UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	
BANK OF NEW YORK MELLON CORP. FOREX TRANSACTIONS LITIGATION	)	12 MD 2335 (LAK)
	)	ECF Case
This Document Relates to:	)	
Louisiana Municipal Police Employees' Retirement System v. The Bank of New York Mellon Corp.	)	11 Civ. 9175 (LAK)

MEMORANDUM OF LAW OF
THE BANK OF NEW YORK MELLON CORPORATION
IN SUPPORT OF ITS MOTION TO DISMISS
THE CONSOLIDATED CLASS ACTION COMPLAINT

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INTRODUCTION

Plaintiffs' Complaint in this securities fraud action rests on the legally untenable premise that The Bank of New York Mellon Corporation (collectively with its subsidiaries, "BNYM"; individually, "BNYM Corp.")[1] defrauded its foreign-exchange customers by failing to disclose the size of its spreads on trades in the unregulated spot market for foreign currencies. From there, Plaintiffs claim that BNYM defrauded its investors by failing to disclose the existence of this alleged fraud against its customers. Neither step of this theory can survive scrutiny. BNYM did not defraud its customers because it had no duty to tell them how much money it made on unregulated trades; and, even if that underlying alleged fraud *had* occurred, BNYM nevertheless did not defraud its investors because it had no duty to accuse itself publicly of fraud.

Plaintiffs also allege affirmative misrepresentations to BNYM's customers and investors, but these allegations fall far short of the pleading standards imposed by the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4,and Federal Rule of Civil Procedure 9(b) for actions under SEC Rule 10b-5, and for Securities Act claims that (like these) sound in fraud. Plaintiffs attempt to allege a purportedly massive fraud on customers by quoting marketing statements from a website without alleging when the statements were made, who made them, or who (if anyone) read and relied on them. They further attempt to allege a fraud on investors by quoting broad, general statements about foreign exchange revenues without any plausible allegation that those statements could have led any reasonable investor to form any belief whatsoever about the particular standing instruction foreign exchange service at issue. A case of this magnitude should not be permitted to proceed on such flimsy allegations.

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[1] The Complaint uses the term "BNYM," which it uses extensively, to refer to BNYM Corp., which is the only named corporate defendant. *See* Compl. p. 1; *id.* ¶ 19. However, many of the allegations in the Complaint refer to the operations of BNYM Corp.'s subsidiaries. For convenience, this motion uses the term "BNYM" to refer to the entire family of companies. In some situations, however – such as in identifying corporate officers authorized to speak on BNYM Corp.'s behalf to investors – the distinction becomes important and a separate term is needed.

Plaintiffs' failure to raise a strong inference of scienter is even more blatant. They offer no recognizable motive for the alleged fraud on investors. Nor can they plead circumstances that suggest any officer of BNYM Corp. was aware of the alleged fraud. In their entire 68-page Complaint, they identify only a single e-mail that was seen contemporaneously by any officer of BNYM Corp. That e-mail does not indicate any intent to defraud. Rather, it merely points out the obvious fact that market pressures for increased transparency and lower margins had the potential to decrease BNYM's profits in the future. Acknowledging market realities cannot possibly be a basis for a strong inference of scienter. Neither that lone e-mail nor the few conclusory assertions Plaintiffs add to it can meet their pleading burden.

Ultimately, Plaintiffs' theory is this: because BNYM has been sued in connection with its standing instruction service, it *must* have committed the wrongdoing that has been alleged; and because other plaintiffs have asserted that BNYM owes them a large amount of money, that wrongdoing *must* have been substantial enough to be known to BNYM Corp.'s officers. Such a pure copy-cat complaint is insufficient under the PSLRA and Rule 9(b) and should not be allowed to open the door to discovery. This Court should grant the motion to dismiss.

STATEMENT OF FACTS

A. BNYM's Custodial and Foreign Exchange Services

BNYM is a leading manager and servicer of global financial assets. Its customers include many of the world's largest financial institutions, corporations, and government entities. In 2010, BNYM reported $25 trillion in assets under custody and administration, $1.17 trillion in assets under management, total revenues of $13.9 billion, and total net income of $2.6 billion.[2]

[2] *See* Compl. ¶ 1; Ex. 32, at 2 (2010 Annual Report). With the accompanying Declaration of Joshua D. Branson, BNYM has submitted (among other documents) its Form 10-Ks from 2007-2010 (Exs. 1-4); its Form 10-Qs from the first quarter in 2008 through the first quarter in 2011 (Exs. 5-14); its May 2009 and June 2010 Offering Prospectuses (Exs. 28-29); and its Annual Reports from 2007, 2009, and 2010 (Exs. 30-32). *See Rothman v.*

Among the services BNYM provides are custody services for large institutional investors. Broadly speaking, BNYM's duties as a custodian are to safeguard assets, settle transactions as instructed by customers or their investment managers, and provide reports and information. *See* Compl. ¶ 1. BNYM also trades foreign currencies with a range of counterparties, including its custody customers. *See* Ex. 39.[3] BNYM's custody customers and their investment managers have the option of trading foreign exchange either with BNYM or with a third party. *See id*. If they choose to deal with BNYM, they can (1) call BNYM's foreign exchange trading desk and negotiate a trade; (2) use any of several online trading platforms that allow real-time comparison of the rates being quoted by BNYM and its competitors; or (3) issue standing instructions to execute trades at non-negotiated rates. *See* Ex. 37.[4] Customers are often charged a per-transaction fee for third-party trades. *See*, *e.g.*, Ex. 35, at 1-2.[5]

B. BNYM's Standing Instruction Service

Standing instruction service allows a customer or manager to direct BNYM to repatriate (that is, convert to U.S. dollars) selected foreign cash balances on a daily basis, or to convert currency balances to settle securities purchases and sale transactions. Each morning, BNYM publishes guaranteed prices in U.S. dollars for each foreign currency, a low "buy" price and a high "sell" one. *See* Ex. 39. Customers and managers have the opportunity to review those

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Gregor, 220 F.3d 81, 88 (2d Cir. 2000) (noting that court can consider, on a motion to dismiss, "any statements or documents incorporated in [a complaint] by reference, as well as public disclosure documents . . . filed with the SEC") (citations omitted).

[3] Exhibit 39 is a letter from R. Jeep Bryant to the editor of the Richmond Times-Dispatch published on February 27, 2011. The Complaint incorporates this document by reference at ¶ 120. It alleges generically that the document is "false and misleading," but fails to particularize the allegation.

[4] Exhibit 37 is an e-mail from Richard Mahoney to Bob Kelly dated February 1, 2008. The Complaint incorporates this e-mail by reference at ¶ 7 and elsewhere.

[5] Exhibit 35 is an e-mail from David Nichols to Jorge Rodriguez dated June 8, 2004. The Complaint incorporates this e-mail by reference at ¶ 81.

guaranteed prices and can decline standing instruction service before trades are executed. *See id.* Plaintiffs do not allege that BNYM failed to comply with these guarantees.

BNYM then assigns actual (as opposed to guaranteed) buy and sell prices for standing instruction trades each afternoon. With few exceptions, BNYM assigns an actual "buy" price that is at or near the low end of reported trades in the interbank market,[6] and a "sell" price that is at or near the high end of reported trades in the interbank market. *See* Ex. 33, ¶ 1(e).[7] It then executes standing instruction trades at the assigned prices and reports those prices to its customers. *See* Ex. 39. BNYM earns revenue (a "margin" or "spread") on standing instruction trades. The spread is the difference between BNYM's own cost of currency and its standing instruction pricing. That difference generally increases when the market is volatile and the low-end and high-end reported trades are far apart. *See* Compl. ¶ 8.

BNYM's standing instruction prices are generally less favorable to customers than the prices it offers on negotiated transactions. *See* Ex. 37. That does not mean that the service viewed as a whole does not provide value to customers. In its 2010 Annual Report, for example, BNYM offered the following description of its standing instruction service.

> [S]tanding instruction [service] . . . provides a cost-effective and efficient option, to our clients, for handling a high volume of small transactions or difficult to execute transactions in restricted and emerging markets currencies. Our foreign exchange platform . . . transfers to [BNYM] much of the burden, risk and infrastructure cost associated with foreign exchange transactions.

[6] There is no unified market or centralized exchange that reports pricing for spot foreign currency transactions. Anyone can buy and sell foreign currency (with the exception of certain regulated currencies), and those transactions collectively make up "the market." What is usually referred to as the "interbank market" is an elite submarket in which major financial institutions, including BNYM, engage in large transactions on a decentralized basis. Several companies (such as WM/Reuters and Bloomberg) report certain transactions within that submarket to their subscribers, yielding overlapping sets of price data.

[7] Exhibit 33 is a Stipulation and Order of Partial Settlement and Dismissal in *United States v. BNYM*, entered by this Court on January 17, 2012. It is referenced in the Complaint at ¶ 140.

Ex. 32, at 23-24. That is, standing instruction execution makes particular sense for clients when negotiating transactions individually would be especially burdensome or especially risky – for example, converting many small currency amounts, or restricted currencies with regulatory requirements, or thinly traded emerging markets currencies.

C. Allegedly Misleading Statements to Customers

Plaintiffs allege that, at an unspecified time prior to November 2009, "BNYM" made certain statements to customers and investors by means of its website. *See* Compl. ¶ 54.[8] These included statements that standing instruction service was

> "[o]perationally simple, free of charge and integrated with the client's activity on the various securities markets," and w[as] "designed to help clients minimize risks and costs related to the foreign exchange and concentrate on their core business," all while giving . . . [standing instruction] clients the benefit of FX trades "execut[ed] according to best execution standards."

Id.; *see also id.* ¶ 55 (alleging an additional statement that "clients would be given the benefit of 'aggregation and netting' of their FX transactions"). Plaintiffs do not allege which or how many of BNYM's customers read or relied on these representations.

In November 2009, shortly after a complaint against BNYM's competitor State Street Bank was unsealed in California court, BNYM removed from its website the statement that standing instruction service was "free of charge." *See id.* ¶ 75. BNYM also added the following definition of "best execution" to the website:

> We consider best execution, as it relates to the Standing Instruction process, as providing a consistent, accurate and efficient means of facilitating pre-trade, trade and post-trade activities. These activities include identification of trade requirements, pre-trade administration associated with regulated markets, arranging settlement, reconciling discrepancies, posting cash to accounts and reporting all relevant transaction details to investment accounting systems.

[8] Although the Complaint defines "BNYM" to refer specifically to BNYM Corp., *see supra* note 1, that entity only came into being as an entity with the merger of BNY and Mellon on July 1, 2007. *See* Ex. 30, at 2. The Complaint does not state whether plaintiffs believe the website statements were made pre-merger or post-merger.

Id. ¶ 111. Plaintiffs do not allege which or how many of BNYM's customers read or relied on these representations. They also do not allege any other statements that BNYM disseminated generally to its custody customers about standing instruction service.

D. Allegedly Misleading Statements to Investors

BNYM Corp. regularly makes statements to investors about its subsidiaries' collective quarterly and yearly financial performance. Plaintiffs' allegations in this case relate to BNYM's net income for 2007 through the first quarter of 2011, and its income from foreign exchange and other trading revenue for the same period. *See* Compl. ¶¶ 84-88. Plaintiffs do not allege that these historical figures are inaccurate. However, they allege that these figures, although accurate, were rendered misleading by BNYM Corp.'s failure to state, for example, that its profits were "illicit," its practices were "unlawful," or its trading was "illegal." *Id.* ¶¶ 86, 87.

In public filings, press releases, and earnings calls, BNYM Corp. also gave reasons why foreign exchange and other trading revenues varied from quarter to quarter. Generally, these explanations touched on increases or decreases in "volatility" and in "volume." *Id.* ¶¶ 88, 98-102, 104-105. Until February 2011, they did not specifically address BNYM's standing instruction service. Plaintiffs do not allege these statements were inaccurate. However, they allege that these statements, although accurate, were misleading because they failed to disclose that BNYM assigned prices at or near the limits of the interbank range of the day, which Plaintiffs call "the worst price[] of the day." *Id.* ¶¶ 87, 103, 106.

Plaintiffs also allege that BNYM Corp. and some Individual Defendants misled investors by making general statements about the importance of "integrity," "honest[y]," "ethical standards," "transparency," and "credib[ility]," as well as referring to BNYM as "industry-

leading," as a "[market] leader," or as "le[ading] the league tables." *Id.* ¶ 107. None of these statements referred specifically to BNYM's standing instruction service.[9]

E. Additional Disclosures to Investors

In each relevant Form 10-K, BNYM Corp. warned that investing in its securities carried risks. It cautioned broadly that BNYM's "operations are materially affected by conditions" in the "global financial markets," and that a whole host of unforeseeable events could "adversely affect . . . our financial condition."[10] BNYM Corp. also warned investors that legal disputes could "result in increased regulatory supervision, affect our ability to attract and retain customers[,] result in lawsuits, enforcement actions . . . or have other adverse effects."[11]

Well before any government investigation, BNYM Corp. disclosed that its foreign exchange revenue might decrease. It explained that "[m]ost of our foreign exchange revenue is derived from our securities servicing client base," and that "spreads are generally higher when there is more volatility."[12] Because BNYM's "spreads" from trading with its "securities servicing client base" depended on "currency volatility," BNYM Corp. warned that "foreign exchange revenue is likely to decrease during times of decreased currency volatility."[13] It also warned that the "trend towards use of electronic trade networks" could "result in unfavorable pressure on [its] foreign exchange business."[14]

Once the New York Attorney General began, in late 2009, to investigate BNYM's standing instruction practices, BNYM Corp. disclosed that "certain governmental authorities"

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[9] Plaintiffs also allege that certain statements that BNYM Corp. and its officers made in response to various accusations of fraud were misleading. *See infra* pp. 26-27 & n.42 (discussing these statements).

[10] *See* Ex. 4, at 16 (2010); Ex. 3, at 17 (2009); Ex. 2, at 16 (2008); *cf.* Ex. 1, at 14 (2007).

[11] *See* Ex. 4, at 17 (2010); *see also* Ex. 3, at 24 (2009); Ex. 2, at 23 (2008); Ex. 1, at 19 (2007).

[12] *See* Ex. 4, at 20 (2010); Ex. 3, at 19 (2009); Ex. 2, at 18 (2008); Ex. 1, at 16 (2007).

[13] Ex. 4, at 20 (2010); Ex. 3, at 19 (2009); Ex. 2, at 18 (2008); Ex. 1 at 16 (2007).

[14] Ex. 4, at 20 (2010); Ex. 3, at 19 (2009); Ex. 2, at 18 (2008); Ex. 1 at 16 (2007).

had "requested information or served subpoenas" concerning "foreign exchange trades executed in connection with . . . public pension plans."[15]

ARGUMENT

Plaintiffs' two-part theory of fraud liability under Rule 10b-5 requires them to satisfy the PSLRA and Rule 9(b) twice.[16] As to both the alleged fraud against custody customers, and the alleged fraudulent non-disclosure of that alleged fraud to investors, Plaintiffs "must '(1) specify the [allegedly fraudulent] statements . . ., (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'" *In re Parmalat Sec. Litig.*, 479 F. Supp. 2d 332, 339-40 (S.D.N.Y. 2007) (Kaplan, J.) (quoting *Novak v. Kasaks*, 216 F.3d 300, 306 (2d Cir. 2000); alterations in *Parmalat*); *see* 15 U.S.C. § 78u-4(b)(1). They must also "'allege facts that give rise to a strong inference of fraudulent intent.'" *Parmalat*, 479 F. Supp. 2d at 339 (quoting *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994)); *see* 15 U.S.C. § 78u-4(b)(2).[17] And Fed. R. Civ. P. 8 requires Plaintiffs to "state[] a plausible claim for relief" by offering "well-pleaded facts [that] . . . permit the court to infer more than the mere possibility of misconduct." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950 (2009). Plaintiffs fall far short as to both parts of the alleged fraud-within-a-fraud.

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[15] Ex. 31, at 149 (2009 Annual Report); *see also* Ex. 32, at 153 (2010 Annual Report).

[16] Courts of this District have repeatedly dismissed securities fraud claims alleging failures to disclose unlawful conduct because the allegedly undisclosed conduct was not itself pleaded with particularity. *See*, *e.g.*, *In re FBR Inc. Sec. Litig.*, 544 F. Supp. 2d 346, 356 (S.D.N.Y. 2008) ("[I]n order to state a claim that defendants violated the securities laws because they failed to disclose [an] insider trading scheme, plaintiffs must plead the alleged trading scheme with particularity."); *In re Axis Capital Holdings Ltd. Sec. Litig.*, 456 F. Supp. 2d 576, 585 (S.D.N.Y. 2006) (same for failure to disclose alleged anticompetitive conduct); *In re JP Morgan Chase Sec. Litig.*, 363 F. Supp. 2d 595, 632 (S.D.N.Y. 2005) (same for failure to disclose alleged illegal kickback scheme).

[17] Plaintiffs' Securities Act claims are subject to the same heightened pleading standards, because their claims "are premised on allegations of fraud." *Rombach v. Chang*, 355 F.3d 164, 171 (2d Cir. 2004). They purport to disclaim allegations of fraud as to their Securities Act claims, *see* Compl. ¶¶ 165, 169-170, 177-178, 186, but such "boilerplate disclaimer[s]" are ineffective where, as here, a Complaint relies throughout on allegations of fraud and offers no separate "basis for a negligence claim." *In re Ultrafem Inc. Sec. Litig.*, 91 F. Supp. 2d 678, 691 (S.D.N.Y. 2000); *see Rombach*, 355 F.3d at 176 (noting that "courts are not required to sift through allegations of fraud in search of some lesser included claim of strict liability") (internal quotation marks omitted).

I. PLAINTIFFS FAIL TO ALLEGE PROPERLY THAT BNYM COMMITTED FRAUD IN CONNECTION WITH STANDING INSTRUCTION SERVICES

A. BNYM Had No Duty to Disclose Its Pricing Methodology or Revenues for Unregulated Foreign Currency Transactions

Plaintiffs' allegations that BNYM engaged in fraud in connection with its standing instruction service assume that BNYM had a duty to disclose to its customers the methodology by which it assigned prices to standing instruction trades (that is, pricing near the limits of the interbank range of the day) and the spread it thereby realized on those trades. That assumption is fundamentally incorrect. Spot transactions in foreign currencies occur in an unregulated market.[18] BNYM could lawfully buy and sell at whatever prices that market would bear, without any requirement to disclose how those prices were set or how much money it made.

Judge Easterbrook made this point thoroughly and persuasively in *In re Mexico Money Transfer Litigation*, 267 F.3d 743 (7th Cir. 2001):

> Money is just a commodity in an international market. . . . Neiman Marcus does not tell customers what it paid for the clothes they buy, nor need an auto dealer reveal rebates and incentives it receives to sell cars. This is true in financial markets no less than markets for physical goods. The customer of a bank's foreign-exchange section (or an airport's currency kiosk) is quoted a retail rate, not a wholesale rate, and must turn to the newspapers or the Internet to determine how much the bank has marked up its Swiss Francs or Indian Rupees.

Id. at 749; *see id*. ("[S]ince when is failure to disclose the precise difference between wholesale and retail prices for any commodity 'fraud'?").[19] Further, BNYM's customers are not relegated to "newspapers or the Internet" to determine the prices that were available in the market: they

[18] BNYM's foreign exchange transactions with its custody clients are exempt from regulation by the Commodity Futures Trading Commission ("CFTC"), the agency charged with regulating transactions in commodities such as foreign currency. *See* 7 U.S.C. § 2(c); *Sanders v. Forex Capital Mkts., LLC*, No. 11-0864, 2011 WL 5980202, at *9 (S.D.N.Y. Nov. 29, 2011) (noting that, aside from certain retail foreign exchange transactions, spot transactions in foreign currency are not subject to CFTC regulation).

[19] *See also Langford v. Rite Aid of Alabama, Inc.*, 231 F.3d 1308, 1313 (11th Cir. 2000) ("As a general matter of federal law, retailers are under no obligation to disclose their pricing structure to consumers.").

can instead avail themselves of real-time market information offered by BNYM or numerous third parties and negotiate individual trades as their currency needs arise.[20]

Without a duty to disclose the allegedly omitted information, Plaintiffs' claim of fraud by omission fails as a matter of law. *See generally In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993) ("[A]n omission is actionable under the securities laws only when the corporation is subject to a duty to disclose the omitted facts."); *Barrett v. Freifeld*, 77 A.D.3d 600, 601 (N.Y. 2d Dep't 2010) (same under New York common law).[21]

B. Plaintiffs Fail to Allege with Particularity Any Relevant Affirmative Misrepresentations to Customers

Nor have Plaintiffs sufficiently alleged that BNYM made misleading statements to its customers. Plaintiffs allege only a few affirmative statements from BNYM to its customers, none of which pass muster under the PSLRA and Rule 9(b).

1. Plaintiffs focus primarily on the contents of BNYM's website before November 2009, and specifically on its references to standing instruction service as "according [with] best execution standards"; to that service being "free of charge"; and to "aggregation and netting of trades." These allegations fail to meet the most basic requirements of pleading with

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[20] *See Campania Sud-Americana de Vapores S.A. v. IBJ Schroder Bank & Trust Co.*, 785 F. Supp. 411, 419-20 (S.D.N.Y. 1992) (rejecting similar fraud claim because "interbank foreign exchange rates" are readily available to anyone who makes "simple inquiries"). Plaintiffs claim that BNYM "conceal[ed]" the fact that it was pricing near the limits of the interbank range of the day by making a "*de minimis* adjustment." *See* Compl. ¶¶ 3, 66. The assertion is implausible and self-contradictory. A *de minimis* difference is an immaterial one – that is what "*de minimis*" means. If BNYM's customers were aware that there was no *material* difference between BNYM's prices and the limits of the interbank range, then they were not defrauded. Likewise, Plaintiffs' allegation that BNYM committed fraud by failing to provide time-stamped confirmation of standing instruction trades, *see* Compl. ¶ 66, does not explain why the lack of a time-stamp would have prevented a customer from comparing the prices received to the daily range and observing that they fell near the limit. Also, any customer reviewing such a confirmation would have observed the lack of a time-stamp.

[21] Plaintiffs allege that "[i]n conducting FX transactions during the Class Period, BNYM served in a fiduciary capacity." Compl. ¶ 1. A fiduciary relationship can, of course, give rise to a special duty to disclose information. But that is irrelevant here, because the allegation that BNYM acted as a fiduciary in executing standing instruction transactions is "conclusory and not entitled to be assumed true." *Iqbal*, 556 U.S. at 681, 129 S. Ct. at 1951. To support such an allegation adequately, Plaintiffs would need to provide actual facts about BNYM's contractual relationships and courses of dealing with its customers. The Complaint contains no such information.

particularity: "identif[ying] the speaker" and "stat[ing] . . . when the statements were made," *Novak*, 216 F.3d at 306 (internal quotation marks omitted). The Complaint lacks any reference to the date on which the statements were put on the website and is accordingly ambiguous concerning whether BNYM or one of its corporate predecessors[22] posted these materials.

In addition, Plaintiffs also fail to "specify any particular customers who reasonably relied on . . . [the website] statements," *Evercrete Corp. v. H-Cap Ltd.*, 429 F. Supp. 2d 612, 631 (S.D.N.Y. 2006). Indeed, they fail to allege even in general terms that *any* of BNYM's customers did so. *Evercrete* is instructive: there, certain plaintiffs alleged mail and wire fraud by a competitor on its customers as RICO predicates, but the "only specific misrepresentations [they could] point to [we]re statements on [the competitor's] website." *Id.* The court held that this inability to allege any particularized reliance on the website was fatal under Rule 9(b) because the plaintiffs had failed to "expla[in] . . . where and when the fraud on customers occurred." *Id.* (internal quotation marks omitted). So too here: Plaintiffs' allegation that BNYM committed a fraud on customers via its website is a key premise of their securities fraud allegations. But the website could not defraud BNYM's customers unless those customers read and relied on the statements it contained – which Plaintiffs fail to allege.

These pleading defects are not mere technicalities: they are crucial shortcomings that go to the heart of Plaintiffs' claim that BNYM engaged in a fraud that materially affected its revenues. Much of BNYM's standing instruction business can be traced to custody relationships dating to the 1980s, 1990s, or early 2000s.[23] Although it is Plaintiffs' burden to date and

[22] BNYM Corp. itself did not exist as an entity before The Bank of New York ("BNY") merged with Mellon Financial Corporation ("Mellon") in July 2007. It is impossible to determine from the Complaint whether Plaintiffs believe that the statements at issue were made by BNY, Mellon, or post-merger BNYM.

[23] *See, e.g.*, Commonwealth of Virginia Second Amended Complaint in Intervention ¶ 35, *Virginia ex rel. FX Analytics v. The Bank of New York Mellon*, No. CL-2009-15377 (filed Dec. 2, 2011) (noting that the Virginia Retirement System has been BNYM's custody client since 1988).

attribute the website statements, BNYM believes that the website long postdates those preexisting relationships. There is no reason to think that BNYM's customers read or relied on website statements made long after they began using standing instruction service. Thus, even if the website statements were properly pleaded as false or misleading (which they are not),[24] the Complaint could offer no plausible basis to infer any material effect on BNYM's revenues.

2. In November 2009, BNYM revised its website. Plaintiffs allege the approximate date of the revisions, but not the individual or individuals responsible for the revision – alleging only, in the passive voice, that a "proposal was rejected" to add further disclosures. Compl. ¶ 75. Further, Plaintiffs still do not allege that any of BNYM's customers read or relied upon the website language. Their allegations thus still do not satisfy Rule 9(b).

In addition to lacking particularity, Plaintiffs' claim that the post-2009 website language was misleading is implausible. In that language, BNYM disclosed to its customers that when it used the term "best execution" with regard to its standing instruction services, it meant that those services offered "a consistent, accurate and efficient means of facilitating pre-trade, trade and post-trade activities," including "identification of trade requirements, pre-trade administration associated with regulated markets, arranging settlement, reconciling discrepancies, posting cash to accounts and reporting all relevant transaction details to investment accounting systems." *Id*. Plaintiffs do not contend that this description was itself false, but argue that it misleadingly omitted information about BNYM's pricing methodology. *See id*. But the language said nothing

[24] The website statements alleged were also not actionably false because, among other things, (1) there was and is no objective industry or regulatory definition of "best execution" with regard to the unregulated and decentralized spot market for foreign exchange; (2) BNYM legitimately described its standing instruction service as "free of charge" in the sense that it charged no per-transaction fee, such as apply to foreign currency trades in many other contexts; and (3) Plaintiffs allege on apparent information and belief that BNYM did not "net" trades to its customers, *see* Compl. ¶ 65, but fail to allege with particularity the facts and circumstances supporting that belief. In any event, in light of Plaintiffs' failure to plead with particularity the speaker, date, or recipients of the pre-2009 website statements, there is no need for the Court to reach at this time whether they have properly alleged that the statements were false.

about prices and could not plausibly have led a reader to draw any inference about pricing methodology. Moreover, it clearly conveyed to a reasonable reader that BNYM was marketing its services for their administrative efficiency, not as the lowest-priced alternative.[25]

C. Plaintiffs Fail to Establish a Strong Inference of Scienter as to Customers

Plaintiffs also fail to "allege facts that give rise to a strong inference of fraudulent intent" towards BNYM's customers. *Shields*, 25 F.3d at 1128. The e-mails on which Plaintiffs rest their scienter allegations merely show that BNYM employees recognized that increasing pricing transparency and competition in the foreign currency markets, primarily enabled by real-time electronic trading platforms, would cause customers to move away from standing instruction execution and make BNYM's foreign exchange business less profitable over time. Acknowledgments of that reality provide no basis for inferring an intent to defraud.

1. The most important e-mail in the Complaint – the *only* internal communication Plaintiffs identify as received by any officer of BNYM Corp. – is an e-mail from Richard Mahoney to Robert Kelly and Bruce Van Saun dated February 1, 2008. *See* Ex. 37. A fair reading indicates that it supports no inference of fraud. In that e-mail, Mahoney recognized that electronic trading systems lead to "greater rate transparency" that had "resulted in material compression of customer spreads," not only for BNYM but also "across the entire FX industry." *Id.* at 1. The fact that greater pricing transparency and greater competition may lead to lower

[25] Plaintiffs refer throughout the Complaint in conclusory terms to other allegedly false and misleading statements directed from BNYM to its customers, but these allegations generally fall even further short of Rule 9(b)'s requirements than the website allegations. *E.g.*, Compl. ¶ 3 (alleging things that "BNYM represented" without describing recipient or date); *id.* ¶¶ 4, 54-55 (same); *id.* ¶ 77 (alleging undated statement to a representative of T. Rowe Price Associates). They do provide the date of one e-mail in late 2009 that referred to standing instruction pricing as a "blended rate," Compl. ¶ 77, but this isolated example fails to support their allegations of an overarching (and material) fraudulent scheme.

margins is not remarkable and is common to many industries. An e-mail discussing that banal fact does not suggest anyone was engaged in a fraud.

Mahoney also noted that BNYM earns standing instruction "margins" that are "higher" than for electronic trading. He justified this difference by explaining that standing instruction service "provide[s] value-added services surrounding trade execution, such as determining the trade requirements, handling pre-trade administration for regulated market trades, aggregating and netting trade amounts, and assuring settlement." *Id.* The e-mail provides no reason to think that Mahoney (much less Kelly or Van Saun) did not believe the truth of those statements, and therefore supports no inference that any of them thought standing instruction service was a fraud.

Mahoney further explained BNYM's standing instruction margins by noting that standing instruction execution "offers [BNYM's] traders a free intra-day option to time the currency execution in the marketplace knowing we don't have to get back to the customer immediately with the deal price," and that these "pricing advantages disappear when a client trades via an e-commerce platform and full transparency is received." *Id.* Again, acknowledging the fact that standing instruction was a high-margin service, and that transparency would reduce those margins, does not suggest that Mahoney (much less Kelly or Van Saun) believed that there was anything unlawful or deceptive about such trading. Mahoney's statement "do[e]s not permit the court to infer more than the mere possibility of misconduct," *Iqbal*, 556 U.S. at 679, 129 S. Ct. at 1950, and therefore does not satisfy even Rule 8, much less the PSLRA and Rule 9(b).

Mahoney next describes BNYM's response to the demand for transparency:

> The secular trend favoring adoption of e-commerce trading solutions has been unfolding over many years; we can't put the smoke back in the cigarette. On the contrary, we have embraced these new technologies and now use the proprietary features of [electronic trading solutions] iFX Manager and IDeal Forex, as well as our active participation on multibank platforms, to attract new customers.

Ex. 37, at 1. Thus, Mahoney's contemporary, confidential advice to his superiors was that BNYM's customers could and would demand transparent electronic trading; and that such demands might decrease the attractiveness of BNYM's standing instruction service, which offered less favorable rates, but provided more convenience and "value-added services" to customers. But Plaintiffs offer nothing to suggest that Mahoney, Kelly, or Van Saun contemplated any kind of fraudulent or illicit action in response to this changing market reality. To the contrary, Mahoney wrote that BNYM should embrace – already "had embraced," by February 2008 – the new marketplace. This Court should reject Plaintiffs' attempt to create a contrary impression through selective quotation and unsupported characterizations.[26]

2. Plaintiffs rely on other internal communications, none of which are alleged to have gone to any officer of BNYM Corp. They quote several instances in which BNYM's employees acknowledged that transparency tended to reduce profit margins,[27] but that does not suggest scienter: "transparency" is just another word for disclosure, and nondisclosure is not fraud unless disclosure is mandated by law (which, here, it was not). Similarly, Plaintiffs attribute to Mahoney the statement that "'we do not have to tell anyone how much money we make on our dealings,'" Compl. ¶ 76, as though it showed wrongdoing – but Mahoney was correct on the law. *See supra* pp. 9-10 (discussing *Mexico Money Transfer* and *Time Warner*).

Finally, Plaintiffs allege that BNYM employees expressed dismay or concern after learning that their competitor State Street had been accused of fraud, or that BNYM had received

[26] Plaintiffs also rely on a similar e-mail from Jorge Rodriguez to Mahoney sent earlier the same day. *See* Ex. 38. The e-mail gives less context about BNYM's services, and does not discuss embracing the new marketplace, but contains nothing to support an inference of scienter. In addition, Plaintiffs do not allege that Rodriguez's e-mail was ever received by any officer of BNYM Corp. Although the Complaint refers to Rodriguez as an "Officer Defendant," he in fact holds a position with one of BNYM's subsidiaries. *See* Ex. 1, at 29 (2007 10-K, listing officers of BNYM Corp., not including Rodriguez); Ex. 2, at 32-33 (same for 2008); Ex. 3, at 31-32 (same for 2009); Ex. 4, at 30 (same for 2010).

[27] *See*, *e.g.*, Compl. ¶¶ 74, 78, 82.

subpoenas from various authorities.[28] Those allegations do not support a strong inference of scienter because the generalized statements they describe can be explained by a concern that BNYM as a whole, and the individual employees personally, would be gravely inconvenienced by the ensuing investigations and litigation. That entirely accurate apprehension was a real concern whether or not those individuals had actually done anything wrong.[29]

II. PLAINTIFFS FAIL TO ALLEGE THAT BNYM COMMITTED FRAUD ON OR MADE ANY MISLEADING STATEMENTS TO INVESTORS

A. Plaintiffs Have Failed to Identify Any Misleading Statements in BNYM Corp.'s Statements to its Investors

To state a claim under Section 10(b) of the Exchange Act or Sections 11 or 12(a)(2) of the Securities Act, Plaintiffs must plead with particularity an "untrue statement of a material fact," or an omission of a "material fact" necessary to "make the statements made . . . not misleading." 17 C.F.R. § 240.10b-5(b); 15 U.S.C. § 77k(a); 15 U.S.C. § 77*l*(a)(2).[30] Plaintiffs do not even purport to identify any "untrue statement." Nor do they identify any duty to disclose allegedly omitted information other than asserting that disclosure was "necessary to make prior statements not misleading." *Time Warner*, 9 F.3d at 268; *see* Compl. ¶¶ 86, 87, 100, 108.

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[28] *See* Compl. ¶ 72 (e-mail captioned "Oh No"); *id.* (statement that "it's all over").

[29] Plaintiffs also rely on a statement by a "whistleblower" to the Florida AG that they claim "confirms that BNYM's 'top management was aware of the fraud the entire time.'" Compl. ¶ 67. However, they fail to "describe[the whistleblower] . . . with sufficient particularity to support the probability that a person in [his] position . . . would possess the information alleged." *Novak*, 216 F.3d at 314; *see also infra* p. 31 (discussing this letter further). Similarly, Plaintiffs quote an e-mail from Robert Donelan, a "former BNYM FX employee," in the Fall of 2009 which accuses BNYM of "raping . . . custodial accounts of . . . 'Public Trust' money." Compl. ¶ 72. That graphic and prejudicial statement (which BNYM rejects categorically) may have been intended as a serious accusation or perhaps merely as an obscene joke. In either event, the Complaint fails to allege an adequate basis for inferring that Donelan had actual knowledge of BNYM's practices.

[30] The Complaint also briefly recites (at ¶ 158) the elements of a cause of action under subsections (a) and (c) of Rule 10b-5, but it does not describe with any specificity the presence of a scheme to defraud separate from the alleged misstatements. *See SEC v. Kelly*, 817 F. Supp. 2d 340, 344 (S.D.N.Y. 2011) ("Scheme liability under subsections (a) and (c) of Rule 10b-5 hinges on the performance of an inherently deceptive act that is distinct from an alleged misstatement."). This Court should therefore evaluate Plaintiffs' 10b-5 claim under the requirements of subsection (b). *See id.* at 343 (stating that "where the primary purpose and effect of a purported scheme is to make a public misrepresentation or omission, courts have routinely rejected [a plaintiff's] attempt to bypass the elements necessary to impose 'misstatement' liability under subsection (b) by labeling the alleged misconduct a 'scheme'").

Accordingly, they must identify with particularity: (1) a specific false impression that BNYM Corp.'s statements conveyed; and (2) additional information that should have been disclosed to correct that impression. *See* 15 U.S.C. § 78u-4(b)(1). The Complaint fails to allege either one.

1. Accurate Statements of Historical FX Revenue Were Not Misleading

Plaintiffs first assert that BNYM Corp. misled investors by providing them with historical foreign-exchange revenue data. *E.g.*, Compl. ¶¶ 84, 88, 92-99, 101-105. That data was undisputedly accurate, and the Complaint does not allege that BNYM Corp. ever misreported the amount of actual revenue that it received from foreign currency trading. It is well-settled that accurate historical reporting of this sort cannot support a claim for securities fraud. *See In re FBR Inc. Sec. Litig.*, 544 F. Supp. 2d 346, 356 (S.D.N.Y. 2008) ("*Accurate* statements of past earnings figures are not themselves actionable under Section 10(b)."). Plaintiffs contend, however, that these undisputedly accurate figures "concealed" the "sustainability of BNYM's reported revenues" and omitted "risks" that BNYM's foreign-exchange pricing might "expose[]" it "to regulatory action, government and private lawsuits, adverse publicity, [and] the loss of current and future custodial clients." Compl. ¶ 86. These arguments fail for three reasons.

First, BNYM Corp. never represented that the foreign-exchange revenues were sustainable. The statements quoted by the Complaint described in objective numerical terms BNYM's foreign-exchange performance in particular reporting periods. *See*, *e.g.*, *id.* ¶ 84 (quoting 2007 Annual Report (at 5) statement that "[r]evenue from foreign exchange and other trading activities was $786 million in 2007"). Those statements did not imply that BNYM would achieve similar revenue levels in the future. BNYM Corp. explicitly warned investors that

previous results were not necessarily repeatable.[31] It also cautioned investors about its FX revenues, explaining that "future revenue may increase or decrease," and that a migration to "electronic trade networks" could "adversely impact" FX revenue. *E.g.*, Ex. 3, at 19 (2009 10-K). In light of this cautionary language, no reasonable investor could have interpreted a mere recitation of its historical revenues as a guarantee that those revenues were sustainable.[32]

Second, BNYM Corp. never represented that its foreign-exchange revenues were protected or immune from potential future litigation. It had no duty to speculate publicly about possible legal theories that might someday be asserted against it in such litigation. *See Citigroup*, 330 F. Supp. 2d at 377 (holding that corporation was "not required to make disclosures predicting . . . litigation"); *see also Kushner v. Beverly Enters., Inc.*, 317 F.3d 820, 831 (8th Cir. 2003) (noting that company has no duty to "opine about the legality of its product promotion"). Further, the sole internal communication with any officers of BNYM Corp. that is alleged with particularity in the Complaint (the Mahoney e-mail to Kelly and Van Saun) provides no ground for any inference that those officers believed there was anything unlawful about standing instruction execution. *See supra* pp. 13-15. A failure to anticipate potential legal claims is not securities fraud. *See Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 53 (2d Cir. 1995) (dismissing claims based on company's failure to anticipate possible legal consequences of future government inspection).

Third, BNYM Corp. warned investors of the very risks about which Plaintiffs now complain. Each relevant 10-K discussed the presence of "[r]eputational and [l]egal [r]isk,"

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[31] *See*, *e.g.*, Ex. 3, at 1 (2009 10-K) (providing cautions about forward-looking statements); *id.* at 17 (providing a long list of risk factors and cautioning that the list was not exhaustive).

[32] *See In re Axis Capital Holdings Ltd. Sec. Litig.*, 456 F. Supp. 2d 576, 587 (S.D.N.Y. 2006) ("As a matter of law, no statements regarding [defendant's] accurately reported revenue and income have been rendered materially misleading by failing to disclose that such income was 'unsustainable.'"); *In re Citigroup, Inc. Sec. Litig.*, 330 F. Supp. 2d 367, 378 (S.D.N.Y. 2004) (rejecting argument that "reporting of revenue figures implicitly represented that such results would continue"), *aff'd*, 165 F. App'x 928 (2d Cir. 2006).

which BNYM Corp. explained might result in "adverse publicity, regulatory actions or litigation with respect to us." *See*, *e.g.*, Ex. 3 at 23 (2009 10-K). BNYM Corp. explained that it could face "[i]nvestigations by various federal and state regulatory agencies, the Department of Justice and state attorneys general, and . . . related litigation," all of which could "have an adverse effect on investment activity generally and on us." *Id.* at 24.

Further, as soon as those risks became concrete – that is, once government entities began to investigate BNYM's standing instruction service in December 2009 – BNYM Corp. disclosed that government entities had "requested information or served subpoenas" concerning "foreign exchange trades executed in connection with custody services BNY Mellon provides to certain governmental entities and public pension plans." *See* Ex. 31, at 149 (2009 Annual Report). It repeated this disclosure in every 10-Q thereafter.[33] No reasonable investor would have believed after reading BNYM's SEC filings "in their entirety," *Halperin v. eBanker USA.com, Inc.*, 295 F.3d 352, 357 (2d Cir. 2002), that standing instruction transactions were free of legal risk.

2. Accurate Explanations of Changes in Foreign Exchange Trading Revenue Were Not Misleading

The Complaint also alleges (at ¶ 87) that BNYM Corp. misled investors by attributing "changes in FX trading revenue" to "volatility and volume." Again, Plaintiffs do not deny the factual accuracy of these statements. On the contrary, they admit that "the volatility in FX rates" played an important role in determining the profitability of BNYM's standing instruction program. Compl. ¶ 4; *see also*, *e.g.*, *id.* ¶¶ 6, 61. Nonetheless, Plaintiffs characterize these explanations as misleading because BNYM Corp. allegedly should have disclosed that its revenues came from "spreads that far exceeded best execution standards, and that were effectively based on the worst prices of the day." *Id.* ¶ 87. Plaintiffs also contend that BNYM

[33] *See* Ex. 11, at 90 (1Q2010 10-Q); Ex. 12, at 97-98 (2Q2010 10-Q); Ex. 13, at 102 (3Q2010 10-Q); Ex. 14, at 95 (1Q2011 10Q); Ex. 32, at 153 (2010 Annual Report).

Corp. should have disclosed that revenues would have declined had "BNYM not implemented its fraudulent FX scheme." *Id.*; *see also id.* ¶¶ 86, 108. These contentions lack merit.

a. BNYM Corp. Had No Duty to Disclose Its Pricing Methodology or Trading Spreads to Investors

As an initial matter, Plaintiffs' contention that BNYM Corp. was obligated to disclose its pricing methodology should be considered in light of the background principle that participants in an unregulated market – including the spot market for foreign currency transactions – have no general duty to explain how they calculate their prices. *See supra* pp. 9-10 & n.19 (discussing *Mexico Money Transfer* and *Langford*). The Second Circuit has cautioned against "interpreting the securities laws to force companies to [disclose] . . . sensitive pricing information." *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 809 (2d Cir. 1996). That concern is particularly acute on the facts of this case, as BNYM was otherwise entitled to keep its pricing information confidential under applicable law and its investors stood to benefit substantially from that confidentiality.

There is no basis to construe the securities laws to require such disclosure here. None of the allegedly misleading statements about revenue changes even mentions – let alone describes in detail – standing instruction services as opposed to BNYM's foreign exchange services generally. *See* Compl. ¶¶ 87-88.[34] Accordingly, they did not give rise to any duty to disclose otherwise confidential (and competitively sensitive) details about any particular service. Disclosures about a company's business in general terms "d[o] not trigger a generalized duty

[34] BNYM Corp.'s 2010 Annual Report, which was issued in February 2011 after press reports about the Virginia case were already public, in a section separate from the discussion of revenue changes, contains a brief description of BNYM's standing instruction service. *See* Compl. ¶ 88; *supra* pp. 4-5. This description did not discuss pricing and was too generalized to give rise to a duty to disclose BNYM's pricing methodology.

requiring defendants to disclose the entire corpus of their knowledge" about all "related subjects." *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 366 (2d Cir. 2010).[35]

BNYM Corp. might arguably have had a duty to disclose that BNYM assigned prices toward the limit of the daily interbank range if its SEC filings had conveyed a misleading impression that BNYM was pricing in some other manner. The historical statements at issue conveyed no such impression. They concerned only year-on-year or quarter-on-quarter "*changes* in FX trading revenue," Compl. ¶ 87 (emphasis added). They therefore discussed the *changing* factors – like volume and volatility – that accounted for such periodic fluctuations. The Complaint does not allege that BNYM's standing instruction pricing policy – which has remained constant over time – changed on a quarterly basis. Moreover, the statements at issue concerned changes in aggregate foreign exchange revenues, which included negotiated transactions as well as standing instruction service. These high-level explanations of quarterly shifts in aggregate revenue implied nothing about BNYM's pricing methodology for one particular channel of execution.[36]

Even if interpreted to discuss standing instruction service specifically, the statements at issue were not misleading. They emphasized that "[m]ost of [BNYM's] foreign exchange revenue is derived from our securities servicing client base," and that "[a]ctivity levels and

[35] Some courts have argued that if a statement "puts the topic of the cause of [a company's] financial success at issue, then it is 'obligated to disclose information concerning the source of its success.'" *In re Van der Moolen Holding N.V. Sec. Litig.*, 405 F. Supp. 2d 388, 401 (S.D.N.Y. 2005) (quoting *In re Providian Fin. Corp. Sec. Litig.*, 152 F. Supp. 2d 814, 824-25 (E.D. Pa. 2001)). To the extent those decisions could be read to suggest that any company that speaks in high-level terms about its revenues assumes a duty to divulge every business practice that materially contributes to those revenues, this Court should follow the more persuasive opinions that have rejected any such rule. *See*, *e.g.*, *FBR*, 544 F. Supp. 2d at 356.

[36] *See In re ITT Educ. Servs., Inc. Sec. & Shareholder Litig.*, -- F. Supp. 2d --, 2012 WL 1632762, at *5 (S.D.N.Y. 2012) (holding that company's attribution of sales growth in part to "increased demand" and "effective advertising" did not obligate it to "disclose its hyper-aggressive sales tactics"); *Menkes v. Stolt-Nielsen S.A.*, No. 03 CV 409, 2005 WL 3050970, at *8 (D. Conn. Nov. 10, 2005) (holding that "generic description of the state of the market" and "recitation of historical facts about [defendant's] operations" were "too remote" from alleged bid rigging scheme to "compel disclosure").

spreads are generally higher when there is more volatility." 2009 10-K at 19. In other words, they disclosed the factual essence of Plaintiffs' allegation that BNYM's practices "exploit[ed] daily trading volatility," Compl. ¶ 61 – omitting only legal argument and pejorative language. A reasonable investor, reading that increased volatility allowed BNYM to realize higher "spreads" on FX trades with its "securities servicing client base," could not have been surprised that "BNYM would buy the currency at one rate, but charge its clients a higher rate." *Id.* ¶ 58.

Finally, BNYM Corp.'s disclosures specifically cautioned investors that the "trend towards use of electronic trade networks" could place "unfavorable pressure on our foreign exchange business." Ex. 3, at 19 (2009 10-K). They thus communicated to investors the core message of the Rodriguez and Mahoney e-mails on which the Complaint so heavily relies: that the emergence of electronic commerce platforms, and the pricing transparency that those platforms produce, might drive down BNYM's FX margins. *Compare* Ex. 3, at 19 *with*, *e.g.,* Ex. 37 at 1. In light of this disclosure, and in light of BNYM Corp.'s previous disclosure that its trading "spreads" depended on currency volatility, its description of changes in its FX revenues was not misleading. *See Halperin*, 295 F.3d at 357 (emphasizing that liability turns not on "isolated statements" but whether "defendant's representations or omissions, considered together and in context, would . . . mislead a reasonable investor regarding the nature of the securities").

b. BNYM Corp. Had No Duty to Accuse Itself of Fraud

Plaintiffs' assertion (at ¶¶ 86, 108) that BNYM Corp. should have attributed its FX profits to an "illegal trading scheme" fares no better. Courts have flatly rejected the argument that the "securities laws . . . require a company to accuse itself of wrongdoing." *Citigroup*, 330 F. Supp. 2d at 377.[37] Such a requirement – compelling companies not only to anticipate but

[37] *See also In re Morgan Stanley Tech. Fund Sec. Litig.*, 643 F. Supp. 2d 366, 377 (S.D.N.Y. 2009) ("firms have no duty to accuse themselves of unproven, allegedly illegal policies"), *aff'd*, 592 F.3d 347 (2d Cir. 2010); *Ciresi v.*

preemptively to *endorse* attacks by prosecutors or the plaintiffs' bar – would "make a silly, unworkable rule" and promote "vexatious litigation and abusive discovery." *Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co.*, 475 F. Supp. 328, 332 (S.D.N.Y. 1979) (Leval, J.) (rejecting such a rule under proxy disclosure law), *vacated as moot*, 638 F.2d 7 (2d Cir. 1980). It would also usurp traditional state functions, injecting federal securities law into disputes over state law fraud. *See generally Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 161, 128 S. Ct. 761, 770-71 (2008) (emphasizing that the "securities laws" are not "intend[ed] to provide a broad federal remedy for all fraud" and that the "realm of ordinary business operations" is reserved to "state law") (internal quotation omitted).

Federal securities law, then, did not mandate a disclosure that BNYM's standing instruction service was an "illegal trading scheme." Indeed, the disclosure that Plaintiffs demand is precisely the sort of unnecessary "self-flagellation" that securities law does not require. *In re Pfizer Inc. Shareholder Deriv. Litig.*, 722 F. Supp. 2d 453, 465 (S.D.N.Y. 2010). As discussed, BNYM Corp.'s revenue statements conveyed no impression about the mechanics of standing instruction pricing. *See supra* pp. 17-21. Because those general statements lacked any "direct nexus" with BNYM's standing instruction pricing methodology, they did not obligate BNYM Corp. to say *anything* about that pricing – much less to characterize it as illegal. *Axis*, 456 F. Supp. 2d at 589; *see Menkes*, 2005 WL 3050970, at *8 ("recitation of historical facts" was "too remote" from alleged "illegal conduct" to create a duty to disclose).

3. Statements About "Transparency" and "Integrity" Were Nonactionable Statements of Opinion

The Complaint next characterizes as misleading BNYM Corp.'s various statements about "transparency" and "integrity." Compl. ¶ 107. But it is well settled that "expressions of puffery

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Citicorp, 782 F. Supp. 819, 823 (S.D.N.Y. 1991) ("the law does not impose a duty to disclose uncharged, unadjudicated wrongdoing or mismanagement"), *aff'd*, 956 F.2d 1161 (2d Cir. 1992).

and corporate optimism do not give rise to securities violations." *Rombach*, 355 F.3d at 174. Thus, the Second Circuit has held that "generalizations regarding [a company's] business practices," including those professing a company's intention to "set the standard for integrity" or touting its "highly disciplined" management approach, are inactionable as a matter of law. *ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 205-06 (2d Cir. 2009) (internal quotation marks omitted). To give rise to liability, a statement must do more than generally characterize a company's business practices – it must be "worded as [a] guarantee[]" or be "supported by specific facts." *In re NTL, Inc. Sec. Litig.*, 347 F. Supp. 2d 15, 34 (S.D.N.Y. 2004) (Kaplan, J.).

None of the statements referenced in paragraph 107 of the Complaint satisfies this standard. Plaintiffs identify only general descriptions of business philosophy bereft of firm guarantees or concrete factual assertions. Such general descriptions – including broad statements about "integrity" – were nonactionable. *See ECA*, 553 F.3d at 206 (noting that "broad, general statements regarding the [company's] financial integrity" were not actionable) (internal quotation omitted); *In re JP Morgan Chase Sec. Litig.*, 363 F. Supp. 2d 595, 632-33 (S.D.N.Y. 2005) (holding that "generalizations regarding integrity, fiscal discipline and risk management [] amount to no more than puffery").

Likewise nonactionable were Kelly's generalized statement that "[e]verything is going to be about transparency going forward," Compl. ¶ 107; *see Johnson v. Songwriter Collective, LLC*, No. 3:05-0320, 2006 WL 861490, at *12 (M.D. Tenn. Mar. 28, 2006) (statement that defendant "would offer 'transparency in all financial reporting'" was a "'soft, puffing statement[]' . . . lacking materiality") (citation omitted); and Rodriguez's amorphous statement that BNYM was a "leader in FX service delivery," Compl. ¶ 107, which was "untethered to anything measureable"

and thus incapable of misleading a reasonable investor. *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 671 (6th Cir. 2005) (collecting cases and noting that company's description of itself as a "leader in our segment" was nonactionable puffery) (internal quotation omitted).[38]

4. Statements on BNYM's Website Are Not Alleged with Particularity And Cannot Support Liability

Plaintiffs also rely on statements that the Complaint attributes to BNYM's website. *See* Compl. ¶ 109. As explained previously, Plaintiffs do not plead these statements with particularity. *See supra* pp. 10-12. Their inability to do so also prevents them from raising a strong inference of scienter. *See 380544 Canada, Inc. v. Aspen Tech., Inc.*, 544 F. Supp. 2d 199, 230 (S.D.N.Y. 2008) (rejecting attempt to plead scienter based on "vaguely described" statements lacking "context" such as "when or where" they were made). In any case, the website statements cannot support liability under Rule 10b-5, which applies only to statements made "in connection with the purchase or sale of [securities]." 17 C.F.R. § 240.10b-5. Statements that are "merely incidental or tangentially related to the sale of securities will not meet the 'in connection with' requirement." *Leykin v. AT&T Corp.*, 423 F. Supp. 2d 229, 241 (S.D.N.Y. 2006), *aff'd*, 216 F. App'x 14 (2d Cir. 2007). Liability attaches only to statements made "in a manner reasonably calculated to influence the investing public, e.g., by means of the financial media." *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 862 (2d Cir. 1968).[39]

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[38] Plaintiffs also attack BNYM Corp.'s general description of its "internal control framework" and its Sarbanes-Oxley certification that its controls were sufficient. *See*, *e.g.*, Compl. ¶¶ 85 (quoting 2007 Annual Report at 58), 90. However, they fail to offer any particularized description of any defect in BNYM's internal controls. "[C]onclusory allegation[s] that [a defendant] fraudulently misrepresented the adequacy of its internal controls" are insufficient to state a claim. *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 711 (3d Cir. 1996) (Alito, J.).

[39] The Complaint does not allege that the website statements give rise to Securities Act liability. *See* Compl. ¶¶ 165-68 (basing Securities Act allegations exclusively on "Offering Materials," which did not include the website statements). Nor could it, for the website was neither a "registration statement," 15 U.S.C. § 77k(a), nor a "prospectus or oral communication," 15 U.S.C. § 77*l*(a)(2). *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 567-68 , 115 S. Ct. 1061, 1066 (1995) (limiting "oral communications" to those "that relate to a prospectus").

Plaintiffs fail to allege plausibly that the website's descriptions of standing instruction service were "reasonably calculated" to influence *investors*. A marketing website differs fundamentally from a "press release, annual report, investment prospectus or other such document on which an investor would presumably rely." *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1362 (9th Cir. 1993) (describing the types of documents on that generally give rise to securities liability).[40] As such, the Complaint does not allege (and could not plausibly allege) that the website statements were "'integral to the purchase and sale of the securities.'" *Leykin*, 423 F. Supp. 2d at 241 (quoting *Pross v. Katz*, 784 F.2d 455, 459 (2d Cir. 1986)).[41]

B. BNYM's Responses to Accusations of Fraud Were Not Misleading

Finally, the Complaint attacks BNYM's efforts to defend itself against accusations of fraud that emerged in early 2011. *See* Compl. ¶¶ 118, 120-21. But nothing in the federal securities laws requires a company faced with uninformed accusers making inaccurate allegations to face the Hobson's choice of either surrendering or inviting a securities class action. Instead, BNYM did precisely what any reasonable shareholder would have wanted it to do: it vigorously defended itself. It also criticized certain media accounts of those allegations. None of this was fraud. *See GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170, 179 (4th Cir. 2007) (holding that a "denial of wrongdoing" does not constitute fraudulent concealment because "wrongdoing is not a straightforward matter of fact, and it is not fraud to deny it").

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[40] *In re Carter-Wallace, Inc. Sec. Litig.*, 150 F.3d 153 (2d Cir. 1998), is not to the contrary. That case held that certain "false advertisements in technical journals" were properly alleged to be made "in connection with" a securities transaction. *Id.* at 156. The court of appeals explained that it did so because the "the proof at trial [might] establish[] that the advertisements were used by market professionals in evaluating the stock of the company." *Id.* at 156-57. What must be proved at trial must be plausibly alleged in a complaint. Here, the Complaint is devoid of any allegation that the materials on the website were "used by market professionals" in evaluating BNYM's stock, or of any facts from which such a plausible inference might be drawn.

[41] *See also Siegel v. Tucker, Anthony & R.L. Day, Inc.*, 658 F. Supp. 550, 553 (S.D.N.Y. 1987) (rejecting claim based on defendant's "indefinite promise[] of conservative management" because such promise was "made in connection with defendant's efforts to attract . . . brokerage business rather than with any subsequent trade in a particular security").

The Complaint does not properly allege that any specific responses by BNYM (much less by BNYM Corp.) were inaccurate, much less fraudulent. To take one conspicuous example, BNYM in good faith described the *qui tam* lawsuits against it as being "without merit" and "baseless." *See* Compl. ¶¶ 118, 120, 130. That statement was well justified, as the court hearing the Virginia case ultimately agreed when it dismissed that case last month. *See* Ex. 34. (*Virginia ex rel. FX Analytics v. The Bank of New York Mellon*, Case No. CL-2009-15377 (Va. Cir. Ct. May 1, 2012) (order sustaining demurrer)). To take another, Kelly's statement on April 19, 2011 that "the reporting on this issue just isn't accurate, and in many ways, it's actually misleading," Compl. ¶ 121, is an obvious statement of opinion, and Plaintiffs fail to allege that it was either untrue or not honestly held at the time. With regard to these and the other statements Plaintiffs quote,[42] their repetitive boilerplate allegations of falsehood do not meet Rule 9(b).

C. Plaintiffs Have Failed to Raise a Strong Inference of Scienter As to Investors by BNYM Corp. or Any of Its Officers

BNYM Corp. can be liable under section 10(b) and Rule 10b-5 only if it acted with a "mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193-94 n.12, 96 S. Ct. 1375, 1381 n.12 (1976). Plaintiffs must "state with particularity facts giving rise to a strong inference" of scienter. 15 U.S.C. § 78u-4(b)(2)(A). The inference must be more than "plausible"; it must be "cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551

[42] The remaining statements alleged over the course of 2011 can be dealt with briefly: (1) statements that BNYM's rates were "competitive," referenced at ¶ 118 and ¶ 130, were nonactionable statements of opinion or sales talk; (2) the Complaint fails to allege with particularity why the February 27, 2011 op-ed referenced at ¶ 120 was false or misleading; (3) the Complaint fails to allege that BNYM had not been discussing the allegations in the lawsuits with its clients as of April 19, 2011, as stated on the conference call referenced at ¶ 121, or that its clients had not been supportive at that time; (4) the Complaint fails to allege any particularized basis for its claim that the analyst statements referenced in ¶ 125 merely "parroted BNYM's assertions," as opposed to being the analyst's own good-faith opinion; (5) the Complaint fails to allege with particularity that the statements concerning client behavior as of May 24, 2011, referenced in ¶ 128 were false when made; and (6) the statements referenced in ¶ 135 were nonactionable generic denials of wrongdoing, *see supra* p. 26.

U.S. 308, 314, 127 S. Ct. 2499, 2505 (2007). To satisfy this stringent pleading standard, the Complaint must allege facts that show (1) that an individual acting on behalf of BNYM Corp. had the "motive and opportunity to commit fraud, or (2) strong circumstantial evidence of conscious misbehavior or recklessness." *ECA*, 553 F.3d at 198. It meets neither test.

1. Plaintiffs Have Failed to Plead Any Cognizable Motive

Plaintiffs can plead that BNYM Corp. had a sufficient "motive and opportunity" to defraud only by alleging that it or its agents "benefited in some concrete and personal way from the purported fraud." *Novak*, 216 F.3d at 307. It is well-settled that "[m]otives . . . common to most corporate officers, such as the desire for the corporation to appear profitable and the desire to keep stock prices high to increase officer compensation, do not constitute 'motive' for purposes of this inquiry." *ECA*, 553 F.3d at 198.

None of the Complaint's allegations go beyond these generic corporate motives that courts have long rejected as a basis for pleading scienter. It asserts (at ¶ 80) that standing instruction services were a "major profit center for BNYM," and it alleges (at ¶ 82) that BNYM resisted full "transparency" regarding its standing instruction pricing to avoid the consequent "detrimental effect" on its "FX revenues." That general profit motive could be "imputed to any publicly-owned, for-profit endeavor" and so is "not sufficiently concrete for purposes of inferring scienter." *Chill v. General Elec. Co.*, 101 F.3d 263, 268 (2d Cir. 1996). On the contrary, BNYM's alleged desire to increase its revenues by earning "excessive fees" actually *weakens* the inference of scienter. *ECA*, 553 F.3d at 200. After all, "[e]arning profits for the shareholders is the essence of the duty of loyalty," and BNYM's desire to maximize those profits reveals only that it was attempting to fulfill that duty. *Id.* Thus, even if Plaintiffs could properly allege that BNYM had earned those profits by "duping other institutions" (which they have not), that "would not constitute a motive . . . to defraud its own investors." *Id.* at 203.

The Complaint also refers obliquely (at ¶ 81) to an unspecified "bonus pool," but this allegation is similarly insufficient on its face. Courts have repeatedly rejected attempts to plead a fraudulent motive by invoking corporate bonuses. *See*, *e.g.*, *ECA*, 553 F.3d at 201 (that defendant's officers "received bonuses based on corporate earnings and higher stock prices does not strengthen the inference of fraudulent intent"). As with a generalized profit motive, the "desire to maintain or increase executive compensation is insufficient because such a desire can be imputed to all corporate officers." *Kalnit v. Eichler*, 264 F.3d 131, 140 (2d Cir. 2001).[43]

2. Plaintiffs Have Failed to Plead Circumstantial Evidence

The Complaint likewise fails to allege circumstantial evidence giving rise to a strong inference of fraudulent intent. To plead scienter under this theory, the Complaint must allege facts showing a "reckless disregard for the truth." *South Cherry St., LLC v. Hennessee Group LLC*, 573 F.3d 98, 109 (2d Cir. 2009). "[R]eckless disregard" in this context is "not merely a heightened form of negligence"; it requires a "state of mind approximating actual intent." *Id.* (internal quotation and emphasis omitted). Thus, Plaintiffs bear a "significant burden," *Chill*, 101 F.3d at 270, to allege "conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care," *id.* at 269 (internal quotation omitted). And where (as here) there is "no motive" alleged, the "strength of the circumstantial allegations must be correspondingly greater." *ECA*, 553 F.3d at 199 (internal quotation omitted).

The Complaint does not meet this exacting standard. Because Plaintiffs allege no "affirmative misstatements" and instead focus entirely on "non-disclosure," they must allege that

[43] In context, moreover, the "bonus pool" e-mail is unrelated to the rates that BNYM assigned to its standing instruction transactions. *See* Ex. 35. That e-mail concerned an internal accounting dispute over *which* BNYM division – Global Markets or Asset Servicing ("Custody") – should receive internal credit for the revenue associated with a contemplated per-transaction fee on future FX trades with a particular client. *See id.* The e-mail's author takes the position that *his* division should receive credit (and thus the associated "bonus[es]") for future revenue generated by this proposed fee. That unremarkable sentiment suggests no motive to defraud investors.

some agent of BNYM Corp. consciously or recklessly disregarded a "clear duty to disclose" the details of BNYM's standing instruction pricing. *Kalnit*, 264 F.3d at 144. But any such obligation was at the very least "not so clear." *Id.* BNYM Corp.'s officers could reasonably have believed that BNYM's standing instruction service was perfectly lawful *and* that they had no duty to divulge even possibly illegal conduct. *See supra* pp. 12-16, 22-23. Even they were wrong, those reasonable errors would not amount to scienter.[44]

On top of that, the Complaint does not even properly allege that any officer of BNYM Corp. even knew the facts that, according to Plaintiffs, created the duty to disclose the details of BNYM's standing instruction program. Although Plaintiffs baldly assert (at ¶ 67) that BNYM's standing instruction program "obviously" involved the "knowledge of BNYM's top executives," such a conclusory allegation is of course insufficient. *See Defer LP v. Raymond James Fin., Inc.*, 654 F. Supp. 2d 204, 216-17 (S.D.N.Y. 2009) (Kaplan, J.). So too is their quotation from the similarly conclusory (and recently dismissed) Virginia complaint. *See infra* pp. 34-35. Plaintiffs must instead "specifically identify the reports or statements containing [the] information" that supposedly provided BNYM Corp.'s officers with knowledge triggering a duty to disclose. *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc.*, 531 F.3d 190, 196 (2d Cir. 2008) (internal quotation omitted). Plaintiffs fail in their four attempts to carry this burden.

a. Plaintiffs place great emphasis (at ¶¶ 70-71, 143) on the e-mail that Mahoney sent to Kelly and Van Saun, which assessed the revenue implications of an emerging industry "trend favoring adoption of e-commerce trading solutions." Ex. 37 at 1. This e-mail – which did not even discuss range-of-the-day pricing – provides no basis for any inference of scienter in light of Mahoney's statement that BNYM had "embraced these new technologies" and was actively

[44] *See Board of Trs. of City of Ft. Lauderdale Gen. Emps.' Ret. Sys. v. Mechel OAO*, 811 F. Supp. 2d 853, 875 (S.D.N.Y. 2011) (finding no scienter because a violation of "ambiguous" legal rules was not "obvious").

using them "to attract new customers." *Id.*; *supra* pp. 13-15 (further discussing the e-mail). Plaintiffs' contention that the Mahoney e-mail supports a strong inference that Kelly or Van Saun disregarded a clear duty to disclose an ongoing fraud to investors is simply unfounded.[45]

b. Plaintiffs also quote (at ¶ 67) from a letter in which Richard Herber, a former BNYM employee, asserts that "top management was aware of the fraud the entire time." This allegation fails because the letter (attached as Ex. 36) does not demonstrate that Herber was "likely to know the relevant facts." *In re Optionable Sec. Litig.*, 577 F. Supp. 2d 681, 691 (S.D.N.Y. 2008) (Kaplan, J.). Herber worked at BNYM for six weeks as a "[s]alesperson," two levels below Jorge Rodriguez. Ex. 36. Rodriguez was himself not an officer or director of BNYM Corp. *See*, *e.g.*, Ex. 4, at 30 (Rodriguez not among named executive officers). It is implausible that during his six-week tenure Herber would have had any direct contact with – let alone been privy to the mental state of – anyone responsible for making statements on behalf of BNYM Corp. to investors. *See In re BISYS Sec. Litig.*, 397 F. Supp. 2d 430, 442 (S.D.N.Y. 2005) (Kaplan, J.) (rejecting scienter allegation based on statements from former "sales executives" who had not held "particularly senior position[s]"). Also, the letter's sweeping generalities are not "sufficiently particular and detailed to indicate their reliability." *Optionable*, 577 F. Supp. 2d at 690 (internal quotation omitted).[46]

c. The Complaint next alleges that the alleged "FX scheme" was so "critical" to BNYM's "profitability and overall financial position" that BNYM Corp.'s officers must have known about it. Compl. ¶ 144. Courts routinely reject this kind of generic assertion, and this

[45] The Complaint offers no specific facts to support its assertion (at ¶ 143) that Kelly and Van Saun were "specifically briefed" that BNYM acted in "blatant contravention of BNYM's representations concerning its purported 'best execution' practices and 'free of charge' FX services." The Mahoney e-mail is the only communication alleged to have gone to Kelly or Van Saun, and it did not describe BNYM's marketing of that program at all, much less reference the terms "best execution" or "free of charge."

[46] Robert Donelan's e-mail (quoted at Compl. ¶ 72) is completely irrelevant to this inquiry, as it neither went to nor refers to any officer of BNYM Corp. *See also supra* note 29 (further discussing Donelan's e-mail).

Court should as well. *See In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 539 (3d Cir. 1999) ("Generalized imputations of knowledge do not suffice, regardless of the defendants' positions within the company."). Nor does the general profitability of BNYM's standing instruction business suggest fraudulent intent. *See Chill*, 101 F.3d at 270 ("The fact that [defendant] did not automatically equate record profits with misconduct cannot be said to be reckless.").[47]

Moreover, the Complaint does not allege facts actually showing that BNYM's standing instruction pricing was of "critical importance" to its "overall financial position." *Cf.* Compl. ¶ 144. Those allegations are based solely on the New York Attorney General's unadjudicated "determin[ation]" that standing instruction transactions could have generated 75% of BNYM's total FX revenue, *id.*, which this Court should disregard. *See infra* pp. 34-35. Even assuming *arguendo* that the 75% figure is correct, it must be considered in light of the Complaint's allegations (at ¶ 79) that BNYM's foreign exchange revenues never exceeded 10.7% of overall annual revenue during the Class Period. At most, then, the Complaint alleges a fraud that affected a business accounting for less than 8% of BNYM Corp.'s revenue. That, as this Court has put it, "is not large enough to suffice." *BISYS*, 397 F. Supp. 2d at 448 (rejecting inference of scienter based on alleged inflation of revenues by "more than twenty percent").

d. Finally, the Complaint asserts that BNYM's "cover-up . . . in the aftermath of the *State Street* action" provides evidence of scienter. Compl. ¶ 145. This allegation suffers from the same flaw that undermines Plaintiffs' other theories of scienter: it fails to demonstrate that any individual made a statement on behalf of BNYM Corp. with intent to deceive investors. *See Teamsters*, 531 F.3d at 195 (requiring "pleaded facts" that "create a strong inference that someone whose intent could be imputed to the corporation acted with the requisite scienter").

[47] *See also Glaser v. The9, Ltd.*, 772 F. Supp. 2d 573, 596 (S.D.N.Y. 2011) (rejecting plaintiffs' attempt to infer scienter from allegation that disputed practice was "at the core of defendants' business"); *Defer*, 654 F. Supp. 2d at 219 ("alleging a large fraud on its own does not carry plaintiff's burden to allege *scienter* with particularity").

The e-mails quoted by the Complaint reflecting internal reactions to the *State Street* case exclusively concern those mid-level employees who interacted with BNYM's *customers*. *See* Compl. ¶¶ 72-78. They certainly raise no inference concerning the mental state with which BNYM Corp. and its officers made representations to *investors*.[48] As such, they are irrelevant to Plaintiffs' claim that BNYM Corp. violated Rule 10b-5. *See Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 366 (5th Cir. 2004) (holding that scienter turns on the "state of mind of the individual corporate official or officials who make or issue the statement").

Moreover, what the Complaint terms a "cover-up" actually demonstrates the absence of any fraudulent intent. The most compelling inference supported by the alleged facts is that BNYM employees, in the wake of the *State Street* action, wanted to avoid any possibility that they and their employer would be (wrongfully) accused of fraud. *See Tellabs*, 551 U.S. at 314 (holding that courts must consider "not only inferences urged by plaintiff . . . but also competing inferences rationally drawn from the facts alleged"). Thus, BNYM's employees recognized the need to "examine [its] practices" in light of the *State Street* case. Compl. ¶ 73. That examination led BNYM to remove the term "free of charge" from its website, as well as to adopt a clarifying definition of "best execution." *See supra* pp. 5-6. These corrective efforts – withdrawing or clarifying the very statements that Plaintiffs most stridently attack – "negate[] rather than support[] any inference of scienter." *See In re Segue Software, Inc. Sec. Litig.*, 106 F. Supp. 2d 161, 169-70 (D. Mass. 2000). To punish defendants for such good-faith efforts "would create a perverse incentive for management to conceal mistakes, thereby defeating a core purpose of the securities laws." *Id.*

[48] Plaintiffs' conclusory description of the individuals who received these e-mails as "senior personnel" or "senior management," Compl. ¶¶ 73, 75, does not cure this defect, because the Complaint does not identify any relevant e-mail actually involving someone with authority to speak to investors. The only named Defendant that the Complaint even *mentions* in its section on the "cover-up" is Rodriguez. *See id.* ¶ 78; *see also id.* ¶¶ 72-78. As already explained, Rodriguez was not an officer of BNYM Corp. Speaking to investors was not his job. *See supra* note 26.

The remainder of the statements allegedly showing a "cover-up" simply reflect BNYM's undisputed desire to keep confidential its pricing methodology and spreads for standing instruction transactions, based on the belief that disclosure would assist BNYM's customers to "work [spreads] down to zero." Compl. ¶ 74; *see also id.* ¶¶ 75-76, 78. Because BNYM had no duty to disclose that information to either customers or investors, *see supra* pp. 9-10, 20-22 – and certainly no "clear duty" of the kind contemplated by *Kalnit*, 264 F.3d at 144 – a desire not to disclose provides no basis for inferring fraud.

III. ALLEGATIONS BASED ON BNYM'S PARTIAL SETTLEMENT AND OTHER COMPLAINTS SHOULD BE GIVEN NO WEIGHT

Plaintiffs rely extensively on BNYM's decision to reach a partial settlement with the U.S. Attorney's office for the Southern District of New York under which it changed the language on its web site. *See*, *e.g.*, Compl. ¶¶ 12, 110, 112, 140, 146. BNYM agreed to change the website in order to resolve certain claims by the government "without the need for litigation," and expressly denied liability. Ex. 33, at 2, 5-6. Plaintiffs improperly rely on the settlement to show that BNYM's website statements were misleading and that BNYM acted with scienter.

Under well-settled circuit precedent, the settlement may not be used for that purpose. *See Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976) (granting a motion to strike references to a SEC complaint and consent judgment in later private litigation); *cf.* Fed. R. Evid. 408.[49] "*Lipsky* teaches 'that references to preliminary steps in litigations and administrative proceedings that did not result in an adjudication on the merits or legal or permissible findings of fact are, as a matter of law, immaterial . . . .'" *In re Platinum and Palladium Commodities Litig.*, 828 F. Supp. 2d 588, 593 (S.D.N.Y. 2011) (quoting *In re Merrill*

[49] There is no need for the Court actually to strike the allegations. *See*, *e.g.*, *National Council of Young Israel v. Wolf*, 963 F. Supp. 276, 282 (S.D.N.Y. 1997) (Kaplan, J.) (observing that there is little point in striking allegations from a civil complaint). However, the Court can and should decline to accord them weight.

Lynch & Co. Research Reports Sec. Litig., 218 F.R.D. 76, 78 (S.D.N.Y. 2003)).[50] The Court should follow these cases and disregard Plaintiffs' improper use of the settlement.[51]

Plaintiffs likewise improperly allege that "the New York Attorney General ("NYAG") has determined" that BNYM "reported hundreds of millions of dollars in phony income" through an alleged "FX fraud" and attempt to rely on the NYAG's "calculat[ion]" for litigation purposes of the proportion of BNYM's revenue attributable to standing instruction trades. Compl. ¶ 4 (emphasis omitted). And they improperly rely upon the Virginia Attorney General's conclusory allegation (in a complaint since dismissed) that the "highest reaches of BNYM's senior management . . . were aware of and participated in the deception." *Id.* ¶ 67 (internal quotation marks and emphasis omitted). Those copied allegations should be given no weight.

Plaintiffs rely on the partial settlement and the complaints in those cases heavily when attempting to plead the allegedly misleading nature of BNYM's statements, and even more so when attempting to plead scienter. *See* Compl. ¶¶ 9, 12, 57, 67, 110, 112, 114, 131-33, 137-38, 140, 146. Cut-and-pasting conclusory allegations without particularized support cannot satisfy the rigorous pleading requirements of the PSLRA and Rule 9(b). Accordingly, *Lipsky* adds even greater force to the conclusion that this Complaint should be dismissed.

CONCLUSION

The Motion to Dismiss should be granted.

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[50] *See also Footbridge v. Countrywide Home Loans, Inc.*, No. 09 Civ. 4050 (PKC), 2010 WL 3790810, at *5 (S.D.N.Y. Sept. 28, 2010) (striking allegations "based on pleadings, settlements, and government investigations in other cases"); *RSM Prod. Corp. v. Fridman*, 643 F. Supp. 2d 382, 403 (S.D.N.Y. 2009) ("Second Circuit case law is clear that paragraphs 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" under Rule 12(f)), *aff'd*, 387 F. App'x 72 (2d Cir. 2010); *Merrill Lynch Research Reports*, 218 F.R.D. at 77 (applying *Lipsky* to strike allegations that "refer to or rely on" complaints).

[51] The settlement also contains descriptions of BNYM's standing instruction pricing – specifically, pricing at or near the limits of the interbank range of the day – which BNYM acknowledged in the settlement were accurate. *See* Ex. 33, ¶ 1(e). BNYM does not object to references to these descriptions.

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Respectfully submitted,

THE BANK OF NEW YORK MELLON CORPORATION

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