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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE ANIMATION WORKERS ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Master Docket No. 14-cv-4062-LHK

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS THE CONSOLIDATED AMENDED COMPLAINT

Date: March 26, 2015
Time: 1:30 p.m.
Courtroom: 8
Judge: Hon. Lucy H. Koh

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

OTHER AUTHORITIES

Nothing in plaintiffs' opposition ("Opp.") to defendants' motion to dismiss ("Mot.") overcomes the many deficiencies in the Consolidated Amended Complaint ("CAC").

First, plaintiffs' claims are untimely. Despite having access to voluminous and directly relevant discovery, plaintiffs fail to allege a single specific unlawful act occurring within the limitations period – *i.e.*, after September 8, 2010. Indeed, plaintiffs' allegations of purportedly conspiratorial communications almost entirely pre-date 2008. Faced with this deficiency, plaintiffs now urge this Court to change the law by applying a "discovery rule" to the accrual of their claims. But the Supreme Court long ago declared that antitrust claims accrue when a plaintiff is injured, not when a plaintiff discovers her injury. The Ninth Circuit has endorsed that principle on at least *six* occasions since. *See, e.g.*, *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1060 (9th Cir. 2012) ("We do not require a plaintiff to actually discover its antitrust claims before the statute of limitations begins to run."). Plaintiffs ignore this long line of binding authority, citing instead a single out-of-circuit decision and a lone district court decision from within this circuit. But neither of those decisions is reconcilable with the Supreme Court and Ninth Circuit precedent adopting the antitrust injury accrual rule, and neither overrules the effect of that precedent, which controls here. Indeed, neither decision even cited the Ninth Circuit opinions recognizing the injury accrual rule for antitrust claims.

Plaintiffs also assert that the statutes of limitation should be tolled because of defendants' purported fraudulent concealment of the alleged conspiracy. But to support that argument, plaintiffs merely repeat their conclusory allegations that defendants had executive-level meetings not attended by plaintiffs; exchanged telephone calls and emails supposedly in an effort to "minimize" documentation of the alleged conspiracy; and communicated pretextual compensation information to plaintiffs through mediums to which plaintiffs had no access, such that the information could not possibly have misled them. None of these vague and conclusory allegations satisfies plaintiffs' burden under Rule 9(b) to plead specific and plausible affirmative acts by defendants to conceal the alleged conspiracy. And none of these allegations identifies any conduct "above and beyond" the alleged conspiracy itself, a requirement the Ninth Circuit has reiterated repeatedly. Nor can plaintiffs overcome their other pleading defects, including their failure to allege any measure of diligence in investigating their supposed claims.

In addition, plaintiffs now claim that the CAC sufficiently alleges unlawful conduct within the limitations period based on a theory of a "continuing violation." But the CAC does not allege a single overt act occurring within the last four years. That defect is fatal. It is well-established that injuries alleged to occur within the limitations period caused by actions that pre-date the limitations period do not restart the statute of limitations. Thus, even if plaintiffs were to allege that conduct prior to September 2010 had the effect of suppressing compensation within the limitations period (which they fail to do with anything more than generic conclusions), that would not save their time-barred claims.

Second, plaintiffs purport to assert a *per se* claim challenging a supposed over-arching wage-fixing agreement among all the defendants. But they fail to allege facts evidencing any such agreement, relying instead on allegations concerning commonplace third-party wage surveys and industry meetings. Under well-settled law, plaintiffs' allegations of mere information exchanges are not nearly sufficient. Plaintiffs attempt to disguise the insufficiency of these allegations by conflating them with the alleged no cold-call conspiracy. But the law is equally clear that if plaintiffs intend to pursue a *per se* claim against defendants for agreeing to fix wages, they must plead specific evidentiary facts in support of *that* theory of liability. Accordingly, plaintiffs' claims as to a wage-fixing conspiracy are not only untimely but insufficiently pled, and should be dismissed or stricken.

Finally, recognizing the infirmity of their allegations that Blue Sky and Sony Pictures entered into the alleged overarching no-poach conspiracy, plaintiffs try to conflate it with the separate wage-fixing conspiracy. That effort fails because plaintiffs cannot try to rope Blue Sky and Sony Pictures into the alleged no-poaching conspiracy based on a separate wage-fixing conspiracy that, as explained, is wholly deficient.[1]

I. Plaintiffs Fail To Establish Any Doctrine That Would Render Their Claims Timely.

Plaintiffs have no credible response to defendants' showing that the claims they have asserted are untimely and must be dismissed in their entirety for that reason.

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[1] Defendants do not oppose plaintiffs' request that the Court take judicial notice of certain materials from *High-Tech* or of the content of a publication. Opp. at 37. Of course, in taking judicial notice, the Court should consider the full context and breadth of the *High-Tech* litigation, which highlights the implausibility and deficiency of plaintiffs' theory that challenged conduct continued after September 2010.

A. Application of the Discovery Rule to Plaintiffs' Claims Would Be Contrary to Well-Settled and Controlling Precedent.

It is black-letter law that, for private antitrust claims, "'a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business.'" *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188 (1997) (quoting *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 338 (1971)). This "injury accrual" rule is distinct from the "discovery rule," under which the limitations period for some non-antitrust claims begins to run when a plaintiff discovers her injury. *See* Mot. at 16-18. Plaintiffs labor to create the impression that the discovery rule applies to antitrust claims as well. But, the Supreme Court and the Ninth Circuit have repeatedly stated that the injury accrual rule, not the discovery rule, applies to antitrust claims. Plaintiffs offer no basis for this Court to ignore this settled authority.

1. The Supreme Court and the Ninth Circuit Have Held That Antitrust Claims Accrue When the Injury Occurs, Not When the Injury Is Discovered.

The Supreme Court has made clear that antitrust claims accrue at the time an unlawful act causing purported injury occurs. In *Zenith*, the Court explained that the injury accrual rule "is plain from the treble-damage statute itself." 401 U.S. at 338 (citing 15 U.S.C. § 15). The Court has since observed, on multiple occasions, that antitrust claims are subject to "a pure injury accrual rule" which "applies without modification … in traditional antitrust cases." *Klehr*, 521 U.S. at 188; *see also Rotella v. Wood*, 528 U.S. 549, 556-57 (2000) (recognizing that "the Clayton Act's injury-focused accrual rule [is] well established").[2]

Following the Supreme Court, the Ninth Circuit has steadfastly followed the injury accrual rule for antitrust claims. *See, e.g.*, *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987) ("A cause of action in antitrust accrues each time a plaintiff is injured by an act of the defendant and the statute of limitations runs from the commission of the act."); *AMF, Inc. v. Gen.*

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[2] In addition to the above-quoted language from the majority opinion in *Klehr* (joined by seven justices), Justice Scalia's concurring opinion confirmed that antitrust claims integrate a pure injury occurrence rule. *See Klehr*, 521 U.S. at 198 ("the appropriate accrual rule [for a civil RICO action] is the Clayton Act 'injury' rule—the 'cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business.'") (quoting *Zenith*, 401 U.S. at 338) (Scalia, J., concurring).

Motors Corp., 591 F.2d 68, 70 (9th Cir. 1979) ("A civil cause of action under the [antitrust laws] arises at each time the plaintiff's interest is invaded to his damage, and the statute of limitations begins to run at that time.") (citation and internal marks omitted).[3] The court most recently reaffirmed this principle in *Hexcel*, where it observed that "[w]e do not require a plaintiff to actually discover its antitrust claims before the statute of limitations begins to run." 681 F.3d at 1060 (citing *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 274-75 (9th Cir. 1988)).[4] Plaintiffs attempt to avoid this controlling language from *Hexcel* by claiming that defendants "cherry-pick[ed]" it and that the court's reference was to "actual versus constructive knowledge in the context of fraudulent concealment." Opp. at 6. But that is wrong. *Hexcel started* with the proposition that antitrust claims accrue upon injury (not discovery) and only then turned to the analytically distinct question of whether the facts there presented supported tolling of the limitations period pursuant to the fraudulent concealment doctrine. *See Hexcel*, 681 F.3d at 1060.

Plaintiffs next observe that the Supreme Court and the Ninth Circuit have wrestled with crafting the accrual rules for civil RICO cases. *See* Opp. at 6, 8-9. But the only possible relevance of those cases here is that, in weighing the appropriate accrual rule for civil RICO claims, the courts repeatedly *affirmed* that an injury accrual rule applies to Clayton Act claims. For example, in *Beneficial* – a decision that plaintiffs ignore – the Ninth Circuit drew an explicit contrast with antitrust claims in determining to apply the discovery rule to civil RICO claims:

> There is a question, however, whether this [discovery] rule *or the accrual rule applicable to antitrust suits* should now apply [to RICO claims]. In other actions governed by 15 U.S.C. § 15b, the plaintiff's knowledge is generally irrelevant to accrual, *which is determined according to the date on which injury occurs*.

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[3] Plaintiffs' contention that the Ninth Circuit has never rejected the discovery rule in the antitrust context ignores both the court's unequivocal adoption of the injury accrual rule and its statement that "[w]e do not require a plaintiff to actually discover its antitrust claims…." *Hexcel*, 681 F.3d at 1060.

[4] The leading antitrust treatise is in accord. *See* Phillip Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 320 (3d ed. 2007) ("The Clayton Act § 4 damage action ordinarily accrues on the occurrence of conduct violating the antitrust laws and injuring the plaintiff.").

851 F.2d at 274-75 (emphasis added). Similarly, in *Grimmett v. Brown*, 75 F.3d 506, 511-12 (9th Cir. 1996), the court rejected an "assumption that a plaintiff's cause of action should not accrue until she has discovered that all elements exist," citing the *Zenith* rule that the "Clayton Act statute of limitations period begins to run when plaintiff is injured." *Id.* (citing *Zenith*, 401 U.S. at 338).[5] Plaintiffs mention *Grimmett*'s holding regarding *RICO* cases, *see* Opp. at 8-9, but ignore what makes it relevant here: its affirmation of the injury accrual rule in antitrust cases.[6]

In sum, a mountain of binding authority from the Supreme Court and the Ninth Circuit forecloses any application of the discovery rule here.[7]

2. Plaintiffs Offer No Proper Basis for This Court To Ignore Settled Law Governing the Accrual of Antitrust Claims.

Plaintiffs ask the Court to ignore controlling authority from the Supreme Court and the Ninth Circuit on the basis of two cases: a recent district court decision, and a case from the Seventh Circuit. Plaintiffs turn first to a recent decision from this district that applied the discovery rule to

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[5] *See also LaSalvia v. United Dairymen of Arizona*, 804 F.2d 1113, 1118 (9th Cir. 1986) (observing that the continuing violation doctrine, discussed at pp. 14-16 *infra*, was a "limited exception to the usual rule that an antitrust claim accrues when the plaintiff incurs the injury").

[6] The injury accrual rule is not only compelled by controlling decisions, it produces sensible results. Under the rule, plaintiffs have four years from their injury to bring an action. If the requisite factual showing can be made, that time period may be tolled under an analytically distinct tolling doctrine, such as fraudulent concealment. The Ninth Circuit's approach in *Hexcel*, 681 F.3d at 1060, clearly lays out the separate and different purposes of the injury accrual doctrine, on the one hand, and fraudulent concealment, on the other, in antitrust cases. Contrary to plaintiffs' argument (*see* Opp. at 8-9), if the discovery rule applied to antitrust claims, there would be no purpose to the fraudulent concealment doctrine because by the time plaintiffs discovered their claim and it began accruing, any concealment of the challenged conduct necessarily would have ended.

[7] Plaintiffs cite three cases where, they claim, district courts have recognized the discovery rule "could" apply to antitrust claims. *See* Opp. at 5 n.13. But in *Adobe*, this Court made no such "recognition" – it had no occasion to address the issue in light of its other rulings and, for that reason, declined to do so. *See Free FreeHand Corp. v. Adobe Sys. Inc.*, 852 F. Supp. 2d 1171, 1190 (N.D. Cal. 2012). Plaintiffs' parenthetical describing *Irving v. Lennar Corp.* omits important language establishing that, while that court mistakenly refers to "accrual," it is actually discussing *tolling* doctrines, including fraudulent concealment. 2013 WL 4900402, at *11 (E.D. Cal. Sep. 11, 2013) ("A cause of action, however, does not necessarily 'accrue' when the defendant commits the act causing plaintiff's injury but may be tolled until the plaintiff discovers or should have discovered the injury. *For instance, acts of fraudulent concealment by the defendant toll the limitations period for so long as the concealment continues*.") (emphasis added). Finally, *Bulletin Displays, LLC v. Regency Outdoor Advertising, Inc.* makes the unremarkable observation that the Supreme Court has looked to the Clayton Act in interpreting the civil RICO statute. 518 F. Supp. 2d 1182, 1185 (C.D. Cal. 2007). But, as the court in *Regency* recognized, in antitrust cases, "the normal accrual rule start[s] the limitations period at the point the act first causes injury." *Id.* at 1187 (parentheses omitted).

antitrust claims. *See* Opp. at 5-7 (discussing *Fenerjian v. Nongshim Company, Ltd.*, -- F. Supp. 3d --, 2014 WL 5685562 (N.D. Cal. Nov. 4, 2014)). With respect, *Fenerjian* misapprehends the law and, in any event, cannot justify disregarding controlling Supreme Court and Ninth Circuit precedent.

Significantly, *Fenerjian* fails to address any of the three Supreme Court decisions (*Zenith*, *Klehr*, and *Rotella*) or six Ninth Circuit decisions (*AMF*, *Beneficial*, *Grimmett*, *Hexcel*, *LaSalvia*, and *Pace*) recognizing that the injury accrual rule applies in antitrust cases.[8] Instead, the court cited a decision involving the Fair Debt Practices Act that does not mention the specific accrual rule for antitrust cases that has been established by the Ninth Circuit. *Fenerjian*, 2014 WL 5685562, at *13 (citing *Mangum v. Action Collection Serv., Inc*., 575 F.3d 935, 940-41 (9th Cir. 2009)).

Fenerjian also misapprehends the discovery rule, twice referring to it as a tolling doctrine. *See id.* at *12 ("tolled"), *13 ("tolls"). But, as all parties agree, the discovery rule is an accrual doctrine, not a tolling doctrine. *See* Mot. at 16; Opp. at 6-7.

Perhaps because none of the key antitrust cases were cited to the court by the parties, *Fenerjian* relied on the generalized (and ultimately irrelevant) proposition that "the discovery rule applies broadly to federal litigation." *See Fenerjian*, 2014 WL 5685562, at *13. Plaintiffs make the same flawed point. *See* Opp. at 5. However, that the discovery rule may apply to federal claims arising under other statutory schemes does not vitiate the Supreme Court's and Ninth Circuit's contrary rulings with respect to antitrust actions. *See Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 n.10 (D.C. Cir. 1991) (observing that an "exception" to the use of the discovery rule in federal litigation "is in the area of antitrust, where the Supreme Court has held, as a matter of statutory interpretation, that a cause of action accrues at the time of injury") (Ruth Bader Ginsburg, J.). Indeed, the injury accrual rule is one of a number of distinctive rules that apply to antitrust claims, such as treble damages, attorneys' fees, joint and several liability, the tolling effect of government actions, and direct/indirect purchaser

[8] Plaintiffs in *Fenerjian* devoted only two paragraphs to the discovery rule in their opposition to defendants' motion to dismiss. Defendants, in reply, did not even contest whether the discovery rule applied. Rather, they argued that plaintiffs' claims were time-barred even under that rule. *See* Reply Ex. A (Plaintiffs' Opposition Brief, No. 13-4115 (N.D. Cal.), Dkt No. 93) at 18; Ex. B (Plaintiffs' Reply Brief, No. 13-4115 (N.D. Cal.), Dkt No. 94) at 16-17. Perhaps because they did not contest application of the discovery rule, defendants did not cite any of the Supreme Court and Ninth Circuit decisions adopting an injury accrual rule in antitrust cases. Nor did the district court's decision.

rules.[9] In short, while the discovery rule may apply in certain other contexts, the Supreme Court and Ninth Circuit have made clear that it does not apply in an antitrust case.

Moreover, even if the discovery rule were somehow relevant here – and it is not – plaintiffs and *Fenerjian* misstate the breadth of its use. The Supreme Court has repeatedly cast doubt on any presumption favoring the discovery rule in federal litigation. Indeed, in *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001), the Court observed that there was no "general presumption [that the discovery rule is] applicable across all contexts" and that it applies only to certain claims where "the cry for such a rule is loudest." *Id.* (citation and internal marks omitted). In *Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013), the Court further cabined the discovery rule, characterizing it as an "exception" to the standard accrual rule which should not be read into a statute in the absence of an affirmative "mandate from Congress." *See id.* at 1224; *cf. Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 646-47 (2010) (discovery rule applies to claims where Congress included "discovery" in governing limitations provision).[10]

As would be expected given the Supreme Court's definitive guidance on the subject, at least eight other circuits have unambiguously stated that the injury accrual rule applies to antitrust claims.[11] Plaintiffs attempt to avert the collective weight of this authority by focusing on a decision

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[9] As defendants observed in their opening brief, the Clayton Act's provision providing for a one-year statute of limitations for private claims based upon a government enforcement action, *see* 15 U.S.C. § 16(i), as here, also reflects Congressional intent that antitrust claims accrue upon injury. *See* Mot. at 17 n.17. Because an antitrust plaintiff's cause of action accrues upon injury, not discovery, such a claim could otherwise expire during the pendency of a government action, forcing the plaintiff to bring suit before the government had concluded its work. Congress accordingly enacted Section 16(i)'s savings provision "to ensure that private litigants would have the benefit of prior Government antitrust enforcement efforts." *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 333-34 (1978). But if the discovery rule applied to antitrust claims, Section 16(i) would be superfluous, as in most instances private plaintiffs would enjoy more than one year to bring suit after a government proceeding. As such, application of the discovery rule would also contravene Congress's intent that Section 16(i) be a "statute of repose." *Id.* at 334. Plaintiffs do not even mention, much less answer, this argument.

[10] This has led at least one court to observe that "*Gabelli* should be read as seriously undermining, if not rendering obsolete, earlier statements by the lower courts that the discovery rule operates as a default." *Kost v. Hunt*, 983 F. Supp. 2d 1121, 1127 (D. Minn. 2013). Indeed, the very case that both *Fenerjian* and plaintiffs cite in support of their invocation of the discovery rule itself recognized that the Supreme Court had expressed "skepticism about general application of the discovery rule." *Mangum*, 575 F.3d at 941.

[11] *See Johnson v. Nyack Hosp.*, 86 F.3d 8, 11 (2d Cir. 1996) ("An antitrust cause of action accrues as soon as there is injury to competition."); *Mathews v. Kidder, Peabody & Co., Inc.*, 260 F.3d 239, 246 n.8 (3d Cir. 2001) ("antitrust claims are subject to the less plaintiff-friendly 'injury occurrence' accrual rule" as opposed to "a more lenient 'injury discovery' rule"); *Detrick v. Panalpina, Inc.*, 108 F.3d 529,

(continued…)

from the Seventh Circuit, which is *alone* among the circuits in applying the discovery rule to antitrust claims. *See In re Copper Antitrust Litig.*, 436 F.3d 782, 788-89 (7th Cir. 2006). But even if *Copper* could somehow be reconciled with Supreme Court precedent, and it cannot, the opinion does not and cannot supplant the unambiguous Ninth Circuit authority that is binding on this Court. In addition, and with respect, *Copper* misapprehends Supreme Court precedent.[12] *Copper* acknowledged that an injury accrual rule "generally" applies to antitrust claims, but then reasoned that "in the absence of a contrary directive from Congress," injury accrual rules are "qualified by the discovery rule." *Id.* at 789. But this is *exactly* the presumption that the Supreme Court has disfavored, both before and since *Copper* was decided. *See Andrews*, 534 U.S. at 27 (questioning "premise that all federal statutes of limitations, regardless of context, incorporate a general discovery rule unless Congress has expressly legislated otherwise") (citation and internal marks omitted); *see also* pp. 6-7 *supra*. What is more, *Copper* ignores that the Supreme Court has concluded that Congress *did* issue a "directive" that antitrust claims would accrue upon injury. *See Zenith*, 401 U.S. at 338 (injury accrual rule "is plain from the treble-damage statute itself"); *Connors*, 935 F.2d at 342 n.10.

Finally, plaintiffs stretch too broadly in their assertion that the UCL categorically incorporates a discovery rule. *See* Opp. at 9-10. As defendants explained (*see* Mot. at 17 n.18), the California Supreme Court was more nuanced in *Aryeh v. Canon Business Solutions, Inc.*, 55 Cal. 4th

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538 (4th Cir. 1997) (agreeing that "under the antitrust accrual rule, the statute of limitations is triggered by the date of the injury alone"); *Bell v. Dow Chem. Co.*, 847 F.2d 1179, 1186 (5th Cir. 1988) ("The general rule in our Circuit is that an antitrust cause of action accrues each time a defendant commits an act that injures plaintiff."); *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 467 (6th Cir. 1996) ("For [antitrust] statute of limitations purposes, ... the focus is on the timing of the causes of injury, *i.e.*, the defendant's overt acts, as opposed to the effects of the overt acts.") (citation and internal marks omitted); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 153 (8th Cir. 1991) (observing that "accrual in antitrust actions depends on the commission of the defendant's injurious act rather than on the plaintiff's knowledge of that act or the resulting injury" and that, as a result, "the Clayton Act statute of limitations may lapse before the plaintiff becomes aware that he has a cause of action"), *disapproved on other grounds by Rotella*, 528 U.S. at 549; *Robert L. Kroenlein Trust ex rel. Alden v. Kirchhefer*, 764 F.3d 1268, 1276 (10th Cir. 2014) (recognizing that the Clayton Act "employs the injury-occurrence rule" and not the "injury-discovery" rule); *Connors*, 935 F.2d at 342 n.10.

[12] As with *Fenerjian*, the *Copper* court did not have the benefit of thorough briefing on this issue. It appears that both appellants and appellees in that case devoted a few sentences each to setting out the accrual rule that they believed applied to antitrust claims. *See* Brief for Appellees, 2004 WL 3686053, at Point I; Reply Brief for Appellants, 2004 WL 3686056, at *4 n.3.

1185, 1196 (2013), in noting that while the "last element accrual rule is the default" under the UCL, "it makes sense to acknowledge that a UCL claim in *some* circumstances *might* support the potential application" of the discovery rule. *Id.* (emphasis added). Because the UCL is a "chameleon" that countenances challenges to a variety of conduct, ranging from "countless [] common law and statutory" violations to unfair competition and price-fixing, the court reasoned that whether the discovery rule should apply in a given circumstance hinges on "'the nature of the right sued upon' and the circumstances attending its invocation." *Id.* (citation omitted). Here, "the nature of the right" plaintiffs are asserting under the UCL starts and ends with an antitrust violation. In this circumstance, it would be inappropriate for the discovery rule to apply to plaintiffs' state law claim when it does not apply to their federal law claim. *Aryeh* does not support such an inconsistency.[13]

B. Plaintiffs Fail To Allege Fraudulent Concealment.

It is plaintiffs' burden to plead fraudulent concealment and to do so with the specificity required by Rule 9(b). But plaintiffs fail to plead adequately *any* of the three elements of fraudulent concealment: defendants' affirmative conduct to conceal the alleged conspiracy, plaintiffs' diligence, and plaintiffs' lack of actual or constructive knowledge of their claims. *See* Mot. at 9-16.

1. The CAC's Scattershot Allegations About Meetings, Emails, and the Croner Survey Do Not Constitute Affirmative Acts of Concealment.

Plaintiffs identify three categories of allegations from the CAC that, they claim, evidence affirmative acts of concealment. *See* Opp. at 11. But none satisfies plaintiffs' burden to plead plausible and specific allegations of affirmative deception. *See Conmar Corp. v. Mitsui & Co., Inc.*, 858 F.2d 499, 505 (9th Cir. 1988) ("A plaintiff alleging fraudulent concealment must establish that its failure to

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[13] Plaintiffs also claim that this Court has "already properly interpreted *Aryeh*" to find that the discovery rule applies to UCL claims. *See* Opp. at 9-10 (citing *Plumlee v. Pfizer, Inc.*, 2014 WL 695024, at *8 (N.D. Cal. Feb. 21, 2014)). But in *Plumlee*, this Court merely observed that, pursuant to *Aryeh*, the discovery rule was "*available* to toll the statute of limitations" for a UCL claim – not that it categorically applied. *Id.* at *8 (emphasis added). Moreover, *Plumlee* concerned Pfizer's alleged misrepresentations about its Zoloft drug – exactly the type of fraud-based claim in which the discovery rule quintessentially applies. *See Gabelli*, 133 S. Ct. at 1221 (discovery rule "arose in [] fraud cases as an 'exception' to the standard rule, based on the recognition that 'something different was needed in the case of fraud'") (citation omitted). That is a far cry from the circumstances presented here, where plaintiffs' UCL claim is premised on alleged antitrust violations that do *not* incorporate a discovery rule.

have notice of its claim was the result of affirmative conduct by the defendant.").[14]

Allegations Regarding "Secret" Meetings. Plaintiffs point to conclusory allegations, scattered across the CAC, regarding supposed "secret meetings" and "secret gatherings." *See* Opp. at 12-14. But those allegations describe nothing above and beyond the purported conspiracy itself, which the Ninth Circuit repeatedly has held is insufficient to establish fraudulent concealment. *See Santa Maria*, 202 F.3d at 1177. Plaintiffs ignore the requirement that conduct not only be non-public, but that the defendants have committed some affirmative act that deceives the plaintiff beyond merely failing to publish the alleged conspiracy. *See Thorman v. American Seafoods Co.*, 421 F.3d 1090, 1095 (9th Cir. 2005) ("Merely keeping someone in the dark is not the same as affirmatively misleading him.").[15] Plaintiffs' allegation that high-level executives attended these meetings, and that plaintiffs were not invited, does not suggest that plaintiffs were affirmatively misled. If a plaintiff could establish affirmative acts of concealment merely by alleging that it was not invited to purportedly conspiratorial meetings, the Ninth Circuit's requirement of conduct above and beyond the conspiracy itself would be meaningless.

Plaintiffs cite various cases that, they claim, support the sufficiency of their allegations as to "secret" meetings. *See* Opp. at 14 n.45. But in those cases, the complaints alleged affirmative steps defendants took to hide the fact and purpose of the meetings, such as the use of codes, instructions to employees not to memorialize the meetings, and the use of unusual meeting places. Nothing of the sort is alleged in the CAC. In *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 738 F. Supp. 2d 1011,

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[14] As defendants established in their opening brief, plaintiffs must allege "active conduct by a defendant, above and beyond the wrongdoing upon which the plaintiff's claim is filed." *See Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1177 (9th Cir. 2000). Plaintiffs claim this "above and beyond" language is no longer good law because *Santa Maria* was "overruled," *see* Opp. at 11-12, but neglect to mention that the only portion of the decision overruled was the unrelated holding that tolling is unavailable "where a plaintiff discovers the existence of a claim before the end of a limitations period and the court believes that the plaintiff reasonably could have been expected to bring a claim within the remainder of the limitations period." *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1194 (9th Cir. 2001). That portion of the decision has nothing whatsoever to do with the "above and beyond" standard for fraudulent concealment, which the Ninth Circuit continues to quote and apply. *See, e.g., Coppinger-Martin v. Solis*, 627 F.3d 745, 751 (9th Cir. 2010).

[15] The CAC's allegations as to when and where these meetings occurred, and who attended them, also fall far short of the specificity required by Rule 9(b). *See Guerrero v. Gates*, 442 F.3d 697, 707 (9th Cir. 2006).

1024-25 (N.D. Cal. 2010), for example, plaintiffs alleged affirmative conduct by defendants to avoid detection. This included, *inter alia*, that defendants "var[ied] meeting locations" and agreed "to limit the number of representatives from each Defendant attending their meetings *so as to avoid detection*," "to refrain from listing the individual representatives of the Defendants in attendance at meeting in any meeting report," and "to refrain from taking meeting minutes or taking any kind of written notes during the meetings." *Id*. (emphasis added). *Lithium Ion* and *Rubber Chemicals* are inapposite for the same reasons. *See, e.g.*, *In re Lithium Ion Batteries Antitrust Litig.*, 2014 WL 309192, at *16 (N.D. Cal. Jan. 21, 2014) (defendants "allege[d] with particularity a variety of mechanisms" used to conceal meetings, including "instructing personnel to refrain from memorializing conversations" and "using code to refer to particular entities or topics"). And, although the court in *Rubber Chemicals* determined that the plaintiffs adequately alleged "secret meetings to set prices," that conclusion was substantiated by specific allegations regarding defendants' efforts to conceal or disguise the real purpose of various meetings.[16] Even a cursory comparison of those allegations to those in the CAC highlights the insufficiency of the latter.[17]

Allegations That Defendants Used the Telephone and Exchanged Emails. Plaintiffs next claim that defendants "worked to minimize" a written record of the conspiracy, pointing to

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[16] *See In re Rubber Chemicals Antitrust Litig.*, 504 F. Supp. 2d 777, 788 (N.D. Cal. 2007); Reply Ex. C (Amended Complaint, Case No. 04-cv-1648 (N.D. Cal.), Sept. 22, 2006, Dkt. No. 8) ¶ 80 (alleging "Defendants and their Co-conspirators took care to conceal their meetings and discussions to fix prices, even within their own companies. For example, an internal Flexsys memo titled 'Pricing Policy Flexsys October 1995' states: 'There is no reason to let it be known to Key Accounts that the proposed price levels/contracts will be uniform throughout the industry; so there is no competitive disadvantage to them.' Similarly, an email dated January 11, 2002 to plan a price-fixing meeting between Crompton/Uniroyal's James O'Hearn and Flexsys' Reinhart stated: 'given the nature of our intended discussion, I wonder whether we shouldn't have a more 'secluded' location, either in a Hotel or at a hired meeting room ....'").

[17] The court in *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1132 (N.D. Cal. 2008), did not say – as plaintiffs suggest – that mere allegations of "secret discussions" sufficed for fraudulent concealment. *See* Opp. at 14 n.45. To the contrary, the *TFT-LCD* court explained that the complaints at issue included allegations of "an agreement not to discuss publicly the nature of their price-fixing agreement, and numerous pretextual and false justifications disseminated to consumers regarding defendants' price increases," 586 F. Supp. 2d at 1132, "such as undercapitalization leading to insufficient capacity, undersupply due to demand for larger panels, shortages due to late expansion of production lines, and rapid demand growth." *Id.* at 1119. Here, by contrast, while the CAC asserts that defendants provided pretextual explanations for hiring, recruiting or compensation decisions, they do not mention a single instance of such a pretextual explanation. *See* CAC ¶ 130.

allegations that defendants talked on the telephone and exchanged "emails among themselves." Opp. at 14-15. But using these common means of communication is hardly the stuff of concealment, and the notion that emails provide no "written" trace is nonsensical. As plaintiffs would have it, fraudulent concealment exists for every conspiracy unless the conspirators communicate by mailing letters back and forth. But that, of course, cannot be. Despite having access to voluminous discovery, plaintiffs cannot allege a single specific instance where defendants agreed to destroy communications, to speak on the telephone *in lieu of* written correspondence, or otherwise affirmatively "worked to minimize" documentation of the alleged conspiracy. The CAC thus stands in stark contrast to plaintiffs' cases, in which the complaints alleged specific affirmative conduct designed to conceal. *See, e.g.*, *Lithium Ion*, 2014 WL 309192, at *16 (defendants allegedly "instruct[ed] the recipient of documents or emails to destroy, delete, or discard them after reading," "instruct[ed] personnel to refrain from memorializing conversations," and "us[ed] code" in written communications, such as an "email referring to 'D Company' for Samsung"); *Cathode Ray*, 738 F. Supp. 2d at 1025 (defendants allegedly "refrain[ed] from taking meeting minutes or taking any kind of written notes during the meetings" and agreed "to eliminate references in expense reports that might reveal the existence of their unlawful meetings").

Plaintiffs' assertion that requests in the *High-Tech* litigation to seal documents constitute fraudulent concealment, s*ee* Opp. at 15, is equally unavailing. First, this theory of affirmative conduct is not even pled in the CAC. *See Barnes v. Campbell Soup Co.*, 2013 WL 5530017, at *2 (N.D. Cal. July 25, 2013) ("Plaintiffs cannot unilaterally use their Opposition as an opportunity to amend and raise new arguments to cure deficiencies in their Complaint."). Second, nothing suggests that Pixar and Lucasfilm (the only defendants in this case that were also in *High-Tech*) did anything other than comply with the Protective Order, which of course does not constitute fraud. As this Court stated, "I have really appreciated – I felt that, of all the defendants, Lucasfilm and Pixar have been the best at narrowly tailoring their sealing requests." Reply Ex. D (*High-Tech*, Hrg. Tr., Oct. 30, 2013, Dkt. No. 539) at 12.

Allegations Regarding Croner Data. Finally, plaintiffs assert that defendants used the Croner Survey to conceal anticompetitive conduct from plaintiffs. *See* Opp. at 16-17. For the reasons discussed above (at pp. 10-11), plaintiffs' allegations that defendants attended "secret" meetings coincident with Croner meetings do not demonstrate acts of concealment above and beyond the alleged

conspiracy. In addition, plaintiffs concede they had no access to the contents of the Croner survey.[18] As such, they could not have been misled by it. In the cases plaintiffs cite, defendants were alleged to have disseminated misleading information *to the plaintiffs*. *See, e.g.*, *Lithium Ion*, 2014 WL 309192, at *16 ("The complaints allege public, putatively false statements by various defendants affirming their compliance with applicable antitrust laws … as well as the existence of vigorous price competition in the lithium ion battery market."); *Cathode Ray*, 738 F. Supp. 2d at 1025 (defendants alleged to have agreed "on what to tell customers about price changes" and "upon the content of public statements regarding capacity and supply"); *Rubber Chemicals*, 504 F. Supp. 2d at 787.[19]

2. Plaintiffs' Additional Arguments in Support of Fraudulent Concealment Are Equally Unavailing.

Plaintiffs' failure to allege plausible acts of affirmative concealment with the specificity required by Rule 9(b) is dispositive. *See American Seafoods*, 421 F.3d at 1096 (where plaintiff failed to allege affirmative acts and thus could not "establish[] fraudulent concealment as a matter of law," it was unnecessary to consider other elements). But, plaintiffs also fail to plead the other two elements of the doctrine: that they exercised due diligence in attempting to discover the facts, and that they had neither actual nor constructive knowledge of the facts giving rise to their claims before the limitations period.

First, plaintiffs' due diligence is an independent element of fraudulent concealment. *Hexcel*, 681 F.3d at 1060. Courts consider a plaintiff's diligence when deciding whether to invoke an equitable doctrine such as fraudulent concealment. *See Pace v. DiGuglielmo*, 544 U.S. 408, 419 (2005)

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[18] Nor have defendants ever claimed that the survey contents were available to plaintiffs, although plaintiffs imply otherwise. Defendants merely observed that the fact of the survey, and certain information about it, was available. *See* Mot. at 12 n.11 (observing that "details of the Croner survey, including the participating companies," are available on the Croner website).

[19] *Rubber Chemicals* also illustrates the specificity required to sustain allegations of this type, and which the CAC lacks. *See* Reply Ex. C ¶ 80 (alleging that "Defendants and their Co-conspirators also concealed their anticompetitive scheme by providing false and pretextual reasons for pricing of Rubber Chemicals during the conspiracy period and by describing such pricing as being a result of competitive factors rather than collusion. For example, in announcing the July 1, 2001 worldwide price increase, Crompton/Uniroyal attributed the increase to '[t]he cost of energy' and the increased prices on 'raw materials.' Crompton/Uniroyal further stated: 'These changes are all related to cost increases in oil, natural gas and electricity and are not expected to be short-lived. We have absorbed these increases in the past but cannot continue to do so and remain a viable supplier to you and the industry in the long-term.'").

("Under long-established principles, [a] lack of diligence precludes equity's operation"). In this case, plaintiffs have failed to allege that they took any steps to investigate the existence of a claim once they had notice one might exist. Indeed, plaintiffs cannot dispute (a) that they waited nearly four years after gaining constructive knowledge of the Pixar-Lucasfilm agreement through the government's challenge and ensuing consent decree; (b) that the CAC is silent as to what they were doing after allegedly knowing of their claims; and (c) that it was not until plaintiffs' counsel began soliciting potential plaintiffs after this Court rejected a proposed settlement in *High-Tech* that any employee came forward. *See* Mot. at 14-15. Plaintiffs claim that these undisputed facts are irrelevant because they were not on notice of their claims, but plaintiffs have made none of the requisite allegations of any diligence upon learning of a potential claim.

Second, although plaintiffs argue that articles from 2009 and early 2010 did not put them on notice of their claims, those articles evidence a broadly publicized DOJ investigation into compensation practices at some of the region's most prominent employers of highly skilled technical employees. *See* Mot. at 15-16. The overlap between the conduct described in those articles and the alleged conduct challenged here make it obvious that plaintiffs had sufficient notice to begin investigating their potential claims. Instead, there was no complaint until this Court rejected a substantial settlement in the *High-Tech* case.

C. Plaintiffs Have No Answer to the CAC's Conspicuous Lack of Allegations Concerning Unlawful Conduct Within the Limitations Period.

As defendants observed in their brief, plaintiffs' naked assertion that the alleged conspiracy was a "continuing violation" which continued after the DOJ proceedings and into the limitations period lacks any factual support whatsoever and is implausible in light of events well known to this Court. *See* Mot. at 5-9. In response, plaintiffs first mischaracterize defendants' argument, and then offer up a new theory of a continuing violation that is both baseless and absent from the CAC.

1. Plaintiffs Cannot Disguise Infirmities in the CAC By Claiming That Defendants Bear a Burden To Refute Their Allegations.

Plaintiffs claim that defendants are advancing the "dubious notion that this Court must conclude, on the pleadings and as a matter of law, that their conspiracy ended in 2009 or 2010." Opp. at 22. But defendants are not asking the Court to make findings "as a matter of law" about the end date of

any conspiracy. Rather, defendants' point is that this Court should evaluate the plausibility of plaintiffs' threadbare allegation of a continuing conspiracy in light of the undisputed and judicially noticeable fact of the DOJ investigation and lawsuits, and subsequent *High-Tech* litigation. *See* Mot. at 7-8; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007). Those events provide a crucial lens of "judicial experience" through which the "common sense" plausibility of a continuing violation theory should be viewed. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Here, plaintiffs have only conclusory allegations of misconduct within the limitations period, and all of the communications they allege occurred well before September 2010 (indeed, most occurred before 2008).

Relatedly, plaintiffs also argue that defendants offer insufficient proof that the alleged conspiracy ended in 2009 or 2010. *See* Opp. at 22. But this is not a motion for summary judgment on an affirmative defense. *Plaintiffs* bear the burden to plead sufficient facts in the CAC to state a plausible claim that the conspiracy continued into the limitations period. *See Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008) ("To survive a motion to dismiss for failure to state a claim, the plaintiff must allege 'enough facts to state a claim to relief that is plausible on its face.'") (citing *Twombly*, 550 U.S. at 570). The CAC lacks a *single specific allegation* evidencing unlawful conduct after the DOJ investigation started, much less after September 2010.

2. Plaintiffs' New Theory of a Continuing Violation Is Both Legally Untenable and Inadequately Pled.

Plaintiffs' opposition also contains an entirely new theory of a continuing violation. Citing their allegation that plaintiff Nitsch worked for DreamWorks through 2011 (*see* CAC ¶ 18) and a boilerplate allegation that defendants "repeatedly invaded" plaintiffs' interests (*id.* ¶ 123), plaintiffs now claim that agreements defendants allegedly reached prior to September 8, 2010 (the beginning of the limitations period) "continued to govern Plaintiffs' employment" after September 8, 2010, and that plaintiffs, accordingly, were injured each time they were paid, including during the limitations period. Opp. at 20-21. Plaintiffs' argument suffers from numerous defects.

First, it is not pled in the CAC, which contains no allegations regarding how any plaintiff's compensation during the limitations period was affected by conduct from before the limitations period. This is entirely consistent with the fact that Dr. Leamer used compensation data from 2010 as part of his competitive benchmark in the *High-Tech* case. *See* Mot. at 8 & n.6.

Second, as plaintiffs concede, the continuing violation doctrine requires an "overt act" sufficient to restart the statute of limitations, which must at least "be a new and independent act that is not merely a reaffirmation of a previous act." *Pace Indus.*, 813 F.2d at 238; *see also AMF*, 591 F.2d at 72 ("inertial consequences of some pre-limitations action" are not actionable). Absent allegations that defendants continued to conspire during the limitations period, it is not enough to allege that defendants' non-conspiratorial compensation levels within the limitations period somehow (plaintiffs do not say how) reflected the lingering effects of an earlier conspiracy. *See Aurora Enters., Inc. v. Nat'l Broad. Co., Inc.*, 688 F.2d 689, 694 (9th Cir. 1982); *Rambus Inc. v. Micron Tech., Inc.*, 2007 WL 1792310, at *1 (N.D. Cal. June 19, 2007) ("If an initial act or decision occurs outside the limitations period, separate violations ... not controlled by the previous act or decision restart the statute of limitations, but mere continuing injury does not.") (citation and internal marks omitted).[20] As *Aurora* recognized, "[a]ny other holding would destroy the function of the statute [of limitations], since parties may continue indefinitely to receive some benefit as a result of an illegal act performed in the distant past." 688 F.2d at 694. Courts have declined to find a continuing violation in cases where the plaintiff was injured pursuant only to an agreement that predated the limitations period. *See, e.g., id.* (continued receipts by the defendant from unlawful pre-limitations contract were not an overt act capable of restarting the statute of limitations).

The CAC is bereft of allegations that defendants met or otherwise communicated *during* the limitations period to perpetuate the alleged conspiracy.[21] This failure to allege new overt acts within the limitations period dooms plaintiffs' unpled theory of a continuing violation. *See Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981) ("A continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation.").

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[20] *See also Varner v. Peterson Farms*, 371 F.3d 1011, 1020 (8th Cir. 2004) ("[p]erformance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period").

[21] Plaintiffs cite several cases that are distinguishable on this basis, as they involved defendants' continued efforts, into the class period, to enforce unlawful agreements. *See, e.g., Samsung Elecs. Co., Ltd. v. Panasonic Corp.*, 747 F.3d 1199, 1204 (9th Cir. 2014) (observing that the "typical antitrust continuing violation occurs ... when conspirators continue to meet to fine-tune their cartel agreement," and "[t]hat is what is alleged here") (citation omitted); *Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1300–01 (9th Cir. 1986) (defendants coordinated to steer tourists away from plaintiff's souvenir shop).

II. Plaintiffs Fail To Plead Adequately a *Per Se* Antitrust Claim Based on an Alleged Wage-Fixing Agreement.

In addition to their assertion of an alleged scheme "not to actively recruit employees from each other," *see, e.g.*, CAC ¶ 2, allegations largely (and belatedly) recycled from the *High-Tech* litigation, plaintiffs separately assert an alleged agreement to fix wages and compensation ranges. *See id.* ¶¶ 74-91. However, those allegations are legally insufficient to support a *per se* antitrust claim. *See* Mot. at 18-22. Nothing in plaintiffs' opposition demonstrates otherwise.

A. Plaintiffs Allege No Evidentiary Facts To Support a *Per Se* Wage-Fixing Claim.

Plaintiffs have chosen to assert a *per se* wage-fixing claim, *see, e.g.*, CAC ¶¶ 136, 141; Opp. at 29, and do not dispute that they have failed to state a claim under the rule of reason. *See* Mot. at 22 n.24. But to proceed with a *per se* theory, plaintiffs must allege evidentiary facts supporting the existence of an actual wage-fixing agreement as opposed to mere exchanges of information. While plaintiffs' opposition repeatedly asserts that they have done so, the CAC is devoid of factual allegations evidencing the existence of such an agreement.

Plaintiffs assert that they are required to put forth only "a short and plain statement of a claim for relief," Opp. at 23, but it has long been established that an antitrust conspiracy claim requires *evidentiary facts* to support a plausible violation *under the legal theory asserted*. *See* Mot. at 22. While plaintiffs repeatedly claim that there is "evidence" of an alleged wage-fixing agreement, *see, e.g.*, Opp. at 27, 29-30, plaintiffs allege nothing more than the sharing of information which, under well-settled principles, does "not constitute a *per se* violation of the Sherman Act." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 443 n.16 (1978); *see also In re Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 447 n.13 (9th Cir. 1990). Plaintiffs' allegations of mere exchanges of wage information, at most, could support only a rule of reason claim. *See Todd v. Exxon*, 275 F.3d 191, 198-99 (2d Cir. 2001).[22]

[22] In *High-Tech*, the Court concluded that it was unnecessary to determine at the pleading stage whether the claims in that case involved a *per se* as opposed to a rule of reason offense. *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1115 n.9 (N.D. Cal. 2012). However, the legal situation there was decisively different. Proof that defendants in *High-Tech* agreed not to solicit each other's employees arguably could have been sufficient to establish an antitrust violation under either a *per se* or a rule of reason theory. Here, by contrast, proof that defendants exchanged wage or benefit information at most could support a rule of reason claim, which plaintiffs do not allege. *Todd*, 275 F.3d at 198-99.

The CAC's failure to allege how the alleged wage-fixing conspiracy worked, which defendants allegedly participated in it, and what wages were fixed renders implausible plaintiffs' effort to convert allegations regarding a routine and unremarkable wage survey and isolated exchanges of information regarding individual companies' practices or intentions into a *per se* illegal agreement to fix wages. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008). Thus, for example, plaintiffs do not claim that participating in wage surveys is inherently anticompetitive. *See* Opp. at 29. Instead, they argue that defendants' communications show more than a "mere exchange of information." *Id.* at 27. However, they fail to point to any email or other evidence (including from the *High-Tech* record) that purports to show anything more than that, and certainly not any agreement to fix wages. Plaintiffs similarly concede that there is nothing nefarious about competitors attending the same industry meetings. *Id.* at 29. While they claim that such meetings provided an *opportunity* to conspire, such an opportunity is an insufficient basis for alleging a *per se* price-fixing conspiracy. *See In re Citric Acid Litig.*, 191 F.3d 1090, 1103 (9th Cir. 1999).

The cases plaintiffs cite involve far more detailed allegations of coordinated conduct based on information exchanges. In *Todd v. Exxon*, for example, the alleged exchange of information was vastly more extensive and specific than anything alleged here. *See* 275 F.3d at 195-97, 211-213. It also, critically, was accompanied by "assurances that the participants would primarily use the exchanged data in setting their … salaries." *Id.* at 213. It was this alleged "assurance" that potentially converted the conduct from mere information exchanges to a possible agreement to fix compensation. The amended complaint in *In re Graphics Processing Units Antitrust Litigation*, 540 F. Supp. 2d 1085, 1094-95 (N.D. Cal. 2007), included not only allegations that the defendants attended many of the same meetings, but also assertions of unprecedented changes in lockstep pricing behavior after the alleged conspiracy had formed. *In re Flash Memory Antitrust Litigation* included allegations of price coordination by defendants and internal emails instructing recipients to "urge [their competitors] that they *must not retreat from the last quoted price*." 643 F. Supp. 2d 1133, 1143-44 (N.D. Cal. 2009) (emphasis in original). Plaintiffs make no such allegations here, and could not do so in good faith.

Finally, plaintiffs' strained attempt to avoid dismissal by conflating their two separate theories of illegality (no-poaching and wage-fixing) is unavailing. "When determining whether there is

a single conspiracy or multiple conspiracies, the 'question is what is the nature of the agreement.'" *Bauldry v. County of Contra Costa*, 2013 WL 1747906, at *5 (N.D. Cal. Apr. 23, 2013) (quoting *United States v. Varelli*, 407 F.2d 735, 742 (7th Cir. 1969)). "Various people knowingly joining together in furtherance of a common design or purpose constitute a single conspiracy." *Id.* Here, plaintiffs allege, in two distinct sections of the CAC, two very different types of conduct with different participants.[23] Plaintiffs should not be permitted to assert a single Sherman Act claim based on a conflation of these two distinct alleged conspiracies without having met the *Twombly* standard for each.

Plaintiffs cite *United States v. Moussaoui*, 382 F.3d 453, 473 (4th Cir. 2004), and *United States v. Sharpe*, 193 F.3d 852, 867 (5th Cir. 1999), to support their argument that the scope of a conspiracy is a jury question, but nothing in these pre-*Twombly* cases relieves plaintiffs of the requirement that they first satisfy *Twombly*. Nor do any cases cited by plaintiffs suggest that a plaintiff can satisfy the *Twombly* requirements by lumping an obviously deficient set of conspiracy allegations together with allegations of a different conspiracy and pursuing them under a single "claim." Each alleged conspiracy must independently meet *Twombly*. *See, e.g.*, *Steshenko v. Gayrard*, 2014 WL 4904424, at *12 (N.D. Cal. Sept. 29, 2014) (dismissing plaintiff's single civil conspiracy claim that was "[i]n effect, . . . three separate conspiracies," after testing whether plaintiff had alleged sufficient specific facts as to each individual conspiracy).

The sufficiency of plaintiffs' wage-fixing allegations must be judged based on the facts relating to those purported agreements. Alleged facts relating to purported no-poach agreements among some (but not all) defendants prior to 2009 do nothing to help lift the wage-fixing allegations over the *Twombly* hurdle. Thus, if the Court does not grant the motion to dismiss the CAC in its entirety, as defendants respectfully submit it should, the Court should nonetheless dismiss plaintiffs' *per se* wage-fixing claim because it is deficient as a matter of law.[24]

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[23] There is no allegation, for example, that the *High-Tech* defendants that allegedly participated in the no-poaching conspiracy (*e.g.*, Google and Apple) also participated in the alleged wage-fixing conspiracy among animation studios. Nor is there any allegation that all of the participants in the Croner survey participated in the alleged no-poach conspiracy.

[24] Plaintiffs repeatedly attempt to invoke *Continental Ore Co. v. Union Carbide & Carbon Corp.* as supposed support for their overarching conspiracy allegations. But that case does not somehow justify a plaintiff's effort to assert the existence of a price-fixing (or wage-fixing) agreement, without alleging the

(continued…)

B. Plaintiffs' Claims of Injury Are Unsupported by the Required Factual Allegations.

Plaintiffs also fail to allege plausible facts to show they were injured by the purported wage-fixing agreement. Plaintiffs suggest that they "extensively alleged how the conspiracy impacted compensation," Opp. at 30, but the cited paragraphs merely repeat in a formulaic fashion that wages were suppressed. *See, e.g.*, CAC ¶ 97. "A 'naked assertion' of antitrust injury . . . is not enough; an antitrust claimant must put forth factual 'allegations plausibly suggesting (not merely consistent with)' antitrust injury." *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 451 (6th Cir. 2007) (citing *Twombly*, 550 U.S. at 557). Allegations of injury must be based on evidentiary facts and be plausible. *See id.* Having alleged nothing about the terms of any wage-fixing agreement (aside from allegations of mere occasional exchanges of information), plaintiffs have no basis to allege, and they do not allege, how even one defendant paid wages that were below competitive levels for even one job title, much less all job titles. Their broad assertion that the alleged "injuries . . . impacted all visual effects and animation workers," CAC ¶ 104, contains none of the required factual specificity.[25]

III. Plaintiffs Do Not Adequately Plead Claims Against Blue Sky or Sony Pictures.

Even if the Court were to conclude that the CAC should not be dismissed in its entirety, *each* defendant unquestionably is entitled to separate consideration on a motion to dismiss under *Twombly*. Mot. at 23. Tested by that standard, neither Blue Sky nor Sony Pictures belongs in this lawsuit.

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elements of such an agreement, by referencing some vaguely defined "conspiracy to restrain competition." Rather, *Continental Ore* held only that where a plaintiff is required to demonstrate that a defendant's acts caused harm to the plaintiff's business, a jury verdict cannot be overturned by examining the effect of each act independently on the plaintiff's business in order to conclude that each act, on its own, was insufficient to have harmed the plaintiff; rather a verdict must be upheld if, taken as a whole, the acts found to have been committed by the defendant caused such harm. 370 U.S. 690, 699 (1962).

[25] Plaintiffs argue that defendants' alternate request to strike paragraphs 74-91 of the CAC – in the event the Court does not grant the motion to dismiss the CAC in its entirety – has no proper legal basis. Opp. at 28. However, a court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). The wage-fixing conspiracy alleged in paragraphs 74-91 of the CAC lacks any relationship to plaintiffs' alleged non-solicitation conspiracy and is not supported by any independent facts. In an effort "to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial," *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983), the paragraphs should be either stricken under Rule 12(f) or dismissed under Rule 12(b)(6).

A. Blue Sky

Plaintiffs do not dispute that they fail to provide even the most basic facts of Blue Sky's supposed joining of any non-solicitation conspiracy, and the few examples of purportedly conspiratorial conduct they identify do not evince anything other than unilateral conduct. Instead, they point to allegations of a non-solicitation conspiracy purportedly involving defendants *other* than Blue Sky, and seek to rope Blue Sky into costly and protracted discovery by making stray allegations regarding Blue Sky that are not connected to the broad, multi-party conspiracy they allege. Whether considered individually, collectively, or in conjunction with the non-Blue Sky allegations in the CAC,[26] the allegations regarding Blue Sky do not meet *Twombly*'s standard.

Blue Sky's Desire To Avoid a Wage-War. Unilateral decisions to avoid starting price- or wage-wars with one's competitors are not actionable under Section 1 of the Sherman Act. *See, e.g.*, *Citric Acid*, 191 F.3d at 1101. Yet one of the only two examples of conduct provided in the section of the CAC that purportedly demonstrates that "Blue Sky Studios Joins the Conspiracy," CAC ¶ 63, is a document that reflects nothing more than such a unilateral determination. Mot. at 25. Plaintiffs' claim that Blue Sky is merely inviting the Court "to resolve competing inferences," Opp. at 32-33, is premised on its assertion that "[o]n its face, this document evidences a clear intent to honor the terms of the Defendants' agreement not to solicit each other's employees," *id.* at 33. The document does no such thing. It neither states nor implies the existence of, or Blue Sky's involvement in, any supposed agreement whatsoever; rather, it just says Blue Sky did not "want to be starting anything with" Pixar. Pitt Decl. Ex. 1. Statements that are as consistent with unilateral conduct as with conspiracy are the classic example of allegations that fail under *Twombly*. 550 U.S. at 557.

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[26] Plaintiffs' error in claiming that Blue Sky engaged in disaggregation by examining the sufficiency of their allegations is best exemplified by their citation to *Continental Ore*. As discussed above, *see* n.24 *supra*, *Continental Ore* does not support plaintiffs' arguments. Nowhere does that case – which predates *Twombly* – suggest that a plaintiff can properly allege a particular defendant's participation in a conspiracy by alleging *other* defendants' participation in the alleged conspiracy and then pointing to a handful of documents that evince unilateral conduct regarding the defendant in question and claiming the two sets of allegations can be read together to impute involvement in the alleged conspiracy.

Blue Sky's Concerns over Employee Retention. Plaintiffs' selective quotation of an internal Pixar conversation regarding Blue Sky's purported concern about "employee retention," CAC ¶ 64; Opp. at 33, does not demonstrate that Blue Sky somehow participated in a non-solicitation conspiracy. That document, which at most demonstrates a desire on Pixar's part to tell Blue Sky it would pursue an employee engaged in the making of *Ice Age 2*, but not actually hire him away until that project was completed, Mot. at 26, certainly does not suggest Blue Sky participated in the broad anti-solicitation conspiracy plaintiffs purport to have alleged.

Allegations Regarding the Exchange of Salary Information. Plaintiffs also point to a smattering of allegations regarding Blue Sky's participation in the Croner survey and its alleged exchange of salary information, which neither pertain to the supposed non-solicitation conspiracy they allege nor state the *per se* wage-fixing claim plaintiffs purport to assert. Opp. at 32. But plaintiffs cannot bolster their conclusory allegations regarding Blue Sky's alleged participation in a supposed non-solicitation conspiracy by citing documents evincing, at most, an exchange of wage information. *See* pp. 18-19 *supra* (plaintiffs cannot survive motion to dismiss by conflating two separate theories of illegality). Allegations that defendants exchanged information or participated in salary surveys do not state a *per se* claim for wage-fixing. *See* pp. 17-18 *supra*.

The McAdams Email. Plaintiffs' case against Blue Sky rests primarily on a single statement, made in error in an email, by an employee of a different company, to the effect that she believed Blue Sky was a participant in a "gentleman's agreement." CAC ¶¶ 5, 50; Opp. at 32. As discussed in defendants' opening brief, even if Ms. McAdams had not misspoken in her email,[27] that document would show, at most, her understanding, not Blue Sky's – an understanding that is unsupported by any other document or well-pled allegation. Mot. at 26. Plaintiffs denigrate Blue Sky's argument as "confusing[]," Opp. at 32 n.110, only because they misunderstand it. What Blue Sky actually said was that McAdams' purported *understanding* – as reflected in a statement she

[27] Plaintiffs claim McAdams in her deposition was merely "trying to explain away her inculpatory statements." Opp. at 33. In fact, she confirmed the existence of a "gentleman's agreement" with other entities not to engage in certain forms of cold-call solicitation, but stated that she simply erred in writing that Blue Sky was a participant in it. Mot. at 26 n.28 & Pitt Decl. Ex. 4.

acknowledged was simple error – is unsupported by any document or well-pled allegation. Plaintiffs identify no such document or allegation. That failure is particularly noteworthy given McAdams's sworn testimony.

B. Sony Pictures

Sony Pictures has demonstrated that there are no factual allegations credibly suggesting that it at any time conspired not to solicit its competitors' employees. Mot. at 27-33. The allegations that attempt to link Sony Pictures to a broad non-solicitation conspiracy are limited to a single paragraph referencing a meeting between Ed Catmull and two Sony Pictures executives that purportedly led to a bilateral "gentleman's agreement" between Sony Pictures and Pixar not to solicit each other's employees. CAC ¶ 61; Opp. at 34. Not only do these allegations, on their face, fail to suggest that Sony Pictures agreed to join in the broad multi-party non-solicitation conspiracy alleged in the CAC, but Mr. Catmull, himself, has acknowledged – both in subsequent emails and in his testimony in the *High-Tech* litigation – that Sony Pictures never altered the aggressive recruiting tactics affirmatively described by plaintiffs, themselves, in the CAC. Mot. at 28-30. Mr. Catmull's emails and testimony are supported by many other facts referenced in Sony Pictures' section of defendants' brief. Mot. at 27-33.

Plaintiffs' scant one-page response all but concedes that they have no answer to Sony Pictures' argument or the evidence (and *absence* of evidence) on which it is based. *See* Opp. at 33-34. Instead, plaintiffs try to avoid their failure by claiming that the facts Sony Pictures presents are inadmissible on a motion to dismiss or, failing that, by directing the Court to allegations from the separate wage-fixing section of their complaint. However, neither tactic is sufficient to defeat Sony Pictures' motion to dismiss.

As an initial matter, plaintiffs cannot avoid dismissal by urging the Court to exclude the evidence that they, themselves, put into play on the ground that it is "outside the Complaint" and, thus, not subject to "judicial notice." Opp. at 34. *Plaintiffs* – not Sony Pictures – introduced the Catmull and Lucas depositions by relying on portions of those transcripts in the CAC. *See* CAC ¶ 4 ("Catmull testified . . . ."), ¶ 7 ("As Catmull later explained under oath . . . . [A]s George Lucas stated . . . ."), ¶ 101 ("George Lucas explained under oath . . . ."), ¶ 102 ("During his deposition several years later, Catmull made clear . . . ."). Having included these witnesses' testimony in the CAC and asked the Court

to accept it as true, plaintiffs cannot now ask the Court to reverse course and disregard other portions of that same testimony simply because they don't like what the witnesses said. To the contrary, when a plaintiff references a document in a complaint and relies upon it for his or her claim, the entire document is deemed to have been incorporated by reference and the Court may "assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). In fact, the incorporation by reference doctrine exists, at least in part, for the precise purpose of "prevent[ing] plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting documents upon which their claims are based." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (internal quotation marks and alterations omitted).[28]

Having all but abandoned even a pretense of claiming that Sony Pictures conspired not to solicit other studios' employees, plaintiffs try to rescue their claim against it by asserting that the absence of such evidence is irrelevant since the supposed non-solicitation agreement was simply part of some broader, over-arching conspiracy involving not merely non-solicitation, but wage-setting. That argument fails as well for two separate reasons:

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[28] Indeed, plaintiffs' own authority acknowledges that courts may consider "materials incorporated into the complaint by reference" in addition to documents that are subject to judicial notice. *Figy v. Frito-Lay N. America, Inc.*, 2014 WL 3953755, at *2 (N.D. Cal. Aug. 12, 2014) (quoting *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008)).

Plaintiffs do not cite a single case rejecting consideration of deposition testimony at the pleading stage when the plaintiff itself relies on the deposition in its complaint. They also offer no response to the cases cited by Sony Pictures in which courts considered deposition transcripts in connection with motions to dismiss when the plaintiffs cited those transcripts in the complaint. *See Teamsters Local 617 Pension & Welfare Funds v. Apollo Grp., Inc.*, 633 F. Supp. 2d 763, 775-76 (D. Ariz. 2009); *Glenbrook Capital Ltd. P'ship v. Kuo*, 2008 WL 929429, at *6 (N.D. Cal. Apr. 3, 2008). In both cases, the court considered, under the incorporation by reference doctrine, excerpts from deposition transcripts that went beyond the portions cited in the complaints.

Plaintiffs also do not dispute that Exhibit F to the Goldstein Declaration was filed in the public record in *High-Tech*, nor do they dispute that a court may take judicial notice of documents filed with the court in another proceeding. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (taking judicial notice of "several other pleadings, memoranda, expert reports, etc." from another litigation, as courts "may take judicial notice of court filings and other matters of public record"); *Armstead v. City of Los Angeles*, -- F. Supp. 3d --, 2014 WL 6896039, at *4-5 & n.51 (C.D. Cal. Dec. 5, 2014) (taking judicial notice of nearly 50 documents from court files in related cases). This Court thus may take judicial notice of Exhibit F.

First, as explained above, the CAC alleges no facts sufficient to support a *per se* wage-fixing claim. *See* pp. 17-19, *supra*; *see also* Mot. at 18-22. At most, plaintiffs point to a handful of information exchanges which, under the most generous interpretation, relate to a rule of reason claim that plaintiffs have elected not to assert. *See* Mot. at 21-22; *see also* discussion, pp. 17-18 *supra*.

Second, there is no evidentiary basis to support a claim that Sony Pictures participated in any conspiracy – much less the broad over-arching conspiracy alleged in the CAC. As explained in defendants' prior memorandum, to sustain such an assertion plaintiffs must allege specific facts demonstrating a defendant's knowing participation and commitment to the terms of the conspiracy they allege. Mot. at 23; *Kendall*, 518 F.3d at 1048. Furthermore, "[t]o establish the existence of a single conspiracy, rather than multiple conspiracies, the [plaintiff] must prove that an overall agreement existed among the conspirators." *United States v. Bibbero*, 749 F.2d 581, 587 (9th Cir. 1984). The Ninth Circuit has described this test as asking whether "each defendant knew or had reason to know of the scope of the conspiracy and that each defendant had reason to believe that their own benefits were dependent upon the success of the entire venture." *United States v. Kenny*, 645 F.2d 1323, 1335 (9th Cir. 1981) (citation and internal marks omitted).

Neither portion of that test is met here as to Sony Pictures. There is absolutely nothing suggesting that Sony Pictures even knew about – let alone agreed to participate in – an overarching non-solicitation and wage-setting conspiracy amongst the various named defendants. Mot. at 30-32. Thus, there is no credible evidence that Sony Pictures either "knew or had reason to know of the [multi-faceted] scope of the conspiracy" alleged in the CAC.

Equally important, Sony Pictures had no "reason to believe that [its] own benefits were dependent upon the success of the entire venture." To the contrary, an agreement not to solicit its competitors' employees would not have made economic sense for a company in Sony Pictures' position. For a company seeking to expand its presence in the animation industry – which is precisely how plaintiffs themselves describe Sony Pictures (*see, e.g.*, CAC ¶¶ 58-59) – agreeing to limit the pool of available employee talent not only makes no common sense, but would be particularly perverse since its effect would be to restrict the supply of labor – a condition leading to *upward* pressure on the wages of its existing work force. *See, e.g., William O. Gilley Enters., Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 662

(9th Cir. 2009) (claim alleged must be "'plausible' in light of basic economic principles") (quoting *Twombly*, 550 U.S. at 556).[29]

IV. Plaintiffs Do Not Adequately Plead a Claim Under California Business and Professions Code §§ 17200.

Plaintiffs concede they are not seeking restitution or disgorgement under California Business and Professions Code §§ 17200 *et seq.*, Opp. at 36, but they continue to pursue a claim for injunctive relief, notwithstanding that they lack standing to seek such relief. They attempt to cure this deficiency by stating that plaintiff Georgia Cano works in the visual effects and animation field "through the present"; that class members have to regularly find new employment; and that "only a limited number of studios are able to support the visual effects and animation work required by modern motion pictures." Opp. at 36.

These statements cannot revive plaintiffs' UCL claim. That Cano has worked for *other* unidentified visual effects or animation studios does not indicate, or even suggest, that she faces a real or immediate threat posed by the defendants in this case. The mere possibility that one of the named plaintiffs may at some unknown date in the future choose to seek employment with one of the defendants is exactly the type of "conjectural [and] hypothetical" situation the rules seek to avoid. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004) (noting that the plaintiff must show "an injury that is actual or imminent, not conjectural or hypothetical"). "Such an attenuated interest in the requested injunctive relief is entirely too speculative to confer any legitimate

[29] Sony Pictures is, of course, well aware that the technology companies in the *High-Tech* litigation unsuccessfully advanced a nominally similar argument. *High-Tech*, 856 F. Supp. 2d 1103. However, the situation and Sony Pictures' legal position here are entirely different from the arguments advanced in that case. The technology companies in *High-Tech* argued that even if they had entered into the alleged bilateral agreements, there was an insufficient connection between those supposed agreements to support allegations of a single unified conspiracy. Not only is that not Sony Pictures' argument, but the allegations regarding the technology companies in *High-Tech* could not be more dissimilar than the allegations against the studios here. As described in the *High-Tech* opinion, plaintiffs in that case "alleged a 'larger picture' of senior executives from closely connected high-tech companies … contemporaneously negotiating and enforcing … identical bilateral agreements" over a short period of time. *Id.* at 1120. Elsewhere, this Court reviewed, and relied upon, allegations about overlapping officers and directors at the companies as supporting an inference that the "significant policies" reflected in the purported conspiracy in that case "would have [been] approved at the highest levels" of the defendants. *Id.* at 1118-19. Analogous facts are, tellingly, absent from the CAC and, in particular, from the allegations regarding Sony Pictures.

interest in injunctive relief." *Gonzales v. Comcast Corp.*, 2012 WL 10621, at *16 (E.D. Cal. Jan. 3, 2012) (noting that plaintiffs' argument that former Comcast customers *may* someday become Comcast customers again, and eventually need relief from Comcast's current practices, is entirely too speculative).

Finally, plaintiffs argue that they are entitled to seek injunctive relief against Pixar and Lucasfilm because the stipulated final judgments that Pixar and Lucasfilm entered with the DOJ do not address the alleged wage-fixing agreement. Opp. at 37. But, those allegations are plainly insufficient to state a claim. The DOJ judgment eliminates any basis for an injunction with respect to no-poaching agreements, and those allegations are time-barred in any event.

V. Conclusion

For the foregoing reasons, this Court should dismiss the CAC. Because plaintiffs have had the benefit of substantial discovery and still cannot muster a set of allegations that would establish plaintiffs' entitlement to relief, dismissal with prejudice is appropriate.

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ATTESTATION

I, Emily Johnson Henn, hereby attest, pursuant to N.D. Cal. Civil L.R. 5-1, that the concurrence to the filing of this document has been obtained from each signatory hereto.

DATED: March 2, 2015

By: */s/ Emily Johnson Henn*
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