- BARCLAYS CAPITAL INC. and BARCLAYS PLC, Defendants.	Index No.: 451391/2014 Hon. Shirley Werner Kornreich Motion Sequence No. 001

BARCLAYS' REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

October 7, 2014

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The NYAG's Opposition ("Opposition" or "Opp.") confirms that the Complaint (i) seeks to expand the NYAG's authority far outside the confines of the Martin Act's plain and unambiguous language, and (ii) otherwise fails to plead claims under the Act or Executive Law § 63(12).[1] The Court should dismiss the Complaint with prejudice.

First, the NYAG concedes that the only alleged misrepresentations in the Complaint are about how "Barclays operates its trading venue" (Opp. at 1), not about any particular "security," which is the focus of the Martin Act. This concession is fatal to the Complaint. The NYAG's reading of the Martin Act would render the Act virtually unlimited in scope. His sweeping interpretation would improperly reach *any* purported misstatement that could possibly have an effect on a securities transaction. Under this expansive view, the NYAG could bring Martin Act claims against an internet service provider that misrepresents the reliability of an internet connection used to trade securities, or a software company that misrepresents the reliability of its trading software. The Opposition cites no New York authority supporting this dramatic expansion. Instead, the NYAG turns to inapposite federal cases concerning more broadly-worded federal laws, while ignoring the most recent Supreme Court precedent that, if applied here, would bar the NYAG's claims. This Court should decline the NYAG's invitation to construe the Act in a manner inconsistent with both its text and the case law interpreting it. (*Infra* pp. 3-9.)

Second, the Opposition fails to rebut the fact that, read in context and in their entirety, the materials referenced in the Complaint accurately disclosed the involvement of ELPs and "aggressive" trading in LX, as well as the functioning of Barclays' Liquidity Profiling

---

[1] Unless otherwise specified, defined terms have the meanings given to them in Barclays' opening brief dated August 8, 2014 ("Defs' Br.").

service and order routing procedures. Instead, the NYAG tries to persuade the Court to avoid ruling on this issue by stating—no fewer than ten times—that Barclays' "arguments . . . are appropriate only for trial." (*E.g.*, Opp. at 19.) But courts routinely dismiss fraud claims where the challenged documents show on their face that they are not misleading. (*Infra* pp. 9-13.)

Apparently recognizing this defect, the Opposition relies heavily on an extemporaneous remark—which appears nowhere in the Complaint—made by a Barclays employee during a panel discussion at a think tank conference. (Opp. at 1, 2, 6, 23.) But an isolated remark mentioned for the first time in an opposition cannot save a deficient complaint, especially where, as here, the documentary evidence demonstrates that it was a true statement. The NYAG's use of the isolated statement is just another example of his ripping a quote out of context, mischaracterizing its meaning, and creating a perception of wrongdoing where none exists. (*Infra* pp. 12-13.)

Third, the Opposition still fails to identify how or why the alleged misrepresentations in the Complaint were material to any LX customer. Instead, the NYAG contends that the standard for materiality—"'a substantial likelihood' that a reasonable investor would consider the information important"—does not change according to the sophistication of investors. (Opp. at 20-21.) That contention merely begs the question whether the alleged misrepresentations were important to any reasonable customer. Importantly, the Complaint nowhere alleges that the out-of-context snippets from the marketing brochures and news publications on which the NYAG relies *were*, in fact, "important" to any customer, let alone customers choosing between dozens of competing venues who manage hundreds of millions of dollars of assets and have access to voluminous data about trades and execution quality when deciding whether to trade on LX or an alternative platform. (*Infra* pp. 13-14.) Nor can the

NYAG plausibly contend that, because the volume of trading in LX declined after the filing of the NYAG's erroneous Complaint and amidst the negative press that it generated, the alleged misrepresentations were material to LX participants. (Opp. at 9 n.5, 21.) It is perhaps the ultimate irony that, having wrongly scared off LX customers by making inaccurate allegations, the NYAG now points to a decline in LX volume (not alleged in the Complaint) as evidence of materiality. All the decline shows is that, when a regulator levels public allegations of misbehavior regarding a product, certain customers may suspend using the product. (*Infra* p. 14, n.15.)

Finally, the NYAG cannot save the Executive Law § 63(12) claim (Opp. at 15-16 & n.11) nor the request for damages and restitution (*id.* at 29-30). The NYAG does not dispute that the First Department has squarely held that Executive Law § 63(12) does not create independent claims. And the Opposition does not point to a single allegation asserting injury to anyone. Indeed, the NYAG does not deny that the Complaint contains no allegation that Barclays failed to provide its clients with quality executions when using LX. Damages and restitution are thus not available here. (*Infra* pp. 14-15.)

ARGUMENT

I. THE OPPOSITION CONFIRMS BARCLAYS' POSITION THAT THE NYAG IS SEEKING AN IMPERMISSIBLE EXPANSION OF THE MARTIN ACT.

The Opposition emphasizes the obvious point that the Martin Act prohibits fraud designed "to 'induce or promote' the 'exchange, sale, negotiation or purchase' of securities." (Opp. at 13; *see also id.* at 1, 10, 11, 12, 15 (citing N.Y. Gen. Bus. Law ("G.B.L.") § 352-c).) But the NYAG repeatedly admits that his case does not concern inducing or promoting a securities transaction, but rather whether Barclays' made purported misstatements "about how,

and for whose benefit, Barclays operates its trading venue." (Opp. at 1.)[2] Accordingly, the NYAG concedes that the alleged misrepresentations here do *not* concern the investor's decision as to *what* security to trade, but rather the investor's *subsequent*—separate and distinct—decision about *where* to execute that trade. Thus, the Martin Act does not apply. *See All Seasons Resorts, Inc.* v. *Abrams*, 68 N.Y.2d 81, 92-93 (1986) (Martin Act does not apply where allegations concern "selling use" of a product, "not investment" in a security).

A. The NYAG Identifies No Case Law Supporting His Novel and Expansive Reading of the Martin Act.

The Opposition relies heavily on New York cases that support only the unremarkable proposition that the Martin Act is broad in scope. (Opp. at 10-11, 13.) But these cases all involve "fraudulent and deceitful practices in the [purchase or] sale of securities," *People* v. *Abbott*, 147 N.Y.S.2d 256, 259 (Sup. Ct. N.Y. Cnty. 1955),[3] not in the operation of a trading platform. "The intention of the Martin Act [is] to protect the general public against fraud in the [purchase or] sale of securities and [it] '***cannot be reasonably extended to cover a purchaser who does not make his purchase from the misrepresenter***.'" *Kaufman* v. *Chase Manhattan Bank, N.A.*, 581 F. Supp. 350, 355 (S.D.N.Y. 1984) (quoting *Herdegen* v. *Paine, Webber, Jackson & Curtis*, 220 N.Y.S.2d 459, 460 (Sup. Ct. N.Y. Cnty. 1961)) (emphasis added); *see also Schenck* v. *Bear, Stearns & Co.*, 484 F. Supp. 937, 946 (S.D.N.Y. 1979) (same).

Likewise, here, the Martin Act "cannot reasonably be extended to cover" purported misrepresentations about a trading venue (LX) that are not alleged to have induced

---

[2] (*See also id.* at 11 ("By making false statements to the public and its clients, Barclays promoted its stock trading services . . . ."); 13 ("Barclays touted the safe and transparent services it offered as both a broker and operator of a trading venue . . . .").)

[3] *See also Assured Guar. (UK) Ltd.* v. *J.P. Morgan Inv. Mgmt. Inc.*, 18 N.Y.3d 341, 349 (2011) ("The Martin Act . . . 'authorizes the Attorney General to . . . enjoin fraudulent practices in the *marketing* of stocks, bonds and other *securities* . . . .'" (internal quotations omitted; emphasis added)); *People* v. *Royal Sec. Corp.*, 165 N.Y.S.2d 945, 950 (Sup. Ct. N.Y. Cnty. 1955) (describing allegations of "fraudulent[] misrepresent[ations] . . . in *purchasing* for [customer] accounts thousands of *shares of stock*" (emphasis added)).

customers' decisions to purchase or sell securities. The NYAG can cite no New York authority supporting his expansive interpretation of the Act. Lacking any supporting New York authority, the NYAG relies upon federal cases that are unrelated to the question of whether the Martin Act is applicable here, and purport to show only that the Complaint's allegations fall within the *broader* standard of the federal Securities Exchange Act of 1934 or the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), under which alleged misstatements need only be "*in connection with* the purchase or sale of a security." 15 U.S.C. § 78j(b) (emphasis added). But those federal cases, even if they were applicable, are also unavailing because none of them decided the issue here. For example, although the NYAG maintains that the court in *In re Facebook, Inc., IPO and Sec. and Deriv. Litig.*, 986 F. Supp. 2d 428 (S.D.N.Y. 2013), "accepted" that alleged misstatements concerning "the capabilities of [NASDAQ's] trading venue" were made "in connection with" the purchase of Facebook stock (Opp. at 12), the parties never raised, and the court did not consider, whether the "in connection with" requirement was met in that case. *Facebook*, 986 F. Supp. 2d at 462-71; *see also People* v. *Casassa*, 49 N.Y.2d 668, 677 (1980) (declining a party's "attempt to further extend [a] holding" where "th[e] question was not presented . . . and [the court] did not decide it").[4]

The NYAG's citation (Opp. at 12) of *Weissman* v. *NASD, Inc*., 468 F.3d 1306, 1312 (11th Cir. 2006), *aff'd en banc*, 500 F.3d 1293 (11th Cir. 2007), is also inapt. As in *Facebook*, *Weissman* did not consider the "in connection with" requirement—the sole issue there

[4] *Facebook* is also inapposite, as the alleged misrepresentations there were in connection with an initial public offering in which NASDAQ was the sole source of the stock. *See* 986 F. Supp. 2d at 466 ("NASDAQ's failure to correct flawed information about its technology capabilities could have impacted Plaintiffs' *decision* to [purchase Facebook stock] and *ability to trade* during that offering." (emphasis added)). By contrast, LX is one of *dozens* of platforms for any security traded on it, so there can be no allegation that any purported misrepresentations about the operation of LX affected a customer's "decision" or "ability to trade" a given stock. *See SEC* v. *Goble*, 682 F.3d 934, 944 (11th Cir. 2012) (holding that "a misrepresentation that would only influence an individual's choice of broker-dealers cannot form the basis for § 10(b) securities fraud liability" because "it would not affect the underlying investment decision").

was whether NASDAQ was entitled to absolute immunity from the claims asserted and, in any event, the case involved allegations of the promotion of specific securities, unlike here. 468 F.3d at 1311-12 ("The complaint mainly concerns Appellant's advertising activities, which . . . fraudulently touted Worldcom's stock . . . ."). Likewise, the "in connection with" requirement was not analyzed in *Newton* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F.3d 266 (3d Cir. 1998) (Opp. at 12), which also involved alleged misrepresentations concerning specific securities transactions, *id.* at 269, not a trading venue.[5]

In relying on a few federal cases that do not touch upon the key issue, the Opposition somehow ignores that, earlier this year, the United States Supreme Court clarified that "[a] fraudulent misrepresentation or omission is not made 'in connection with' [the] 'purchase or sale of a covered security' *unless it is material to a decision by one or more individuals (other than the fraudster) to buy or sell* a 'covered security.'" *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058, 1066 (2014) (emphasis added). The Court further explained that "a connection matters where the misrepresentation makes *a significant difference to someone's decision to purchase or to sell a covered security*." *Id.* at 1060 (emphasis added). Here, the Complaint nowhere pleads that Barclays' alleged misrepresentations made *any* difference, let alone a "significant difference," to any LX customer's "decision to purchase or sell" any particular "security" in LX.[6]

---

[5] *Gray* v. *Seaboard Sec., Inc.*, 126 F. App'x 14 (2d Cir. 2005), cited by the NYAG (Opp. at 12) notwithstanding its lack of precedential effect under Second Circuit Rules, *see* 2d Cir. R. 32.1.1, is likewise inapposite. That case involved allegations of misrepresentations regarding "the provision of investment advice," *Gray*, 126 F. App'x at 17, which is indisputably not at issue here.

[6] *Abada* v. *Charles Schwab & Co.*, 127 F. Supp. 2d 1101 (S.D. Cal. 2000) and *Shaw* v. *Charles Schwab & Co.*, 128 F. Supp. 2d 1270 (C.D. Cal. 2001)—cited in Barclays' opening brief (Defs' Br. at 11-12)—are consistent with *Troice*, as are other federal securities cases. *See, e.g.*, *The Pension Comm. of the Univ. of Montreal Pension Plan* v. *Banc of America Secs., LLC*, 750 F. Supp. 2d 450, 453-55 (S.D.N.Y. 2010) (alleged misrepresentations concerning the valuation of hedge funds "were not made 'in connection with' the purchase and sale of covered securities . . . because the alleged fraud relates to those hedge funds rather than to the covered securities in the[ir]

(*footnote continued*)

B. The NYAG's Position Would Expand the Martin Act Beyond Any Meaningful Limitation and Cause Conflict with the SEC's Uniform National Regulations Over ATSs.

Notwithstanding the case law barring his Martin Act claim, the NYAG still tries to persuade the Court that Barclays' alleged misrepresentations "'induce[d] or promote[d]' the 'exchange, sale, negotiation or purchase' of securities," G.B.L. § 352-c(1), because to hold otherwise would require this Court to accept a "factual assumption that decisions to buy or sell securities *cannot* be influenced by" those misrepresentations. (Opp. at 13 (emphasis added).) This argument has no merit.

First, the NYAG's contention flips the pleading burden on its head. Having brought a claim under G.B.L. § 352-c(1), the NYAG must plead "allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory" regarding that provision of the Martin Act. *MatlinPatterson ATA Holdings LLC* v. *Fed. Express Corp.*, 87 A.D.3d 836, 839 (1st Dep't 2011) (internal quotations omitted). As shown above (*supra* Section I.A), the Complaint does not plead that Barclays "influenced," "induced," or "promoted" the sale of a particular security—as distinct from the subsequent (and separate) decision as to *where* to trade that security. All the NYAG has pled is that investors decided to use LX once they made their separate and distinct decision to buy securities. That does not make out a Martin Act claim. *See All Seasons*, 68 N.Y.2d at 92-93; *Schenck*, 484 F. Supp. at 946 (dismissing § 352-c claim where "plaintiff did not purchase or sell securities from defendants as a result of the alleged representations, nor were the alleged representations designed to induce or promote such a

---

(*footnote continued*)
portfolios"); *Spielman* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 2001 WL 1182927, at *5 (S.D.N.Y. Oct. 9, 2001) (alleged misrepresentations concerning "the fees [plaintiffs] would be charged when purchasing . . . securities . . . did not concern the value of those securities, or the consideration received," and thus were "not sufficiently connected to the underlying securities to meet the . . . 'in connection with' [requirement]").

purchase or sale").[7]

Second, the NYAG's attempt to rewrite the Martin Act to cover any alleged misrepresentation unless an investment decision "cannot be influenced" by it (Opp. at 13) would render the Martin Act virtually unlimited in scope. (*See supra* pp. 3-6.) Indeed, *any* purported misrepresentation that could *possibly* have an effect on a securities transaction (rather than an investment decision) would be covered, with no meaningful limitation. The Act is not so broad. *See, e.g.*, *Herdegen*, 220 N.Y.S.2d at 460; *Kaufman*, 581 F. Supp. at 355; *Schenck*, 484 F. Supp. at 946; *cf. Hertz Corp.* v. *Att'y Gen. of State*, 518 N.Y.S.2d 704, 709 (Sup. Ct. N.Y. Cnty. 1987) ("If the [NYAG] were correct, he would become the overseer and policeman of our entire economic price structure . . . .").

Third, the NYAG's far-reaching view of his regulatory power over ATSs under the Martin Act conflicts with Congress' objective of having the SEC establish uniform, national standards for ATSs. Although the NYAG contends that the Complaint "seeks to hold Barclays accountable for making false statements," which is "consistent with the federal regulatory scheme" (Opp. at 18), the Complaint goes much further than that. For example, the Complaint purports to require Barclays to go beyond SEC disclosure requirements concerning Barclays' order routing by complaining that Barclays did not fully disclose the "manner" in which "it routed client orders." (Compl. ¶¶ 69, 73.) The SEC's disclosure requirements, however, provide only that Barclays make public (i) the top ten venues to which it routes non-directed orders, and

---

[7] The NYAG also cites § 352(1) of the Martin Act for the proposition that it "includes any 'course of business relating to the purchase, exchange, investment advice or sale of securities . . . which is fraudulent.'" (Opp. at 10.) But that clause is merely one of several disjunctive clauses that define "fraudulent practices" (which also includes the violation of "any other section of this article," such as § 352-c). The scope of each such clause is limited by the introductory clause (starting with "Whenever it shall appear" and ending with "hereinafter called security or securities"), which sets forth essential limitations applicable to each of the enumerated "fraudulent practices." Among other things, the introductory clause (i) defines the term "security" and, crucially, (ii) limits the Act to enumerated "fraudulent practices" that occur "in the . . . exchange, purchase, sale, [or] promotion . . . of . . . securities." *Id.*

(ii) the percentage of orders routed to each such venue. 17 C.F.R. § 242.606(a)(1). The Complaint also seeks to impose greater restrictions on "fair access" to LX (Compl. ¶¶ 54-57, 83-88) than the SEC currently requires, *see* 17 C.F.R. § 242.301(b)(5)(ii). (Defs' Br. at 12-16.) The NYAG does not allege that Barclays violated these SEC requirements, but nevertheless seeks to regulate the very conduct governed by them. This would "upset the policy-based delicate balance Congress directed the SEC to achieve . . . under the 1975 amendments to the Securities Exchange Act." *Guice* v. *Charles Schwab & Co.*, 89 N.Y.2d 31, 49 (1996).[8]

II. THE OPPOSITION CONFIRMS THAT BARCLAYS MADE NO MISSTATEMENTS ABOUT LX.

As shown in Barclays' opening brief (Defs' Br. at 16-29), the Complaint merely plucks a few isolated quotations from larger documents that, when read as a whole, show Barclays has made no misstatements about LX. As the Court of Appeals has explained, "factual claims flatly contradicted by documentary evidence are not entitled" to favorable inferences or a presumption of truth. *Mass* v. *Cornell Univ.*, 94 N.Y.2d 87, 91 (1999) (citation omitted). Here, the NYAG tellingly did not attach any of the materials it claimed were false to the Complaint. Barclays, by contrast, included those materials with its opening brief, and explained how they accurately disclosed (among other things) the involvement of ELPs and "aggressive" trading in LX, as well as the functioning of Barclays' Liquidity Profiling service and order routing procedures. (Defs' Br. at 16-29.) Like the Complaint, the Opposition barely acknowledges

[8] The NYAG points out that the Court of Appeals in *Guice* noted that § 28(a) of the Exchange Act "leave[s] the States with as much leeway to regulate securities transactions as the Supremacy Clause [allows] . . . and particularly [saves] state blue-sky laws from pre-emption." (Opp. at 18-19 (citing *Guice*, 89 N.Y.2d at 49 (alteration in Opp.)).) But the NYAG ignores that, in the next paragraph, the Court of Appeals explained that Section 28(a) "only negat[es] implied *field* preemption, but not conflict preemption, leaving the courts to determine when any given State regulation is impliedly preempted because it prevents . . . the full achievement of congressional objectives." *Guice*, 89 N.Y.2d at 49 (emphasis in original). That is precisely what the Complaint prevents here, and the cases the NYAG cites (Opp. at 17-18)—each involving criminal violations or federal statutes other than the Exchange Act—do not support a contrary holding.

those materials, and relies instead on its mantra that Barclays' arguments raise factual disputes that are "appropriate only for trial." (Opp. at 19; *see also id.* at 20, 22, 24, 26, 27, 29, 30.) But there can be no factual dispute about the content of the materials referenced in the Complaint, and they—and the Complaint itself—show that Barclays committed no fraud.[9] For example:

Aggressive Trading. The NYAG says "Barclays misrepresented the amount of aggressive trading in its dark pool . . . [as] no higher than 6%," while secretly "acknowledg[ing] to certain high frequency traders that 25% of the orders taking liquidity were 'aggressive.'" (Opp. at 22.) But this ignores that the 25% figure was expressly based solely on orders "taking liquidity," whereas the 6% figure was based on *all* "trading activity in its dark pool." (Compl. ¶¶ 48-50; Scott Decl. Ex. 9 (April 2014 LP Marketing Flyer).) This is akin to the NYAG bringing a fraud claim against a grocer who tells one customer that 6% of all *food* he sells are apples, and another customer that 25% of all *fruit* he sells are apples. There is simply no fraud.

Sample Chart. Although the Complaint alleges that the Liquidity Profiling Chart constituted "an analysis *purporting to represent the 'liquidity landscape' of Barclays' dark pool*" (Compl. ¶ 35 (emphasis added)), the Opposition belatedly acknowledges that it says on its face that it is a "Sample" (Opp. at 19) intended to show Barclays' ability to categorize users' trading behavior. The Liquidity Profiling Chart does not purport to illustrate actual trading activity over any particular timeframe for any particular portion of Barclays' client base. Rather, the point of the chart was to show that Barclays had sophisticated tools for monitoring LX flow that enabled clients to customize their trading relationships beyond the traditional metrics. Indeed, the

---

[9] *See, e.g.*, *Gomez-Jimenez* v. *N.Y. Law Sch.*, 103 A.D.3d 13, 17 (1st Dep't 2012) (dismissing fraud claim because the allegedly misleading "data disclosed . . . was not actually false (even if it was incomplete)"); *Derwald* v. *LJN Toys, Ltd.*, 161 A.D.2d 223, 223-24 (1st Dep't 1990) (holding that allegations of misleading statements did "not set forth valid causes of action for fraud, since our examination of those statements indicate they did not misrepresent existing facts"); *Jana Master Fund, Ltd.* v. *JPMorgan Chase & Co.*, 859 N.Y.S.2d 903, 905 (Sup. Ct. N.Y. Cnty. 2008) (dismissing complaint where documents "referred to in the complaint . . . directly contradict the conclusory claims" of plaintiff).

following language appears directly below the "Sample liquidity landscape" heading, and directly on top of the Liquidity Profiling Chart:

> Participants in the same category do not trade in the same manner. With LX Profiling, the Barclays ATS team can quickly identify aggressive flow from an individual client. (Scott Decl. Ex. 2 (June 2013 LP Marketing Flyer).)

Ignoring this crucial context, the NYAG contends the chart is still false because internal Barclays emails quoted in the Complaint (Compl. ¶¶ 40-46) suggest that *prior to* the publication of the marketing flyer, some Barclays personnel used a different version of the Liquidity Profiling Chart as an illustration of actual order flow in LX. (Opp. at 20.) But the NYAG does not attack the truthfulness of any such *prior* representations, and the NYAG concedes that the Complaint does not plead that Barclays represented this "sample" as a depiction of the then-current flow in LX *after* publication of the marketing flyer. (*See id.* at 18.)

Trade Monitoring. The NYAG argues that Barclays represented that it "was monitoring trading behavior with meaningful regularity" when, in fact, it was not. (Opp. at 24.)[10] The NYAG continues to conflate ongoing monitoring of trading activity with the categorizing of clients into certain buckets. Barclays' monitoring not only includes the segmenting of clients, but also visualization tools that allow Barclays to use a variety of different metrics to review trading activity at or around the time of trading. (*See* Scott Decl. Ex. 5 (Execution Sales Education Series Class Notes Booklet).) The NYAG never contests that Barclays *was*, in fact, routinely monitoring interactions in the pool, exactly as its materials stated.[11] Moreover, the NYAG still cannot identify a single instance of Barclays telling clients it

---

[10] In support of this and other arguments, the NYAG references "an internal document." (Opp. at 24.) This document is an internal audit which Barclays voluntarily conducted. (*See* Defs' Br. at 21-22.)

[11] (*See* Scott Decl. Ex. 5, at 21 (Execution Sales Education Series Class Notes Booklet Excerpt describing interface for "[r]eal-time" monitoring); Ex. 6, at 8 (December 2011 Marketing Deck separately listing "client[] profiles" and "proactive[] monitor[ing]").)

revised Liquidity Profiling groupings at any particular interval. (Defs' Br. at 22.)[12]

Prohibiting Traders From LX. The Opposition acknowledges that the Complaint nowhere pleads—and the materials referenced in the Complaint do not show—that Barclays promised it would bar "aggressive" traders from LX. (Defs' Br. at 21.) Recognizing the weakness of the Complaint's actual allegations, the NYAG improperly cites, for the first time, a few seconds of content from a 13-minute videotaped panel discussion by a Barclays executive at a think tank conference in June 2012 that is nowhere mentioned in the Complaint. (Opp. at 1, 2, 6, 23.) But it is well settled that "amend[ing] the complaint through an opposition brief . . . is not permissible." *MediaXposure Ltd. (Cayman)* v. *Omnireliant Holdings, Inc.*, 918 N.Y.S.2d 398 (Sup. Ct. N.Y. Cnty. 2010); *see also Rosenberg* v. *Home Box Office, Inc.*, 2006 WL 5436822, at *20 (Sup. Ct. N.Y. Cnty. Jan. 30, 2006) ("[P]laintiff may not amend his complaint . . . via statements . . . in [an] opposition [brief]."), *aff'd*, 33 A.D.3d 550 (1st Dep't 2006).

In any event, even these excerpts from the presentation do not support a Martin Act claim. The Opposition challenges a statement from the presentation that "where we see suspect activity we've gone out proactively to sit down with clients and we've actually shut them off from the firm." (Opp. at 23.) The documentary evidence demonstrates that this was a true statement, referring to a specific client interaction that occurred just days before the presentation. *See* CPLR § 3211(a)(1) (documentary evidence may justify dismissal). Ten days prior to the presentation, Barclays detected abnormal order flow patterns from a client and instructed the client to stop trading on LX. The Barclays executive who gave the presentation wrote to a

[12] The NYAG's allegations regarding Barclays' representations concerning order routing likewise fail, as the NYAG does not dispute that Barclays made available to its customers "[r]egular, individualized reports provid[ing] insight into a client's trading activity" (Scott Decl. Ex. 4 (July 2013 Marketing Deck) at 6), and "[i]ntra-trade analytics tools . . . allow[ing] clients to monitor their trades in real time against multiple benchmarks while also providing real-time market color" (Scott Decl. Ex. 8 (December 2012 Marketing Deck) at 19).

colleague that Barclays "should consider turning [the client] off." The colleague replied: "done," and separately wrote that "[w]e communicated with [the client] to trade away for now." (Supplemental Declaration of Jeffrey T. Scott, dated October 7, 2014, Exs. 18 & 19.) The mischaracterization of this video clip is just the most recent example of the NYAG stringing together out-of-context facts to create a public perception of wrongdoing where none exists.[13]

III. NOTHING IN THE OPPOSITION SHOWS THAT BARCLAYS' PURPORTED MISREPRESENTATIONS WERE MATERIAL TO LX CUSTOMERS.

Nobody disputes that customers choosing between LX and competing trading platforms—institutional clients, broker-dealers, and ELPs (including HFTs)—are highly sophisticated and knowledgeable regarding the variety of platforms on which they trade. (Opp. at 20.) Instead, the NYAG contends that "the standard for materiality is the same whether investors are 'sophisticated' or not." (Opp. at 21.) That contention is beside the point.

As an initial matter, the cases the NYAG cites in support of that contention—*Hanly* v. *SEC*, 415 F.2d 589, 596 (2d Cir. 1969), and *S.E.C.* v. *True N. Fin. Corp.*, 909 F. Supp. 2d 1073, 1103 (D. Minn. 2012)—are federal securities cases involving misrepresentations regarding the value of security interests to arguably unsophisticated investors. *See Hanly*, 415 F.2d at 593-94; *True N. Fin. Corp.*, 909 F. Supp. 2d at 1102 (noting that "nurses, retired individuals, and teachers were included . . . as 'sophisticated' . . . investors"). Those cases thus have no bearing on the materiality of the alleged misstatements that the NYAG does not even

[13] The Opposition underscores that there are many other instances in the Complaint of the NYAG clearly attempting to create a public perception of wrongdoing that is contrary to the facts. For example, the Opposition nowhere refutes that a Barclays employee was not "fired" in retaliation for refusing to "chang[e] the number" in a client presentation (Opp. at 28)—as the Complaint states (Compl. ¶ 80)—but was rather subject to a reduction-in-force commenced well in advance of the alleged presentation (Defs' Br. at 29 n.5). There is likewise no reason to address the NYAG's argument that Barclays "chang[ed] the number" in a single presentation to a single customer of LX. (Opp. at 28.) Indeed, the Martin Act requires harm to a "substantial segment of the state's population." *People ex rel. Spitzer* v. *Grasso*, 11 N.Y.3d 64, 69 n.4 (2008).

plead were seen by the undisputedly sophisticated customers of LX.[14]

Moreover, the "standard for materiality" for any investor requires there to be "a substantial likelihood" that a reasonable investor would consider the information "important" and "as having significantly altered the 'total mix' of information made available." *State* v. *Rachmani Corp.*, 71 N.Y.2d 718, 726 (1988) (citation and emphasis omitted). Here, the Complaint *does not even allege* that the snippets from marketing brochures and news publications on which the NYAG relies were "important" to LX customers, much less how such materials could have "significantly altered the 'total mix' of" the more substantial and detailed information about LX that was available, including information contained in the very documents the NYAG selectively quotes in the Complaint. (*See* Defs' Br. at 16-25; *supra* p. 12, n.12.) The NYAG has thus failed to meet his burden of alleging materiality.[15]

IV. THE EXECUTIVE LAW CLAIM STILL FAILS.

In *People ex rel. Cuomo* v. *Charles Schwab & Co., Inc.*, the First Department squarely held that "Executive Law § 63(12) . . . does not create independent claims." 971 N.Y.S.2d 267, 270 (1st Dep't 2013) (citation omitted). Despite the NYAG's effort to minimize this holding as supposedly being "unexplained" (Opp. at 16 n.11), it is the controlling law of this Court.[16] As shown above (*supra* pp. 3-14), the Complaint fails to plead a Martin Act claim, and

---

[14] (*See, e.g.*, Scott Decl. Ex. 2 (June 2013 LP Marketing Flyer "directed at . . . professionals" and "not intended for retail customer use").)

[15] The Opposition's contention—made nowhere in the Complaint—that LX customers "apparently found the allegations in the complaint to be significant to their decision to trade securities" given the purported "severe and rapid decline in trading volume at Barclays immediately after the facts in the complaint were made public" (Opp. at 21) is unfounded. The fact that LX trading volume may have declined "immediately after" the NYAG filed an error-filled Complaint and held a press conference attacking Barclays has no reasonable bearing on whether those customers reduced or paused their trading in LX out of concern that Barclays made misrepresentations, as opposed to the uncertainties created by the NYAG's lawsuit. The initial decline in LX trading volumes is, simply put, irrelevant.

[16] The NYAG asserts that the case on which *Charles Schwab* relied—*State* v. *Cortelle Corp.*, 38 N.Y.2d 83 (1975)—"allowed an independent § 63(12) claim to proceed." (Opp. at 16 n.11.) In fact, the Court of Appeals

(*footnote continued*)

the materials referenced in the Complaint foreclose any possibility that Barclays "engaged in repeated fraudulent or illegal acts or otherwise demonstrated persistent fraud." (Compl. ¶ 92).[17]

V. THE NYAG HAS NOT PLED ANY INJURIES TO LX CUSTOMERS.

The Opposition confirms that the NYAG cannot demonstrate any injury to the citizens of New York as a result of Barclays' alleged conduct, because there were none. Instead, the NYAG points to two paragraphs in the Complaint (Compl. ¶¶ 14-15) that allege no such thing. Rather, they merely describe (i) certain trading strategies of HFTs and how "ordinary investors generally seek to avoid interactions" with HFTs due to the (unexplained) "effect those sorts of strategies can have on an investor's trading performance" (Compl. ¶ 14), and (ii) how "[d]ark pools have grown in number and market share, at least in part as a means to protect institutional traders . . . from . . . [HFTs]" (Compl. ¶ 15). Those allegations do not provide any "factual details that would establish specific damages resulting from [Barclays'] alleged misrepresentations." *N. Stamping, Inc.* v. *Monomoy Capital Partners, L.P.*, 107 A.D.3d 427, 428 (1st Dep't 2013). Nor does the Opposition show where the Complaint alleges that Barclays failed to provide its clients with quality executions when trading in LX, as opposed to other venues. (*See* Opp. at 29 n.21; Defs' Br. at 28-29.) Accordingly, damages and restitution are unavailable. *See, e.g.*, *Cohen* v. *Brown, Harris, Stevens, Inc.*, 64 N.Y.2d 728, 731 (1984).

CONCLUSION

For the reasons set forth in Barclays' opening brief and this reply memorandum,

---

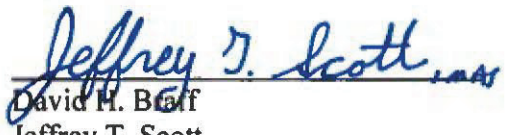
(*footnote continued*)
found that the claim could proceed only because the defendant had committed "wrongful" conduct "prior to and independent of the Executive Law." *Cortelle Corp.*, 38 N.Y.2d at 87. There has been no such conduct here. (*Supra* pp. 9-13.) Moreover, none of the cases cited by the NYAG (Opp. at 16 n.11) sustained an independent claim under § 63(12), as opposed to another claim coupled with a § 63(12) claim.

[17] *See In re State ex rel. Lefkowitz* v. *I.C. System, Inc.*, 361 N.Y.S.2d 930, 931 (1st Dep't 1974) (reversing injunction under Executive Law § 63(12) barring defendant from making representation in debt collection letters where "the letters do not contain that representation").

the Complaint should be dismissed with prejudice.

Dated: October 7, 2014
New York, New York

Respectfully submitted,



David H. Braff
Jeffrey T. Scott
Matthew A. Schwartz
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
Facsimile: (212) 558-3588

Jonathan D. Schiller
Christopher E. Duffy
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-2300
Facsimile: (212) 446-2350

Matthew T. Martens
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 663-6000
Facsimile: (202) 663-6363

Brent J. McIntosh
SULLIVAN & CROMWELL LLP
1700 New York Avenue, N.W., Suite 700
Washington, D.C. 20006
Telephone: (202) 956-7500
Facsimile: (202) 293-6330

Attorneys for Barclays Capital Inc. and Barclays PLC