UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF PROVIDENCE, RHODE ISLAND, PLUMBERS AND PIPEFITTERS NATIONAL PENSION FUND, EMPLOYEES' RETIREMENT SYSTEM OF THE GOVERNMENT OF THE VIRGIN ISLANDS, STATE-BOSTON RETIREMENT SYSTEM, AND FÖRSTA AP-FONDEN, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, -against- BATS GLOBAL MARKETS, INC., et al., Defendants.	Civil Action No.: 1:14-cv-02811-JMF (Consolidated)

BARCLAYS' MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION TO DISMISS
THE CONSOLIDATED AMENDED COMPLAINT

November 3, 2014

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PRELIMINARY STATEMENT

Plaintiffs' amended securities fraud complaint ("Amended Complaint") against Barclays PLC ("Barclays") is based on purported "false advertising" about Barclays LX ("LX"), an Alternative Trading System ("ATS") used by sophisticated investment professionals to trade securities. Impermissibly copying their allegations almost verbatim from an unadjudicated civil complaint filed by the New York Attorney General ("NYAG") on June 25, 2014, plaintiffs claim that Barclays provided some of its clients with marketing materials that concealed the extent of trading by high-frequency traders ("HFTs") on LX.[1] Even if plaintiffs were not barred by clear case law from simply parroting unproven assertions from another complaint, their claims should be dismissed for numerous, independent reasons:

First, under Section 10(b), plaintiffs can only sue Barclays for false or misleading statements upon which they *actually relied*. Plaintiffs' allegations are based almost entirely on confidential marketing materials sent to Barclays clients, but plaintiffs do not allege that they were Barclays clients, nor that they even received, let alone relied upon, *any* of the marketing materials at issue. For example, Barclays marketed a service that routes clients' stock orders to the trading venue offering best execution for that order. Plaintiffs allege that Barclays' marketing materials did not disclose that many orders were initially routed to LX—but plaintiffs do not allege that they relied on any false or misleading statements Barclays made on this point, nor do they allege that they ever used Barclays' order router or received marketing materials about it. This is fatal to plaintiffs' claims, because the fraud-on-the-market presumption of

[1] The NYAG's allegations, which plaintiffs repeat, are based largely on snippets from marketing brochures taken out of context. Barclays has moved to dismiss the NYAG complaint because, *inter alia*, it fails to identify any misleading statements. *See* Barclays' Memorandum of Law in Support of its Motion to Dismiss the Compliant, *People ex rel. Schneiderman* v. *Barclays Capital*, *Inc.*, No. 451391/2014 (N.Y. Sup. Ct., N.Y. Cnty., filed Aug. 8, 2014).

reliance is not available where, as here, the purported misstatements are not public and do not relate to the value of the securities plaintiffs traded.

Second, plaintiffs do not allege any facts supporting the "strong inference" of scienter required to survive a motion to dismiss in a securities fraud case. Plaintiffs offer little more than conclusory statements that Barclays acted "intentionally" or "knowingly," and allegations that Barclays, a for-profit company, had a motive to increase profits. Courts in this Circuit have repeatedly held that such allegations are insufficient to satisfy the stringent requirements of the Private Securities Litigation Reform Act ("Reform Act").

Third, plaintiffs fail to allege that any misrepresentations by Barclays proximately caused any trading losses they incurred. Plaintiffs do not allege that they lost money on even a single trade executed using LX, and they offer little more than conclusory assertions that they were somehow injured. Moreover, plaintiffs fail to tie any losses they suffered to misrepresentations by Barclays. Plaintiffs' basic theory is that marketwide manipulative conduct *by HFTs*—not statements by Barclays in marketing materials—caused their injuries. The federal securities laws do not allow private plaintiffs to sue Barclays on the theory that it somehow aided and abetted purported misconduct by HFTs.

Accordingly, the Court should dismiss the Amended Complaint with prejudice.

BACKGROUND

A. The Parties

Barclays is a financial services company based in the United Kingdom. (Compl. ¶ 32.) An indirect subsidiary, Barclays Capital Inc., operates an ATS called Barclays LX. (*Id.*)[2]

[2] Plaintiffs do not allege that Barclays PLC, the only Barclays defendant, had any involvement in the conduct at issue. The Amended Complaint thus should be dismissed because Barclays PLC is not a proper defendant, and because it fails to state a claim, as shown below.

None of the plaintiffs alleges that it was a Barclays client. Two plaintiffs allege that their stock trades during the putative Class Period were "executed by various brokers" on several trading venues, including LX. (Compl. ¶¶ 19, 22.) These two plaintiffs are the City of Providence, Rhode Island ("City of Providence"), a municipal corporation that manages hundreds of millions in assets, and State-Boston Retirement System ("State-Boston"), a public defined-benefit plan that manages approximately $5.4 billion in assets. (*Id.*) The remaining three plaintiffs do not allege any interactions with Barclays or LX. (Compl. ¶¶ 20, 21, 23.)

Plaintiffs also assert claims against seven national securities exchanges related to the trading of HFTs on those exchanges, specifically BATS Global Markets, Inc., Chicago Stock Exchange, Inc., Direct Edge ECN, LLC, The NASDAQ Stock Market LLC, NASDAQ OMX BX, Inc., New York Stock Exchange, LLC, and NYSE Arca, Inc. (collectively, "Exchange Defendants"). (Compl. ¶¶ 24-31.)

B. Barclays LX

Barclays LX is an ATS regulated by the U.S. Securities and Exchange Commission ("SEC"). ATSs perform many of the same functions national exchanges do, such as receiving and matching buy and sell orders. *See* 15 U.S.C. § 78c(a)(1); 17 C.F.R. § 240.3b-16(a); SEC Regulation ATS, 17 C.F.R. §§ 242.300-303.

Unlike national exchanges, ATSs are not required to provide pricing and order data to the public in real time. *Compare* 17 C.F.R. § 242.301(b)(3) *and* Compl. ¶ 51, *with* 17 C.F.R. § 242.602(a). This is because the SEC recognizes that keeping trading data confidential can benefit institutional investors that wish to trade large volumes of stocks without influencing the prices for those stocks. *See* Regulation of Non-Public Trading Interest, Exchange Act Release No. 34-60997, 74 Fed. Reg. 61,208, 61,208-09 (Nov. 23, 2009); *see also* Concept Release on Equity Market Structure, Exchange Act Release No. 34-61358, 75 Fed. Reg. 3594,

3599 (Jan. 21, 2010). When an institutional investor places a sell order on a "lit" venue, such as the New York Stock Exchange, the exchange immediately broadcasts the price and quantity that the investor is seeking to sell. In response to the supply of shares for sale, the market price may drop. "Dark" pools (such as LX) do not publicly disclose the price or size of pending orders. (Compl. ¶ 229.) As a result, institutional investors can trade with a lower risk of moving the market price. *See* 74 Fed. Reg. at 61,209.

There are two general types of interactions on any trading venue, including LX. Clients may "provide" liquidity by posting an order to buy or sell at a specific price. Conversely, clients may "take" liquidity by submitting an order that will be executed against posted orders. *See* Self-Regulatory Organizations, Exchange Act Release No. 34-59039, 73 Fed. Reg. 74,770, 74,783 (Dec. 9, 2008). LX anonymously matches orders, effecting executions whenever there is a buyer and seller willing to trade at the same price. (*See* Compl. ¶ 228.)

C. High-Frequency Traders

HFTs use computers to make a large number of trades very quickly in order to profit from small changes in the prices of the securities. (Compl. ¶¶ 61, 64.) According to the Amended Complaint, some HFTs analyze market data to detect large orders and then allegedly try to "trade ahead" of the investor who placed the order—for example, buying shares before the investor can, then selling the shares to the investor at a higher price. (Compl. ¶ 66.)

Although some HFTs have been criticized for strategies based on "trading ahead" of other investors, the SEC has noted that many "HFT strategies appear to have beneficial effects on market quality, such as by reducing spreads and reducing intraday volatility." SEC, Div. of Trading & Mkts., *Equity Market Structure Literature Review*, *Part II: High Frequency Trading* 9 (Mar. 18, 2014), *available at* http://www.sec.gov/marketstructure/research/hft_lit_-review_march_2014.pdf; *see also* Concept Release, 75 Fed. Reg. at 3607 ("[S]ome [high-

frequency trading] strategies may benefit market quality and long-term investors and others could be harmful."). SEC Chairwoman Mary Jo White has noted that computerized trading has benefitted the market and that "investors are doing better in today's algorithmic marketplace than they did in the old manual markets." *Enhancing Our Equity Market Structure*, Speech at the Sandler O'Neill & Partners, L.P. Global Exchange and Brokerage Conference (June 5, 2014), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370542004312.

D. Barclays LX Liquidity Profiling

Prior to 2011, Barclays segmented traders using LX into four groups: (i) institutional investors, (ii) broker-dealers (which handle orders on behalf of clients and also trade for their own account), (iii) Electonic Liquidity Providers ("ELPs"), of which HFTs are the largest subset, and (iv) Barclays internal traders. (*See* Ex. 1, at 9 (December 2012 Marketing Deck).)[3] LX clients had the option of restricting which of these segments could trade against the clients' buy or sell orders. (*See id.*) For example, a Barclays client could specify that it wanted to prohibit ELPs from executing against the client's orders. If the client posted an order, institutional investors, broker-dealers, and Barclays internal traders would be able to execute against that order, but ELPs would not. (*Id.*) This feature is known as "counterparty blocking."

In 2011, Barclays introduced a service called "Liquidity Profiling." (*See* Compl. ¶ 246.) In describing this service to clients, Barclays explained that the ELP segment "include[s]

[3] All references to "Ex." refer to the exhibits to the Declaration of Jeffrey T. Scott, dated November 3, 2014. As explained therein, each of these exhibits was referenced in the complaint. In resolving this motion to dismiss, the Court can consider documents plaintiffs relied on in their Amended Complaint. *See Knox* v. *Countrywide Bank*, 4 F. Supp. 3d 499, 507 (E.D.N.Y. 2014) (on motion to dismiss, court may consider "documents 'integral' to the complaint and relied upon in it, even if not attached or incorporated by reference"); *see also Roth* v. *Jennings*, 489 F.3d 499, 509 (2d Cir. 2007); *I. Meyer Pincus & Assocs., P.C.* v. *Oppenheimer & Co.*, 936 F.2d 759, 762 (2d Cir. 1991) (court can consider a document containing alleged misrepresentations even if the "plaintiff has chosen not to attach the [document] to the complaint").

both aggressive and *passive* liquidity providers" and "contains . . . beneficial liquidity," not just "aggressive" order flow. (Ex. 1, at 9-10 (December 2012 Marketing Deck).) Liquidity Profiling gave Barclays clients the option to block counterparties based on whether Barclays rated that counterparty's trading as "aggressive," "neutral," or "passive." That way, clients could allow "neutral" or "passive" ELPs to execute against the client's orders, while limiting exposure to "aggressive" ELPs. (Compl. ¶ 246.) While the Complaint reiterates the NYAG's allegations concerning Liquidity Profiling, none of the plaintiffs alleges that it or its broker ever used this optional service or received any information about it.

E. Plaintiffs' Improper Copying of the NYAG Complaint

City of Providence filed its original complaint on April 18, 2014, naming as defendants nearly 40 exchanges, broker-dealers, and HFTs, and alleging a marketwide conspiracy. Although Barclays was mentioned in the original complaint, there were no substantive allegations against Barclays. On June 25, 2014, the NYAG filed his complaint against Barclays, pleading claims under New York's Martin Act and Executive Law § 63(12), neither of which requires reliance, scienter, or loss causation. *People ex rel. Schneiderman* v. *Barclays Capital*, *Inc.*, No. 451391/2014 (N.Y. Sup. Ct., N.Y. Cnty., filed June 25, 2014).

On September 2, 2014, plaintiffs filed the Amended Complaint, in which the plaintiffs abandoned their claims against HFTs and all of the broker-dealers other than Barclays, but maintained claims against Barclays and the Exchange Defendants. (*See* Letter from Lead Counsel to Court (Oct. 27, 2014), ECF No. 233.) Plaintiffs now assert claims against Barclays—but not against any other broker-dealer—based solely on allegations copied from the NYAG complaint. (*See* Appendix A (showing that the Amended Complaint in this action copies substantial portions of the NYAG complaint, largely verbatim).)

Based on the NYAG complaint, plaintiffs allege that Barclays sent misleading marketing materials to some of its clients. (Compl. ¶¶ 245-257; *see also supra* note 1.) None of the plaintiffs alleges that it or its broker-dealer received any of these materials.

Plaintiffs allege the following misstatements:

Monitoring Behavior. Plaintiffs contend that Barclays falsely told its clients that it would "monitor" the behavior of LX participants, "quickly respond" to "adverse behavior," and could "refuse a client access" to execute on certain trades. (Compl. ¶¶ 246, 247.) Plaintiffs allege that these statements were false, because Barclays "never prohibited a single firm from participating in its dark pool." (Compl. ¶ 255(a).) Plaintiffs do not allege that Barclays lacked the ability to refuse clients access if appropriate, nor do they allege that Barclays failed to "monitor" LX or respond to adverse behavior in other ways.[4]

Counterparty Blocking. Plaintiffs allege that Barclays did not disclose that it applied "overrides" to Liquidity Profiling ratings and that Liquidity Profiling is not applied to some activity in LX. (Compl. ¶ 255(c) &(d).) Plaintiffs also allege that periodic reviews of the ratings were not completed for all clients. (Compl. ¶ 255(b).) As noted earlier, plaintiffs do not even allege that they used the Liquidity Profiling service, nor that Barclays' clients were told that

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[4] Apparently misreading the NYAG complaint, plaintiffs inaccurately allege that Barclays made a statement about "refus[ing] a client access" in "various industry publications." (Compl. ¶ 247.) The Court can take judicial notice of the fact that none of the publications plaintiffs cite contains any such statement. *See Staehr* v. *Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 424-25 (2d Cir. 2008); *Plumbers' & Pipefitters' Local # 562 Supp. Plan & Trust* v. *J.P. Morgan Acceptance Corp. I*, No. 8-cv-1713, 2012 WL 601448, at *11 (S.D.N.Y. Feb. 23, 2012). The portion of the NYAG complaint that plaintiffs copy related to a confidential pitchbook—not any statement in industry publications. The pitchbook says: "High alpha takers [*i.e.*, aggressive traders] can be held accountable, e.g., by encouraging liquidity providing strategies or by refusing a client access." (Ex. 2, at 4 (July 2013 Marketing Deck).)

reviews would be updated more frequently than they actually were, nor that Barclays told clients that Liquidity Profiling applied to all activity in LX.

Aggressive Trading. Plaintiffs allege that Barclays prepared a marketing flyer for its institutional clients titled "Liquidity Profiling — Protecting You [*sic*][5] in the Dark." (Compl. ¶ 248.) The flyer showed that Barclays considers "most of the trading in" LX to be "passive." (Compl. ¶ 248.) In March 2014, Barclays issued marketing materials that asserted that 6% of the "trading activity" in LX (*i.e.*, orders taking liquidity *and* orders providing liquidity) was "aggressive." (Compl. ¶¶ 249, 254.) Plaintiffs allege that this number was false because Barclays purportedly told an HFT firm in the same month that Barclays considered 25% of "the orders *taking* liquidity" to be "aggressive." (Compl. ¶ 254 (emphasis added).) These figures are two different metrics calculated in different ways; they are not inconsistent. Plaintiffs' allegation is akin to claiming that a grocer must have lied because he told one customer that 6% of his *food* sales are apples, and another that 25% of his *fruit* sales are apples.

Order Routing. Plaintiffs allege that Barclays misled clients that used its order router by telling these clients that Barclays would "maximize fill rates while reducing information leakage." (Compl. ¶ 250.) Plaintiffs allege that, in fact, Barclays "essentially routed all client orders to [its] dark pool first." (Compl. ¶ 256(a).) These conclusory assertions are unsupported by any factual allegations, and plaintiffs do not allege that better execution was available on another venue for any order that Barclays routed to LX. Moreover, order routing is a service for Barclays' brokerage clients; plaintiffs do not allege that they were ever Barclays clients, or that Barclays' order router had any effect on their trading. (*See* Compl. ¶ 250.)

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[5] The flyer's actual title is "LX® Liquidity Profiling – Protecting clients in the dark." (Ex. 3.) The NYAG complaint made this same mistake. (*See* NYAG Complaint ¶¶ 35, 65.)

Servicing HFTs. Plaintiffs allege that Barclays represented that it "excluded predatory 'aggressive' traders" from LX when in fact it "actively courted HFT firms." (Compl. ¶ 257.) Barclays allegedly (i) disclosed "sensitive information" to ELPs, (ii) charged ELPs reduced commissions, (iii) allowed ELPs to cross-connect to Barclays' servers, and (iv) used slow market data feeds that did not prevent latency arbitrage. (*Id.*) Plaintiffs do not allege that Barclays ever told its clients anything to the contrary about its relationship with ELPs; indeed, marketing materials on which plaintiffs rely disclosed that 35% of the trading on LX was by ELPs and that some of that trading was "aggressive." (*See* Comp. ¶ 249; Ex. 3.) Plaintiffs also do not allege that any of the information Barclays purportedly disclosed to ELPs contained other clients' proprietary or confidential information, nor do plaintiffs allege that Barclays did not routinely share the same information with any LX client that asked for it.

STANDARD OF REVIEW

This Court must dismiss a complaint if it fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007). The Court does not accept as true "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009), or allegations "that are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely, or by facts of which the court may take judicial notice." *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 405-06 (S.D.N.Y. 2001).

Because plaintiffs' claims against Barclays are based on Section 10(b) of the Securities Exchange Act of 1934 (Compl. ¶¶ 272-78), the Amended Complaint must satisfy the heightened pleading requirements of Rule 9(b) and the Reform Act. *Anschutz Corp.* v. *Merrill Lynch & Co.*, 690 F.3d 98, 108 (2d Cir. 2012). Rule 9(b) requires plaintiffs to "(1) specify the

statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Lerner* v. *Fleet Bank*, *N.A.*, 459 F.3d 273, 290 (2d Cir. 2006). The Reform Act requires plaintiffs to "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading," and "state with particularity facts giving rise to a strong inference that the defendant acted with [scienter]." 15 U.S.C. § 78u-4(b). A complaint can survive a motion to dismiss "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw." *Tellabs*, *Inc.* v. *Makor Issues & Rights*, *Ltd*., 551 U.S. 308, 324 (2007).

ARGUMENT

I. THE ALLEGATIONS COPIED FROM AN UNADJUDICATED COMPLAINT IN ANOTHER LAWSUIT SHOULD BE STRICKEN.

The allegations copied from the NYAG complaint must be stricken. "It is well settled under Second Circuit law that allegations in a complaint 'that are either based on, or rely on, complaints in other actions that have been dismissed, settled, or otherwise not resolved, are as a matter of law, immaterial within the meaning of Fed. R. Civ. P. 12(f).'" *Low* v. *Robb*, No. 11-cv-2321, 2012 WL 173472, at *9 (S.D.N.Y. Jan. 20, 2012) (quoting *RSM Prod. Corp.* v. *Fridman*, 643 F. Supp. 2d 382, 403 (S.D.N.Y. 2009)); *see also In re CRM Holdings*, *Ltd. Sec. Litig.*, No. 10-cv-00975, 2013 WL 787970, at *5-6 (S.D.N.Y. Mar. 4, 2013); *In re Merrill Lynch & Co.*, *Inc. Research Reports Sec. Litig.*, 218 F.R.D. 76, 78 (S.D.N.Y. 2003). Because there has been no "decision on the merits," such allegations "have no possible bearing on the dispute before [this] court." *RSM Prod.*, 643 F. Supp. 2d at 403 (quoting *Lipsky* v. *Commw. United Corp.*, 551 F.2d 887, 894 (2d Cir. 1976)); *see also In re Lehman Bros. Sec. & ERISA Litig.*, No. 10-cv-6637, 2013 WL 3989066, at *4 (S.D.N.Y. July 31, 2013); *Dexia SA/NV* v. *Deutsche Bank*

AG, No. 11-cv-5672, 2013 WL 98063, at *1 n.1 (S.D.N.Y. Jan. 4, 2013); *In re Platinum & Palladium Commodities Litig.*, 828 F. Supp. 2d 588, 593-94 (S.D.N.Y. 2011).

As Appendix A illustrates, plaintiffs' allegations against Barclays rely almost entirely on the NYAG's unadjudicated complaint, quoting many allegations verbatim. Indeed, there appears to be no basis for the plaintiffs' decision to name Barclays in the Amended Complaint—while dropping allegations against every other broker-dealer—besides the fact that plaintiffs could simply copy allegations against Barclays from the NYAG complaint. Plaintiffs also apparently made little or no independent investigation, as required by Rule 11(b). For example, misreading the NYAG complaint, plaintiffs alleged that Barclays stated, in industry publications, that it could "refuse a client access" to LX. (Compl. ¶ 247.) No such statement appears in any of the industry publications plaintiffs cite, which plaintiffs could have ascertained by reviewing those publications. (*See supra* note 4 (statement appeared in a confidential pitchbook, which plaintiffs do not allege they received).) Plaintiffs instead parroted the NYAG complaint without investigation.[6] Because "the paragraphs in which plaintiffs describe . . . their fraud claim are lifted from" the NYAG complaint, the Amended Complaint "must be dismissed." *Grimes* v. *Fremont Gen. Corp.*, 933 F. Supp. 2d 584, 607 (S.D.N.Y. 2013) (citation omitted).

II. THE AMENDED COMPLAINT FAILS TO ALLEGE ANY ACTIONABLE MISREPRESENTATIONS WITH PARTICULARITY.

Even if plaintiffs' allegations against Barclays are not stricken, they do not come close to alleging actionable misrepresentations with the requisite particularity. "To sustain a claim under Section 10(b), [a plaintiff] must show (i) a material misrepresentation or omission; (ii) scienter; (iii) a connection with the purchase or sale of a security; (iv) reliance by the

[6] As noted above (*supra* note 5), plaintiffs reproduced even the transcription errors in the NYAG complaint, confirming that plaintiffs copied allegations from that complaint without investigation.

plaintiff(s); (v) economic loss; and (vi) loss causation." *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 509 (2d Cir. 2010) (quoting *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 341-42 (2005)) (quotations and brackets omitted). Plaintiffs here allege no facts showing that they relied on any false or misleading statements (*infra* Section II.A). Plaintiffs also fail to allege facts giving rise to a "strong inference" of scienter, as required by the Reform Act (*infra* Section II.B), and do not allege any losses proximately caused by Barclays (*infra* Section II.C).[7]

A. Plaintiffs Do Not Allege that They Relied on Any Materially False or Misleading Statements.

"Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011). "[R]eliance . . . must be pleaded with particularity." *In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.*, 995 F. Supp. 2d 291, 313 (S.D.N.Y. 2014). Although a plaintiff need not allege actual reliance if "a rebuttable presumption of reliance" is applicable, *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008), plaintiffs do not (and cannot) allege that any such presumption is applicable here:

"First, if there is an omission of a material fact by one with a duty to disclose, the investor to whom the duty was owed need not provide specific proof of reliance." *Id.* Plaintiffs' claim against Barclays, however, is "not 'primarily' [an] omission claim[]." *Starr ex rel. Estate of Sampson* v. *Georgeson S'holder, Inc.*, 412 F.3d 103, 109 n.5 (2d Cir. 2005) (quoting *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 153 (1972)). Rather, plaintiffs allege that "Barclays

[7] Notably, under the Martin Act and Executive Law § 63(12)—the New York statutes at issue in the NYAG complaint—reliance, scienter, and loss causation are not required elements. *See State* v. *Rachmani Corp.*, 71 N.Y.2d 718, 725-26 (1988). The fact that plaintiffs' allegations against Barclays are copied almost exclusively (and word-for-word) from a complaint that does not allege these elements underscores that those elements are not satisfied here.

made a series of *misrepresentations*" about LX. (Compl. ¶ 245 (emphasis added).) As this is not a case "involving primarily a failure to disclose," the presumption of reliance for omissions is inapplicable. *Affiliated Ute*, 406 U.S. at 153.[8]

"Second, under the fraud-on-the-market doctrine, reliance is presumed when the statements at issue . . . [are] communicated to the investing public." *Stoneridge*, 552 U.S. at 148-49. But this doctrine is available only when "the market price" of the securities traded would be affected by the alleged misrepresentations. *Halliburton*, 131 S. Ct. at 2185 (quoting *Basic Inc.* v. *Levinson*, 485 U.S. 224, 246 (1988)). Here, plaintiffs allege misrepresentations about a trading venue that do not "affect[] the market price of the securit[ies]." *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 103 (2d Cir. 2007); *Last Atlantis Capital LLC* v. *Chi. Bd. Options Exch., Inc.*, 455 F. Supp. 2d 788, 800-01 & n.16 (N.D. Ill. 2006) (fraud-on-the-market theory inapplicable to claims based on allegedly "misleading information about the operation of the exchanges"); *cf. Clark* v. *Nevis Capital Mgmt., LLC*, No. 04-cv-2702, 2005 WL 488641, at *18 (S.D.N.Y. Mar. 2, 2005) ("[A] plaintiff who has allegedly acquired shares in a mutual fund, the price for which is unaffected by alleged misrepresentations and omissions concerning the fund itself, may not establish reliance by invoking the . . . so-called fraud-on-the-market theory."). Moreover, Barclays' alleged misrepresentations were contained in marketing materials sent to

[8] Plaintiffs also do not allege that Barclays owed them any duty of disclosure. Nor could they; the Second Circuit has rejected any duty to disclose in analogous circumstances. *See, e.g.*, *Levitt* v. *J.P. Morgan Sec., Inc.*, 710 F.3d 454, 456-57, 465-68 (2d Cir. 2013) (broker who clears trades for another broker owes no duty of disclosure to the second broker's clients); *Murphy* v. *McDonnell & Co., Inc.*, 553 F.2d 292, 295-96 (2d Cir. 1977) (trading venue ordinarily owes no duty of disclosure to investors if the venue is not itself a party to the trades).

certain Barclays' clients. Plaintiffs do not, and cannot, allege that these materials were "disclosed to the investing *public*." *Stoneridge*, 552 U.S. at 161 (emphasis added).[9]

Because no presumption of reliance is applicable here, plaintiffs must allege reliance "by showing that [they were] aware of a company's statement and engaged in a relevant transaction—*e.g.*, purchasing common stock—based on that specific misrepresentation." *Halliburton*, 131 S. Ct. at 2185. As shown below, plaintiffs do not even attempt to show that they actually relied on any statements by Barclays. None of the plaintiffs alleges that it was a Barclays customer—and none alleges that it or the broker-dealers through which it supposedly traded read *even one* of the purported misstatements. Plaintiffs' conclusory allegation that "they would not have purchased or sold stock . . . in Barclays' dark pool" if they had known the truth (Compl. ¶ 277) is wholly insufficient. It is well-settled that merely "conclusory allegations of reliance" do not suffice. *In re Citigroup Auction Rate Sec. Litig.*, 700 F. Supp. 2d 294, 306 (S.D.N.Y. 2009); *see also Cohen* v. *Stevanovich*, 722 F. Supp. 2d 416, 433 (S.D.N.Y. 2010).

Moreover, plaintiffs fail to allege any actionable misrepresentation. To do so, "[p]laintiffs must do more than allege that statements were materially misleading—'they must demonstrate with specificity why and how that is so.'" *In re Optionable Sec. Litig.*, 577 F. Supp. 2d 681, 689 (S.D.N.Y. 2008) (quoting *Rombach* v. *Chang*, 355 F.3d 164, 174 (2d Cir. 2004)); *see also* 15 U.S.C. § 78u-4(b)(1). Plaintiffs instead simply rip short quotes out of context and string together language from different articles and documents, written at different times, by different authors—with no allegations showing that the statements are false or misleading.

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[9] As noted above (*supra* note 4), plaintiffs incorrectly attributed one Barclays statement to "industry publications" when that statement in fact was in nonpublic marketing materials. Plaintiffs do not allege facts showing that any statements in industry publications (Compl. ¶ 247) were false or misleading, and in any event, those statements are so vague and general that they plainly cannot support a fraud claim standing alone. *See infra* Section II.A.1.

1. Barclays Never Promised that It Would Bar Aggressive Traders or High-Frequency Traders from LX.

Plaintiffs allege that Barclays misled its clients into believing that LX was a "safe place for them to trade, insulated from . . . aggressive or predatory HFT practices." (Compl. ¶ 245.) Specifically, Barclays offered a counterparty blocking service as part of Liquidity Profiling that allowed clients to block traders Barclays considered "aggressive" from executing against the client's liquidity. (Compl. ¶ 246.) Based on the NYAG complaint, plaintiffs allege that Barclays (i) did "not regularly update[] the ratings of traders monitored by the Liquidity Profiling service," (ii) "applied 'overrides' to a number of traders in the dark pool, assigning safe Liquidity Profiling ratings to certain traders that should have been rated as toxic," and (iii) did not apply the counterparty blocking service to all trading in LX. (Compl. ¶ 255.)

Plaintiffs allege no facts showing that these statements were false or misleading, and also fail to allege that plaintiffs actually received or relied upon these statements. As plaintiffs acknowledge, counterparty blocking was an optional service offered to Barclays "*clients*." (Compl. ¶ 246 (emphasis added).) None of the plaintiffs alleges that it was a Barclays client—nor that it or any broker-dealer through which it traded ever "opt[ed]" to use counterparty blocking or received any marketing materials about that service. Thus, any alleged deficiencies in the counterparty blocking service are irrelevant. *See Cohen*, 722 F. Supp. 2d at 433 (dismissing fraud claim because "nowhere in the [complaint] is there any mention that [defendants] did anything that influenced Plaintiffs' conduct").[10]

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[10] Plaintiffs complain that ratings were not "regularly updated" (Compl. ¶ 255(b)), but they do not allege that Barclays said it would update ratings more frequently than it actually did. Likewise, plaintiffs complain that Barclays applied "overrides" to the ratings of some traders (Compl. ¶ 255(c)), but they do not allege that Barclays committed to follow any particular criteria in assigning ratings; indeed, the documents on which plaintiffs rely explicitly state that the analysis of factors Barclays used to assign ratings was "continu[ing]," "ongoing," or could (*footnote continued*)

Plaintiffs' claim that Barclays made false statements in industry publications fares no better. Barclays employees were quoted as saying that "Liquidity Profiling . . . provid[es] clients with transparency," and "we can take corrective action with clients who exhibit opportunistic behavior." (Compl. ¶ 247; *see* Ex. 4; Ex. 5.) Even setting aside the fact that plaintiffs allege no facts suggesting that these quotes were false or misleading—or that plaintiffs read these materials—the quotes are not actionable because "sophisticated institution[s]" that manage hundreds of millions of dollars (as both City of Providence and State-Boston do (Compl. ¶¶ 19, 22)) cannot reasonably "rely upon [such] general statements." *Ashland Inc.* v. *Morgan Stanley & Co.*, 700 F. Supp. 2d 453, 471 (S.D.N.Y. 2010). Courts also will not "draw an inference of fraud from a statement appearing in a news article over which defendant had less than complete control." *Schwartz* v. *Novo Industri*, *A/S*, 658 F. Supp. 795, 799 (S.D.N.Y. 1987).

Plaintiffs also incorrectly allege that Barclays said in an "industry publication[]" that "it would 'refuse a client access' to the dark pool if [it] engaged in aggressive or 'toxic' high frequency trading strategies." (Compl. ¶ 247; *supra* note 4.) This allegation in the NYAG complaint relates to a client pitchbook—not a statement in an industry publication. The pitchbook said: "High alpha takers [*i.e.*, aggressive traders] can be held accountable, e.g., by encouraging liquidity providing strategies or by refusing a client access." (Ex. 2, at 4 (July 2013

(*footnote continued*)
include additional "factors," such that Barclays did not commit to follow any particular formula when assigning ratings. (*See*, *e.g.*, Ex. 1, at 11 (Dec. 2012 Marketing Deck); Ex. 2, at 5 (July 2013 Marketing Deck).) Plaintiffs also complain that counterparty blocking was not applied to all trading activity (Compl. ¶ 255(d)), but do not allege that Barclays said it would apply counterparty blocking to any form of trading to which it was not, in fact, applied. Plaintiffs thus fail "to demonstrate with specificity that [the allegedly misleading] statements were false or misleading." *Carpenters Pension Trust Fund of St. Louis* v. *Barclays PLC*, 750 F.3d 227, 236 (2d Cir. 2014). In any event, given that plaintiffs never allege that they attempted to use any of the protections LX offered concerning aggressive trading, all of these allegations are irrelevant.

Marketing Deck).) Plaintiffs plainly cannot allege that they relied on this statement, as they do not allege that they received this pitchbook or any other materials Barclays sent to clients.[11]

2. Plaintiffs Did Not Receive or Rely on Any Calculations of Aggressiveness.

Plaintiffs' allegations that Barclays misled some clients about the percentage of aggressive trading on Barclays LX also are irrelevant. (Compl. ¶¶ 249, 254.) Once again, plaintiffs do not allege that they received any statements whatsoever from Barclays on this topic.

Plaintiffs also allege no facts showing that these statements were false. Plaintiffs allege that Barclays told some clients that "there was very little (about 6%) 'aggressive' trading activity" in LX, but in discussions with another firm, "Barclays itself categorized approximately 25% percent of the orders taking liquidity in its dark pool as aggressive." (Compl. ¶ 254.) But plaintiffs are simply "compar[ing] apples to oranges" and juxtaposing two "wholly different" calculations. *Okla. Firefighters Pension & Ret. Sys.* v. *Student Loan Corp.*, 951 F. Supp. 2d 479, 496-97 (S.D.N.Y. 2013). Barclays stated that 6% of *all* "trading activity" is "aggressive." By contrast, the 25% "aggressive" figure is a percentage only of "orders *taking* liquidity." (Compl. ¶ 254 (emphasis added).) Liquidity takers are generally more aggressive than liquidity providers (*see* Ex. 1, at 10 (Dec. 2012 Marketing Deck)), so it is logical that the percentage of "aggressive" orders would be higher among orders *taking* liquidity than among *all* orders.[12]

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[11] The pitchbook is not false or misleading in any event: plaintiffs do not (and cannot) allege that Barclays' clients lacked the option of refusing aggressive traders access to their liquidity; the counterparty blocking service allowed clients to do just that. (*See* Ex. 2 (July 2013 Marketing Deck).)

[12] Likewise, plaintiffs' allegation that an ELP firm—not Barclays—"concluded that the trading activity in Barclays' dark pool was '50% good, 50% aggressive'" does not support plaintiffs' claims. (Compl. ¶ 254.) Plaintiffs do not allege that "aggressive" is an objective term. Nor could they. Different traders look to different metrics and can have different views on how much trading in a pool is "aggressive." The fact that another firm had a different opinion does (*footnote continued*)

3. Plaintiffs Do Not Allege that They Relied on Any of Barclays' Statements About Routing of Client Orders.

Plaintiffs allege that "Barclays induced investors to use its brokerage services by representing that it 'treat[s] all venues the same based on execution quality,'" but that Barclays in fact "essentially routed all client orders to" LX, and routed "unfilled orders . . . based on where Barclays had been most profitable over the previous 20 days." (Compl. ¶ 256.)

These allegations are, again, irrelevant. Barclays' statements about order routing were made in confidential pitchbooks for Barclays' direct brokerage clients. (*See* Ex. 1, at 13 (Dec. 2012 Marketing Deck); Ex. 6, at 12 (Jan. 2011 Marketing Deck).) Plaintiffs do not allege that they even received these pitchbooks, let alone relied on them. And again, plaintiffs do not allege that they were Barclays' direct brokerage clients, nor that they ever used Barclays' order router. (*See* Compl. ¶¶ 250, 251, 256; *cf.* Compl. ¶¶ 19-23.) Plaintiffs' allegations merely show that they used "various brokers" (other than Barclays), and those brokers chose to route plaintiffs' trades to LX. (Compl. ¶¶ 19, 22.) Without more, plaintiffs have no basis for asserting that they relied on purported misrepresentations related to order routing or brokerage services.[13]

4. Plaintiffs Fail to Allege Any Impropriety in Barclays' Relationships With ELPs.

Plaintiffs claim that, although "Barclays told investors it excluded predatory 'aggressive' traders such as HFT firms from its dark pool," it actually gave ELPs inducements to

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(*footnote continued*)
not render Barclays' statements false. *See In re Salomon Analyst Level 3 Litig.*, 373 F. Supp. 2d 248, 252 (S.D.N.Y. 2005) (defendant "who sets out his own opinion . . . does not omit a material fact by failing to note that others may have different opinions"); *see also In re MF Global Holdings Ltd. Sec. Litig.*, 982 F. Supp. 2d 277, 305 (S.D.N.Y. 2013).

[13] Plaintiffs also allege no facts in support of their claim that Barclays made misrepresentations about its order router. Indeed, plaintiffs do not even allege that better execution was available on another venue for any order Barclays routed to LX. (Compl. ¶¶ 250, 251, 256.)

trade in LX. (Comp. ¶ 257.) Again, plaintiffs fail to show that any of these statements are relevant, as there is no allegation that they received or relied on any of them.

Moreover, plaintiffs allege no facts showing that Barclays promised to "exclude[]" ELPs. The marketing materials on which plaintiffs rely clearly disclosed that at least 30% of the trading on LX was by ELPs, and that some of the trading in LX was "aggressive." (*See* Ex. 1, at 10 (Dec. 2012 Marketing Deck).) The materials also made clear that, in Barclays' view, "[t]he ELP segment contains . . . clients that provide beneficial liquidity that should be accessed by all clients." (Ex. 6, at 8 (Jan. 2011 Marketing Deck).) This plainly negates any suggestion that Barclays was planning to "exclude[]" ELPs.[14]

B. The Amended Complaint Does Not Allege Facts Giving Rise to a "Strong Inference" of Scienter.

Plaintiffs also fail to allege scienter. Under the Reform Act, a plaintiff "must plead 'with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" *ECA*, *Local 134 IBEW Joint Pension Trust of Chi.* v. *JP Morgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009) (quoting 15 U.S.C. § 78u-4(b)(2)). "[A] weak yet reasonable inference of scienter will not suffice." *Kuriakose* v. *Fed. Home Loan Mortg. Corp.*, 897 F. Supp. 2d 168, 183 (S.D.N.Y. 2012) (internal quotations omitted). A complaint must allege particularized facts that "(1) show[] that the defendants had both motive and opportunity to commit the fraud or (2) constitut[e] strong circumstantial evidence of conscious misbehavior

[14] Plaintiffs' remaining allegations fare no better. Plaintiffs allege that Barclays gave ELPs inducements to trade—such as (i) "detailed, sensitive information" about LX, (ii) low fees, and (iii) "cross-connect[ion]" to Barclays' servers. But plaintiffs do not allege that Barclays made any statements to the contrary (and certainly none to plaintiffs). (*See* Compl. ¶ 257.) None of the supposedly "sensitive" information Barclays provided (LX's order router's logic, and a breakdown of trades executed by participant type and "toxicity" level) revealed any client's proprietary or confidential positions. And plaintiffs do not—and cannot—allege that Barclays does not routinely share this same information with any LX client that asks for it.

or recklessness." *ATSI Commc'ns*, *Inc.* v. *Shaar Fund*, *Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007); *see also JP Morgan Chase Co.*, 553 F.3d at 198.

Here, plaintiffs attempt to plead scienter against Barclays by alleging that, as a for-profit company, it had an incentive to engage in fraud to increase profits and achieve "strategic and economic" objectives. (Compl. ¶ 243.) But merely alleging that a defendant had a motive "to increase or maintain profit" is insufficient. *In re Merrill Lynch Auction Rate Sec. Litig.*, 851 F. Supp. 2d 512, 528-29 (S.D.N.Y. 2012). Such a profit motive "could be imputed to any for-profit endeavor," *Defer LP* v. *Raymond James Fin.*, *Inc.*, 654 F. Supp. 2d 204, 217 (S.D.N.Y. 2009), and if that were enough, "virtually every company in the United States . . . could be forced to defend securities fraud actions." *JP Morgan Chase Co.*, 553 F.3d at 201.

Without particularized allegations of a motive, the direct allegations of intent or recklessness "must be correspondingly greater." *Id.* at 199 (internal quotations omitted). But plaintiffs offer nothing more than conclusory assertions that Barclays acted "intentionally" or "knowingly." (*See* Compl. ¶¶ 9, 255(a), 273-75.) Such boilerplate allegations are insufficient. *In re Sec. Capital Assurance*, *Ltd. Sec. Litig.*, 729 F. Supp. 2d 569, 595 (S.D.N.Y. 2010). Without allegations that Barclays made false statements despite "specific contradictory information," plaintiffs fail to allege scienter under the Reform Act. *In re PXRE Group*, *Ltd.*, *Sec. Litig.*, 600 F. Supp. 2d 510, 536 (S.D.N.Y. 2009); *Local No. 38 Int'l Bhd. of Elec. Workers Pension Fund* v. *Am. Express Co.*, 724 F. Supp. 2d 447, 459-462 (S.D.N.Y. 2010).

C. Plaintiffs Fail to Allege that Barclays' Purported Misrepresentations Proximately Caused Their Alleged Losses.

Plaintiffs also fail to allege loss causation. "Mere allegations that the plaintiff would not have entered into the transaction if the misrepresentations had not occurred are plainly insufficient to establish the proximate cause of the plaintiff's loss." *Emergent Capital Inv.*

Mgmt., *LLC* v. *Stonepath Grp.*, *Inc.*, 165 F. Supp. 2d 615, 625 (S.D.N.Y. 2001). "To plead loss causation, the complaint[] must allege facts that support an inference that [Barclays'] misstatements and omissions concealed the circumstances that bear upon the loss suffered such that plaintiffs would have been spared all or an ascertainable portion of that loss absent the fraud." *Lentell* v. *Merrill Lynch & Co.*, 396 F.3d 161, 175 (2d Cir. 2005).

Here, however, plaintiffs offer nothing more than conclusory allegations that they suffered "damage[s]" from "distorted and manipulated prices." (Compl. ¶ 273.) Plaintiffs do not allege the factual circumstances of even a single trade involving LX, nor do they set forth any facts suggesting that they incurred losses on trades in LX due to ELPs. Without more, plaintiffs' allegations that they were "damaged" by "artificially distorted and manipulated prices" (Compl. ¶ 276) are "legally insufficient." *Dura Pharm.*, 544 U.S. at 347-48 (concluding that plaintiffs' allegation that they "paid artificially inflated prices" and "suffered damages" was insufficient to allege loss causation and damages); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 962 F. Supp. 2d 606, 621 (S.D.N.Y. 2013) (denying motion to amend where plaintiffs' proposed amendment merely alleged that plaintiffs were "harmed by Defendants' manipulation").

Moreover, plaintiffs' own allegations make clear that any losses they suffered were proximately caused by ELPs—not any misrepresentations by Barclays. Plaintiffs' theory is that ELPs engaged in "fraudulent activity" that caused plaintiffs to "purchase and sell shares at distorted and manipulated prices." (Compl. ¶¶ 209, 273.) This purportedly "fraudulent activity" by ELPs was not limited to Barclays LX; quite the contrary, plaintiffs allege that ELPs engaged in a marketwide practice of manipulation. (Compl. ¶¶ 13, 210-25.)

This theory precludes any inference that plaintiffs' damages were caused by Barclays' purported misrepresentations, as opposed to any manipulation by ELPs. Even

assuming that, absent the purported misrepresentations, plaintiffs would not have traded on LX, there is no allegation that plaintiffs would have avoided the injuries they assert by trading on another venue. Rather, plaintiffs claim that other venues, including stock exchanges, were manipulated in the same way LX supposedly was. (Compl. ¶ 13.) As the Second Circuit has recognized, "'when the plaintiff's loss coincides with a marketwide phenomenon causing comparable losses to other investors, the prospect that the plaintiff's loss was caused by the fraud decreases,' and a plaintiff's claim fails when 'it has not adequately ple[]d facts which, if proven, would show that its loss was caused by the alleged misstatements as opposed to intervening events.'" *Lentell*, 396 F.3d at 174 (quoting *First Nationwide Bank* v. *Gelt Funding Corp.*, 27 F.3d 763, 772 (2d Cir. 1994)); *In re Sec. Capital Assurance*, 729 F. Supp. 2d at 599. Plaintiffs do not (and cannot) allege that, if Barclays had not issued marketing materials for LX (which, in any event, plaintiffs never received or read), they "would have been spared" the damages caused by HFTs' purported manipulative practices. *Lentell*, 396 F.3d at 175.

III. BARCLAYS IS NOT LIABLE FOR ANY ALLEGED CONDUCT OF HFT FIRMS.

To the extent that plaintiffs assert a claim against Barclays for "wrongfully disclos[ing] . . . non-public information about plaintiffs' . . . intentions to trade," this claim also fails. (Compl. ¶¶ 223, 274.) Private plaintiffs cannot bring "aiding and abetting" or "conspiracy" claims against Barclays for HFTs' alleged misconduct. (*Infra* Section III.A.) And plaintiffs do not plead a viable theory of primary liability, because they do not, and cannot, allege that Barclays revealed information about plaintiffs' trading intentions in violation of any duty of confidentiality or that Barclays knew that any information about plaintiffs' trading intentions was misused for trading. (*Infra* Section III.B.)

A. Barclays Cannot Be Liable for "Aiding and Abetting" HFTs.

"[T]here is no private aiding and abetting liability under § 10(b)." *Cent. Bank of Denver*, *N.A.* v. *First Interstate Bank of Denver*, *N.A.*, 511 U.S. 164, 191 (1994); *see also* 15 U.S.C. § 78t(e); *SEC* v. *Apuzzo*, 689 F.3d 204, 211 (2d Cir. 2012). Private litigants also cannot sue on a conspiracy theory. *Dinsmore* v. *Squadron*, *Ellenoff*, *Plesent*, *Sheinfeld & Sorkin*, 135 F.3d 837, 841-44 (2d Cir. 1998).

Plaintiffs ignore these well-settled principles and proceed on the theory that Barclays somehow assisted HFTs' manipulation by "permitt[ing] HFT firms to gain . . . access" to LX, "knowing that the HFT firms would engage in . . . manipulative practices." (Compl. ¶ 234.) Plaintiffs allege no facts to support this specious theory—and it is foreclosed by Supreme Court precedent, which recognizes that "know[ing] that [an]other's conduct constitutes a [violation] and giv[ing] substantial assistance" is insufficient for Section 10(b) liability. *Janus Capital Grp.*, *Inc.* v. *First Derivative Traders*, 131 S. Ct. 2296, 2308 (2011) (internal quotation marks omitted) (quoting *Cent. Bank*, 511 U.S. at 181) (first and last alterations in original).

Likewise, the Amended Complaint contains no particularized allegations of "manipulative" acts purportedly committed by Barclays. *ATSI*, 493 F.3d at 102 (citing *In re Blech Sec. Litig.*, 928 F. Sup. 1279, 1291 (S.D.N.Y. 1996)); *In re Citigroup Auction Rate Sec. Litig.*, 700 F. Supp. 2d at 304. Plaintiffs' conclusory assertion that Barclays "participated in" HFTs' manipulation (Compl. ¶ 274) is insufficient. "Allegations of 'assisting,' 'participating in,' 'complicity in' and similar synonyms used throughout the complaint all fall within the prohibitive bar of *Central Bank*." *Shapiro* v. *Cantor*, 123 F.3d 717, 720 (2d Cir. 1997); *see also* *Fezzani* v. *Bear*, *Stearns & Co.*, 716 F.3d 18, 25 (2d Cir. 2013).

B. Plaintiffs Fail to Allege a Primary Liability Claim Against Barclays Related to the Conduct of HFTs.

Plaintiffs' claim that "Defendants wrongfully disclosed . . . material non-public information about plaintiffs' . . . intentions to trade" (Compl. ¶ 274) fails for at least three reasons:

First, unlike the Exchange Defendants (Compl. ¶¶ 116, 223), Barclays does not sell access to a data feed of pending orders on LX. Indeed, as an ATS, LX does not disclose information about other clients' pending orders at all. LX only notifies participants when their own orders are executed. (Compl. ¶¶ 229, 236.)[15] Plaintiffs thus do not, and cannot, allege that Barclays disclosed any of their confidential trading information in violation of a duty of trust or confidence. *SEC* v. *One or More Unknown Traders in Sec. of Onyx Pharm.*, *Inc.*, 296 F.R.D. 241, 253 (S.D.N.Y. 2013); *see also United States* v. *O'Hagan*, 521 U.S. 642, 652 (1997).

Second, plaintiffs fail to make any particularized allegations that HFTs traded based on information they obtained from LX. A fraudulent misuse of nonpublic information "is consummated, not when the fiduciary gains the confidential information, but when, without disclosure to his principal, . . . the information [is used] to purchase or sell securities." *O'Hagan*, 521 U.S. at 656. "[I]f there is no trading by [the recipients of nonpublic information] . . . there can be no damages . . . under § 10(b)." *Elkind* v. *Liggett & Myers*, *Inc*., 635 F.2d 156, 165 (2d Cir. 1980), *superseded by statute on other grounds*, Reform Act, Pub. L. No. 104-67, 109 Stat. 737, *as recognized in Acticon AG* v. *China N.E. Petroleum Holdings Ltd.*, 692 F.3d 34, 38-39 (2d Cir. 2012). Plaintiffs do not allege that HFTs actually used any information gleaned from

[15] After execution, orders are not confidential; they must be "reported to FINRA and are publicly disseminated." Self-Regulatory Organizations, Exchange Act Release No. 34-65695, 76 Fed. Reg. 70,190, 70,191 (Nov. 4, 2011); *see also* 17 C.F.R. § 242.601(b).

LX to trade, let alone that they used information regarding plaintiffs' trades. Thus, "the Complaint provides insufficient particulars to give rise to an inference . . . [that Barclays revealed] material, non-public information that caused specific trades." *Gordon* v. *Sonar Capital Mgmt. LLC*, 962 F. Supp. 2d 525, 529-30 (S.D.N.Y. 2013).

Third, plaintiffs fail to "state with particularity facts giving rise to a strong inference" of scienter regarding the conduct of HFTs. *In re Take-Two Interactive Sec. Litig.*, 551 F. Supp. 2d 247, 310 n.50 (S.D.N.Y. 2008) (internal quotation marks omitted) (quoting 15 U.S.C. § 78u-4(b)(2)). Barclays could be liable for revealing nonpublic information about plaintiffs' trading intentions only if it "kn[e]w that the information" at issue was "non-public and . . . material," and "kn[e]w (or [was] reckless in not knowing) that to disseminate the information would violate a fiduciary duty." *SEC* v. *Obus*, 693 F.3d 276, 286 (2d Cir. 2012). ATSs such as LX simply informed LX participants when their trades were executed. (*See* Compl. ¶¶ 229, 235, n.127.) Without more, plaintiffs' "allegations do not support a reasonable inference that [providing such information] was in violation of a fiduciary duty, much less that the Defendants knew or should have known about the violation." *Unknown Traders*, 296 F.R.D. at 252-53.

CONCLUSION

For the foregoing reasons, the Amended Complaint should be dismissed with prejudice.

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Respectfully submitted,

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