APPENDICES

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APPENDIX A

No. 24-1465

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUSAN SCHARPF; ANTHONY D'ARMIENTO, on behalf of themselves and all others similarly situated,

Plaintiffs - Appellants,

v.

GENERAL DYNAMICS CORP.; BATH IRON WORKS CORP.; ELECTRIC BOAT CORP.; GENERAL DYNAMICS INFORMATION TECHNOLOGY, INC.; HUNTINGTON INGALLS INDUSTRIES, INC.; NEWPORT NEWS SHIPBUILDING AND DRY DOCK CO.; INGALLS SHIPBUILDING, INC.; HII MISSION TECHNOLOGIES CORP.; HII FLEET SUPPORT GROUP LLC; MARINETTE MARINE CORPORATION; BOLLINGER SHIPYARDS, LLC; GIBBS & COX, INC.; SERCO, INC.; CACI INTERNATIONAL, INC.; THE COLUMBIA GROUP, INC.; THOR SOLUTIONS, LLC; TRIDENTIS, LLC; FASTSTREAM RECRUITMENT LTD.,

Defendants - Appellees.

COMMITTEE TO SUPPORT THE ANTITRUST LAWS,

Amicus Supporting Appellants.

Argued: January 29, 2025

Decided: May 9, 2025

Before DIAZ, Chief Judge, and WYNN and BENJAMIN, Circuit Judges.

Reversed and remanded by published opinion. Judge Wynn wrote the opinion, in which Judge Benjamin joined. Chief Judge Diaz wrote a dissenting opinion.

WYNN, Circuit Judge:

Plaintiffs Anthony D'Armiento and Susan Scharpf brought a putative class action against the nation's largest shipbuilders and naval-engineering consultancies, alleging a wide-ranging "no-poach" conspiracy in which the companies formed a "gentlemen's agreement" not to recruit each other's employees in an effort to drive down wages. As no named Plaintiff has worked for any Defendant since 2013, the district court dismissed the case as barred by the Sherman Act's four-year statute of limitations. The court concluded that a "non-ink-to-paper" agreement cannot constitute an affirmative act of fraudulent concealment, so it does not toll the limitations period.

We hold that neither logic nor our precedent supports distinguishing between defendants who destroy evidence of their conspiracy and defendants who carefully avoid creating evidence in the first place. Accordingly, we reverse the dismissal of this matter.

I.

We accept Plaintiffs' well-pleaded allegations as true throughout this summary of the facts. *See Wag More Dogs, Corp. v. Cozart*, 680 F.3d 359, 364–65 (4th Cir. 2012).

Defendants comprise many of the largest shipbuilders and naval-engineering consultancies in the country. Roughly 40% of naval engineers work for shipbuilders, and most shipbuilders perform contract work for the federal government to build the U.S. public fleet. The largest shipbuilders—Defendants General Dynamics and Huntington Ingalls—own the

five major private U.S. shipyards that build warships. Another 40% of naval engineers work for naval-engineering consultancies, which also often work as contractors for the federal government.

Throughout the class period, 2000 to the present day, "industry insiders acknowledged that there was an industry-wide shortage of naval engineers." J.A. 86.[1] So one might expect to see "a high degree of labor mobility" in which Defendants "would have competed aggressively to lure away each other's employees by offering better salaries and benefits." J.A. 86. But in reality, "naval engineers generally spend their entire careers without being solicited by a rival firm," "Defendants maintained relatively uniform compensation structures," and salaries were "far below what would be available in a competitive market." J.A. 44, 86, 92.

Plaintiffs allege that this lack of mobility has been deliberately manufactured through a no-poach agreement among Defendant firms that "prohibits any Defendant from actively recruiting naval engineers from other Defendants," allowing them to suppress wages through a lack of competition. J.A. 74.

Plaintiffs D'Armiento and Scharpf worked as naval engineers for Defendants from 2002 to 2004 and 2007 to 2013 respectively. Plaintiffs learned of the no-poach agreement in April 2023 following an "investigation [that] uncovered direct evidence of the conspiracy, gathered from eyewitness industry participants." J.A. 75.

Six months later, Plaintiffs brought this putative antitrust class action against nineteen shipbuilders and naval-engineering consultancies and one re-

[1] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

cruitment agency. They allege that, although its "origins are obscure," the conspiracy began as early as 1980 and was ubiquitous by 2000, and that it continues to this day. J.A. 79. Plaintiffs further allege that "[e]ach Engineering Defendant in this action is tied to the conspiracy through the testimony of at least one witness who verified the party's adherence to the industry's no-poach regime." J.A. 74.

Plaintiffs interviewed multiple industry insiders, quoted anonymously in the Complaint, who acknowledged the existence of the no-poach agreement and provided some details about how it worked. The firms had a "gentlemen's agreement" that they would not actively "'recruit people' from competitors." J.A. 75–76; *accord* J.A. 76 ("I never recruited anyone actively from a competitor."); J.A. 77 (executive at Defendant Gibbs & Cox recounting "that he overheard a colleague say to another colleague in regard to recruiting a potential candidate, 'He works for [the firm now called Serco], we can't do that'"); J.A. 78 (manager involved in recruitment for Defendant Thor Solutions stating that "we would not poach from" companies with which Thor worked, including from Defendant Alion). A recruiter from Defendant Serco explained that his company maintained a "do not hire list" of allied companies from which he was not permitted to recruit. J.A. 75.

And while it was acceptable to offer a position to an engineer from a Defendant firm who applied on their *own* initiative, interviewees explained how the no-poach agreement was still enforced even in those situations. For example, an executive explained that if their company's employee applied to and was accepted by Defendant Gibbs & Cox, that company would "call me and say, 'We didn't poach him.'" J.A. 77. And a naval engineer said that, after he applied to work at

other firms, "he was required to specify that he had independently pursued the opportunity and not been solicited." J.A. 75.

Plaintiffs allege that Defendants concealed this conspiracy by "carefully avoiding" the creation of any documentation of its existence and by referring to it obliquely. J.A. 96. Several of the interviewees described the conspiracy as a "gentlemen's agreement." J.A. 74, 78. They also described the agreement as "non-ink-to-paper," J.A. 46, 78, and one said that "[they] don't put that in writing. You'd be hard pressed to find that in writing," J.A. 46; *see* J.A. 76 (agreement was "never reduced to writing"). Instead, the agreement was "passed on only as verbal instructions from executives to managers." J.A. 76. One recruiter stated that companies asking for recruitment help "would often use coded language to discuss the set of competitors whose employees the hiring manager did not want to recruit, referring to those companies as 'friends' or explaining that the company 'had a relationship' with these competitors." J.A. 46. Plaintiffs allege the agreement was enforced "through private phone calls between high-level executives and unofficial retribution." J.A. 101.

The district court granted Defendants' Rule 12(b)(6) motion in April 2024, finding that Plaintiffs' claims were time-barred by the Sherman Act's four-year statute of limitations.[2] After a review of Fourth Circuit fraudulent-concealment case law, the court concluded that Plaintiffs could "not succeed on their

[2] That is, all Defendants moved to dismiss save Faststream Recruitment Ltd. Faststream did not appear in the district court prior to the motion to dismiss. Plaintiffs later "filed a notice of settlement with Faststream" and moved for approval of the settlement. *Scharpf v. Gen. Dynamics Corp.*, No. 1:23-cv-1372, 2024 WL 1704665, at *1 n.1 (E.D. Va. Apr. 19, 2024).

claim that, by the creation of and participation in a secret conspiracy, the Defendants committed an act of concealment that tolls the statute of limitations" because Defendants' alleged non-ink-to-paper agreement was "simply . . . [a] failure[] to admit wrongdoing." *Scharpf v. Gen. Dynamics Corp.*, No. 1:23-cv-1372, 2024 WL 1704665, at *8 (E.D. Va. Apr. 19, 2024). Plaintiffs timely appealed.

II.

We review de novo a district court's decision to grant a motion to dismiss under Rule 12(b)(6). *Edmonson v. Eagle Nat'l Bank*, 922 F.3d 535, 545 (4th Cir. 2019). We must "accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (citations omitted). Most pleadings must satisfy Rule 8's standard of a "short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2). To survive a motion for dismiss, the complaint must "state[] a plausible claim for relief" that "permit[s] the court to infer more than the mere possibility of misconduct" based upon "its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

The normal pleading standards are heightened for allegations of fraudulent concealment as Federal Rule of Civil Procedure 9(b) states that parties must allege "fraud . . . with particularity." However, we apply a "relaxed Rule 9(b) standard" in "cases involving alleged fraud by omission or concealment"—such as allegations of a non-ink-to- paper agreement—because "it is well-nigh impossible for plaintiffs to plead all the necessary facts with particularity, given that those facts will often be in the sole possession of the defendant." *Corder v. Antero Res. Corp.*, 57 F.4th 384, 402 (4th Cir. 2023). And we have held that a court considering a fraudulent-concealment case

"should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which [it] will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts." *Edmonson*, 922 F.3d at 553 (quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999)).

So, a plaintiff must allege an affirmative act of concealment under a relaxed (but not eliminated) Rule 9(b) particularity standard.

III.

A.

The Sherman Act has a four-year statute of limitations. 15 U.S.C. § 15b. But if a defendant engages in fraudulent concealment, the limitations period does not begin to run until the plaintiff discovers the violation. *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995). To toll a limitations period through fraudulent concealment, "a plaintiff must demonstrate: (1) the party pleading the statute of limitations fraudulently concealed facts that are the basis of the plaintiff's claim, and (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." *Id.*

In this Circuit, a plaintiff satisfies the first element by "provid[ing] evidence of affirmative acts of concealment" by the defendants. *Id.* at 126. We hold that an agreement that is kept "non-ink-to-paper" to avoid detection can qualify as an affirmative act of concealment.

Our conclusion helps to preserve the careful balance between statutes of limitation and the doctrine

of fraudulent concealment. Statutes of limitation are designed to "protect defendants from stale or fraudulent claims." *Id.* at 125 (citing *Wood v. Carpenter,* 101 U.S. 135, 139 (1879)). But, more than a century ago, the Supreme Court noted that it could not "believe that Congress intended to give immunity to those who for the period named in the statute might be able to conceal their fraudulent action from the knowledge of the [victim]." *Exploration Co. v. United States*, 247 U.S. 435, 449 (1918). The Supreme Court has therefore instructed "that the fraudulent concealment tolling doctrine is to be 'read into every federal statute of limitations,'" including that in the Sherman Act. *Marlinton*, 71 F.3d at 122 (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)). This tolling doctrine is designed "to prevent a defendant from 'concealing a fraud . . . until' the defendant 'could plead the statute of limitations to protect it.'" *Id.* (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349 (1874)). This balance would be "subverted . . . if defendants [were] permitted to use statutes of limitation to shield themselves from liability for unlawful conduct by keeping that conduct secret." *Id.* at 125.

The Supreme Court's adoption of the fraudulent-concealment tolling doctrine left open the question of how, exactly, to evaluate when a defendant has engaged in such fraudulent concealment. In a series of decisions in the 1980s and 1990s, the circuits coalesced around three standards: the separate-and-apart standard, the self-concealing standard, and the affirmative-acts standard. *Id.* at 122.

Under the separate-and-apart standard, the plaintiffs must show that the defendants engaged in fraudulent concealment separate and apart from the antitrust conspiracy. *Id.* Under the self-concealing standard, "a plaintiff . . . merely [must] prov[e] that a

self- concealing antitrust violation has occurred."[3] *Id.* Finally, under the intermediate affirmative-acts standard, a plaintiff "must prove that the defendants affirmatively acted to conceal their antitrust violations, but the plaintiff's proof may include acts of concealment involved in the antitrust violation itself." *Id.* Today, the circuits that have spoken on the issue have largely adopted the affirmative-acts standard.[4]

Our cornerstone case of *Marlinton* followed this majority approach and supports our conclusion that unwritten agreements can constitute fraudulent con-

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[3] Judge Higginbotham provided a helpful hypothetical to explain the self-concealing standard in *Texas v. Allan Construction Co.*, 851 F.2d 1526 (5th Cir. 1988). "Sell[ing] a fake vase as if it were an antique" is a self-concealing violation because "[d]eception is an essential element of the wrong, and one that is not intended merely to cover up the wrong itself." *Id.* at 1529. By contrast, "steal[ing] a vase" and "replac[ing] it with a worthless replica is not self-concealing" because "[t]he wrong is the theft of the vase; the replacement is an act separate from the wrong itself and aimed only at concealing the fact that the real vase has been stolen." *Id.* at 1529–30.

[4] The First, Fifth, Sixth, and Ninth Circuits use the affirmative-acts standard. *See Berkson v. Del Monte Corp.*, 743 F.2d 53, 56 (1st Cir. 1984); *Allan Constr. Co.*, 851 F.2d at 1531–32; *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir. 1988); *Conmar Corp. v. Mitsui & Co. (U.S.A.)*, 858 F.2d 499, 505 (9th Cir. 1988). In the Second, Eleventh, and D.C. Circuits, a plaintiff can either show an affirmative act of concealment or that the defendant committed a self-concealing violation. *See New York v. Hendrickson Bros.*, 840 F.2d 1065, 1083–85 (2d Cir. 1988); *Foudy v. Indian River Cnty. Sheriff's Off.*, 845 F.3d 1117, 1124 (11th Cir. 2017); *Riddell v. Riddell Wash. Corp.*, 866 F.2d 1480, 1491–92 (D.C. Cir. 1989). In contrast, by an evenly divided en banc panel, the Tenth Circuit affirmed a district court that applied the separate-and-apart standard. *See Colorado ex rel. Woodard v. W. Paving Const. Co.*, 630 F. Supp. 206, 208, 210 (D. Colo. 1986), *aff'd by an equally divided court*, 841 F.2d 1025 (10th Cir. 1988) (en banc) (per curiam).

cealment. In *Marlinton*, large dairies allegedly conspired to fix milk prices. Supermarkets sued the dairies years later, pointing to testimony from a dairy official given under a grant of immunity in a prior criminal case. *Id.* at 121. That official testified to secret meetings with officials from other dairies to fix prices, explaining that these meetings were purposefully "conducted away from the office" and that he would fill out his expense reports "in such a manner" that nobody would learn of the meetings. *Id.* Applying the "separate-and-apart" standard of fraudulent concealment, the district court granted the defendants summary judgment. *Id.*

We disagreed. We first rejected the separate-and-apart standard as too stringent and indeterminate. *Id.* at 124–26. We also found the self-concealing standard inapplicable because concealment is not a necessary element of a price-fixing violation, although we didn't rule it out for future cases. *Id.* at 123.

We instead adopted the intermediate affirmative-acts standard. *Id.* at 126. As the paradigmatic example of that standard, we repeatedly cited a Fifth Circuit case which held that "'secret agreements and covert price-setting sessions' . . . . could count as proof of fraudulent concealment." *Texas v. Allan Constr. Co.*, 851 F.2d 1526, 1531–32 (5th Cir. 1988) (quoting *Greenhaw v. Lubbock Cnty. Beverage Ass'n*, 721 F.2d 1019, 1030 (5th Cir. 1983)); *see Marlinton*, 71 F.3d at 125. And we rejected the argument that fraudulent concealment must include an act of commission rather than omission, making clear that conspirators who "are *careful not to write down* evidence of their antitrust violations in the first place" can be held accountable. *Marlinton*, 71 F.3d at 125 (emphasis added). So, although we remanded the case to the district

court to apply the affirmative-acts standard to the facts in the first instance, *Marlinton*'s reasoning makes clear that this standard can include secret, non-ink-to-paper agreements.[5]

Indeed, district courts in our Circuit have relied on *Marlinton* to deny motions to dismiss on facts similar to those here. In *Jien v. Perdue Farms, Inc.*, No. 1:19-cv-2521, 2020 WL 5544183, at *13 (D. Md. Sept. 16, 2020), the plaintiffs alleged that the defendants held "off the books" "secret meetings" where they manipulated wage data. The district court found that "[a]ll of these alleged techniques plausibly constitute affirmative acts of concealment." *Id.* And in *Pro Slab, Inc. v. Argos USA LLC*, No. 2:17-cv-3185, 2019 WL 4544086, at *14 (D.S.C. Sept. 19, 2019), the plaintiffs alleged that the defendants created "anticompetitive agreements during secret meetings" and "misrepresented market conditions" in price-increase letters to customers. *Id.* The district court found that these allegations amounted to more than a mere "failure to admit to wrongdoing." *Id.* (quoting *Boland v. Consol. Multiple Listing Serv., Inc.*, 868 F. Supp. 2d 506, 518 (D.S.C. 2011)).

Nevertheless, Defendants flatly claim that "a secret agreement . . . is not an affirmative act of concealment." Response Br. at 35. This is both inconsistent with *Marlinton*'s reasoning and a bad rule on its own merits. Defendants' blanket rule would "encourage[] [wrongdoers] to take advantage of the limitations period to commit secret illegal conduct with-

[5] On remand, the district court denied a motion to dismiss in which the defendants argued that the case was time-barred, but later granted summary judgment for lack of antitrust standing. *Supermarket of Marlinton, Inc. v. Valley Rich Dairy*, 161 F.3d 3, 1998 WL 610648, at *1 n.5, *2 (4th Cir. 1998) (per curiam) (unpublished table decision).

out penalty." *Edmonson*, 922 F.3d at 549 (quoting *Marlinton*, 71 F.3d at 125). It would also lead to illogical results, as there is "no valid reason to differentiate between those conspiracies in which the conspirators document their antitrust violations and subsequently shred those documents, from those in which the conspirators are careful not to write down evidence of their antitrust violations in the first place." *Marlinton*, 71 F.3d at 125. Surely, Congress did not intend for us to reward conspirators who are savvy enough to avoid taking notes while punishing those who take notes but later destroy them. This would unjustly "benefit those defendants who were cunning enough to commit their crimes initially in such a manner that there was no need for further concealment." *Id.*

Our remaining case law is not to the contrary. Defendants claim that *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987), a case that predates *Marlinton*, held that even "lying about a secret conspiracy does not suffice" for fraudulent concealment. Response Br. at 33. But *Pocahontas*'s holding is ambiguous, as we later recognized in *Marlinton*, and is too thin a reed on which to rest such a counterintuitive contention.

The plaintiff in *Pocahontas*, a coal-mining company, asked a defendant company "why [that defendant] refused to accept certain deliveries of coal and why the price paid for delivered coal was so low." *Pocahontas*, 828 F.2d at 218. The defendant "responded that the delivery quotas were due to a railroad strike . . . and that the pricing simply was the maximum allowable." *Id.* More than four years later, the plaintiff sued that company and several others involved in coal mining and production, alleging that they had created "interlocking directorates" to shoulder the

plaintiff out of the market. *Id.* at 215.

We held that the plaintiff's fraudulent-concealment allegations were insufficient. We concluded that "an alleged failure to own up to illegal conduct upon this sort of timid inquiry" did not constitute fraudulent concealment, as "[i]t can hardly be imagined that illegal activities would ever be so gratuitously revealed. 'Fraudulent concealment' implies conduct more affirmatively directed at deflecting litigation . . . and 'due diligence' contemplates more than the unpursued inquiry allegedly made by [the plaintiff]." *Id.* at 218–19.

But as *Marlinton* later noted, it is unclear "to what extent [*Pocahontas*] was based on the fact that the plaintiff had constructive notice of the antitrust violations or had failed to provide evidence of due diligence." *Marlinton*, 71 F.3d at 122. It also seems *Pocahontas* concluded that the plaintiff's question was so "timid"—i.e., so vague and indirect in probing the allegedly illegal acts—that the defendant's answer was not fraudulent at all and therefore was not "affirmatively directed at deflecting litigation." *Pocahontas*, 828 F.2d at 218–19; *see GO Comput., Inc. v. Microsoft Corp.*, 508 F.3d 170, 179 (4th Cir. 2007) (quoting this portion of *Pocahontas* for the proposition that "wrongdoing is not a straightforward matter of fact, and it is not fraud to deny it").

Given these ambiguities, *Marlinton* determined that *Pocahontas* "did not expressly adopt any [fraudulent concealment] standard[]" at all, and instead "simply examined the allegations of the complaint and concluded that the plaintiff had failed to allege facts sufficient to invoke the fraudulent concealment doctrine." *Marlinton*, 71 F.3d at 122. *Pocahontas* therefore should not be read to establish a general standard for fraudulent concealment—much less a

blanket rule that secret, unwritten conspiracies are legally insufficient to toll a statute of limitations. *See also Detrick v. Panalpina, Inc.*, 108 F.3d 529, 542 (4th Cir. 1997) ("As the *Marlinton* court noted, the *Pocahontas* court did not employ any of the standards outlined in *Marlinton*, which of course, is not surprising given that neither party argued for the adoption of any standard, and the case law had not been developed on that issue in the Fourth Circuit.").

Defendants also repeatedly cite *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278 (4th Cir. 2012), which affirmed *Boland*, 868 F. Supp. 2d 506, but that case is of no more help to them than *Pocahontas*. There, the plaintiffs alleged that they were injured by enforcement of the defendant real estate brokerages' "by-laws, policies, and procedures." 2d Am. Compl. ¶ 1, *Boland*, 868 F. Supp. 2d 506, ECF No. 22, 2010 WL 1787986. The plaintiffs also alleged that the defendants fraudulently concealed their conspiracy, as the defendants "never told [them] that they were fixing the prices of real-estate services . . . . [and] the [d]efendants . . . [met] secretly [and gave] pretextual reasons for costs of real- estate services." *Id.* ¶ 64. The district court dismissed the case, concluding that

> the [p]laintiffs' allegations lack the particularity required by Rule 9 and, therefore, are legally insufficient to state a claim of fraudulent concealment. The cases are clear that a plaintiff must allege affirmative acts of concealment or affirmative steps to mislead; here, the Court believes that the [p]laintiffs' allegations amount to no more than a failure to admit to wrongdoing, which does not suffice.

Boland, 868 F. Supp. 2d at 518. This sparse reasoning leaves us uncertain whether the district court dismissed the complaint because:

- the plaintiffs' allegations were non-particularized,
- mere failure to inform is legally insufficient,
- the plaintiffs' argument—that the defendants fraudulently concealed their "secret[]" agreement in "by-laws"—was fundamentally implausible, or
- secret meetings are insufficient as a matter of law (as Defendants now maintain).

We affirmed in a footnote with one sentence of reasoning: "The district court properly concluded that [the] plaintiffs failed to 'allege affirmative acts of concealment or affirmative steps to mislead' and that [the] 'plaintiffs' allegations amount to no more than a failure to admit to wrongdoing, which does not suffice.'" *Robertson*, 679 F.3d at 291 n.2 (quoting *Boland*, 868 F. Supp. 2d at 518) (citing *Pocahontas*, 828 F.2d at 218–19). Given the uncertainty surrounding the district court's reasoning, it is unclear exactly what *Robertson* determined that the district court had "properly concluded." So we don't agree that *Robertson* sets out a general rule that secret meetings are insufficient to constitute fraudulent concealment as a matter of law—particularly because such a rule would conflict with *Marlinton*'s reasoning, which preceded *Robertson* and which *Robertson* did not cite.

In sum, the doctrine of fraudulent concealment is designed to prevent conspirators who take steps to avoid detection from hiding behind the statute of limitations. *See Edmonson*, 922 F.3d at 547 ("We do not believe that Congress intended to allow individuals and entities that conceal their [conspiracies] to reap the benefit of the statute of limitations as a defense."). Neither logic nor our case law support Defendants' proposition that conspirators who cunningly avoid

creating evidence of their conspiracy escape this general rule. On the contrary, we reaffirm *Marlinton*'s reasoning, which makes clear that such a conspirator commits an affirmative act of fraudulent concealment.

B.

As no named Plaintiff has worked for Defendants since 2013, Plaintiffs must adequately plead affirmative acts of fraudulent concealment to avoid their claims being time-barred. We conclude that, under a relaxed Rule 9(b) standard, Plaintiffs have pleaded affirmative acts of fraudulent concealment with particularity.

Plaintiffs adequately allege that Defendants engaged in affirmative acts by creating an illicit no-poach agreement that they deliberately kept non-ink-to-paper. The complaint quotes multiple industry insiders who acknowledge the existence of the no-poach agreement. For example, one witness "confirmed the existence of a 'gentlemen's agreement' among these firms that 'you didn't recruit people' from competitors." J.A. 75-76. Plaintiffs claim that "at least one witness" verified each engineering Defendant's "adherence to the industry's no-poach regime." J.A. 74.

Plaintiffs further allege that Defendants have "carefully avoid[ed] putting anything in writing" to "conceal[] their unlawful conduct," J.A. 96, and that the agreement was "never reduced to writing and passed on only as verbal instructions from executives to managers," J.A. 76. Plaintiffs' interviewees support the proposition that Defendants carefully avoided putting their alleged no-poach agreement in writing. An in-house recruiter for a Defendant "confirmed the existence of a 'non-ink-to-paper' agreement between Defendants that 'we would not poach from each oth-

er.'" J.A. 46. "Managers with hiring authority repeatedly and independently confirmed the existence of an industry-wide 'gentlemen's agreement[.]'" J.A. 74. And one "industry insider" stated that Defendants "don't put [their agreement] in writing. You'd be hard pressed to find that in writing." J.A. 46.

These allegations meet Rule 9(b)'s particularity requirement, which is relaxed but not eliminated in "cases involving alleged fraud by omission or concealment" like this one. *Corder*, 57 F.4th at 402. Defendants have been "made aware" that they will have to defend against allegations of an unwritten agreement not to poach each other's employees unless those employees affirmatively seek employment. *Edmonson*, 922 F.3d at 553. The agreement allegedly "began at least by the early 1980s [and] expanded to industry-wide proportions by at least 2000." J.A. 74. Defendants allegedly avoided detection by transmitting the agreement orally from executives to managers and by referring to it obliquely. Defendants took these steps "to evade detection or accountability." J.A. 96. Furthermore, although Plaintiffs are a bit coy about how many interviews they conducted, their interviewees—who consistently and independently describe a gentlemen's or non- ink-to-paper no-poach agreement—show that Plaintiffs have obtained "substantial prediscovery evidence" of Defendants' alleged affirmative acts of concealment. *Edmonson*, 922 F.3d at 553. Rather than pleading based on information and belief, the bulk of Plaintiffs' allegations are quotes from interviews with industry insiders. These interviews strengthen the plausibility of Plaintiffs' allegations.

Our colleague in dissent argues that we effectively apply the self-concealing standard by allowing Plaintiffs' claims to proceed. We respectfully disagree. A self- concealing violation occurs only when "deception

or concealment is a *necessary element* of the antitrust violation." *Marlinton*, 71 F.3d at 123 (emphasis added). For example, "price-fixing is not inevitably deceptive or concealing" because "the deceptive aspect of price-fixing is intended solely to cover up the illegal act[;] price fixing is not *by its very nature* concealed." *Id.* (quotation omitted). Here, the alleged illegal act is a no-poach conspiracy, which—just like a price-fixing conspiracy—is not inherently deceptive or concealed. Although it would be unwise, Defendants could openly refuse to hire each other's employees.

Instead, Defendants allegedly *covered up* their no-poach conspiracy by, among other things, "carefully avoiding putting anything in writing" and using coded language to refer to it. J.A. 96. That meets the affirmative-acts standard, which allows "the plaintiff's proof [to] include acts of concealment involved in the antitrust violation itself." *Marlinton*, 71 F.3d at 122.

C.

Even if a plaintiff adequately alleges affirmative acts, such as a non-ink-to-paper agreement, the plaintiff must still allege facts sufficient to infer that the defendants performed the acts *with the intent to* prevent or deceive others from discovering their scheme. Otherwise the plaintiff will have failed to show that the defendant "*fraudulently* concealed facts that are the basis of the plaintiff's claim," *Marlinton*, 71 F.3d at 122 (emphasis added), and that the defendant did more than engage in "mere silence," *Wood*, 101 U.S. at 143.

Courts usually must infer intent from circumstantial evidence. That is why Rule 9(b) states that "intent . . . may be alleged generally," and why we do not apply a heightened pleading standard to the intent elements of fraudulent allegations. *See United States ex*

rel. Taylor v. Boyko, 39 F.4th 177, 197 n.14 (4th Cir. 2022) (noting that district court should apply normal Rule 8 standard to an allegation of fraudulent intent rather than a heightened standard under Rule 9(b)). So we will address how courts might infer fraudulent intent from an allegation of an affirmative act, although we emphasize that this is not an exhaustive list.

Courts should first consider whether the affirmative acts themselves imply fraudulent intent. For example, when the defendants in *Edmonson* "back[]dated" documents that would have revealed their conspiracy, it was hard to imagine a benign purpose for their acts. 922 F.3d at 553. In contrast, when the plaintiff in *Pocahontas* asked a "timid" question only indirectly related to the alleged conspiracy, it was difficult to infer that the defendant's response was intended to "deflect[] litigation." 828 F.2d at 218–19. For allegations of unwritten agreements, it will sometimes be difficult to infer fraudulent intent: perhaps the agreement was so vague that there was no reason to commit it to paper, or maybe it was just simpler for the defendants to communicate orally. *Cf. Robertson*, 679 F.3d at 291 n.2 (noting that a mere "failure to admit to wrongdoing" does not itself suffice). On the other hand, if an unwritten agreement allegedly had well-defined rules, was in effect for an extended period, or had many participants, it would be easier to infer fraudulent intent.

Courts should also consider whether the underlying violation—the violation that the affirmative acts are intended to cover up—is obviously illegal. When the alleged violation presents "extremely difficult and particularly close questions of law," it is more difficult to infer that an affirmative act was intended to avoid detection, as defendants may have not even realized

that their actions were illegal. *Boland*, 868 F. Supp. 2d at 516 (rejecting allegations of affirmative acts of concealment where underlying allegation was that a real estate information-sharing organization's rules were designed to exclude innovative brokerages); *see GO Computer*, 508 F.3d at 179 ("[W]rongdoing is not a straightforward matter of fact, and it is not fraud to deny it."). But where a plaintiff alleges an obvious legal violation, a court should more readily infer that an affirmative act was intended to avoid detection. *See Pro Slab*, 2019 WL 4544086, at *14–15 (denying dismissal of affirmative- acts allegation that defendants conspired in secret meetings and sent misleading letters to customers where plaintiff alleged underlying violation of price-fixing and bid-rigging).

D.

Applying Rule 8's more lenient standard, we can infer from Plaintiffs' allegations that Defendants' affirmative acts were intended to avoid detection.

At the most basic level, it is hard to imagine that a decades-old multilateral agreement—with a clear and apparently anticompetitive rule (you shall not hire your co- conspirators' employees) and a clear exception (unless the employee first applies to you)— would remain unwritten merely for the sake of convenience. The coded language Defendants allegedly used to refer to their conspiracy could also indicate that they were self-conscious of its illegality. Plaintiffs allege that one recruiter claimed that Defendants asking for recruitment help "would often use coded language to discuss the set of competitors whose employees the hiring manager did not want to recruit, referring to those companies as 'friends' or explaining that the company 'had a relationship' with these competitors." J.A. 46. And the ubiquitous references to a "gentlemen's agreement" could indicate that Defendants

wanted to make their agreement seem like an agreement among friends as opposed to an illegal conspiracy, or that Defendants recognized they could not rely on the legal enforceability of a written agreement. In a case involving similar allegations in another industry, a California district court applying the affirmative-acts standard concluded as much when it found that allegations that the defendants' conspiracy "was termed a 'gentlemen's agreement'" and that the defendants "intentionally cho[se] to meet in-person or over the telephone, rather than risk memorializing details about the alleged conspiracy" in writing helped to "raise the reasonable inference that [the d]efendants took affirmative steps to conceal the details of their conspiracy." *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175, 1201 (N.D. Cal. 2015).

The allegedly obvious illegality of Defendants' no-poach agreement also weighs in favor of finding that their affirmative acts were intended to conceal or deceive.[6] *See, e.g.*, *Deslandes v. McDonald's USA, LLC*, 81 F.4th 699, 703 (7th Cir. 2023) (vacating dismissal of an allegation of a no-poach agreement and warning that a naked no-poach agreement is a per se Sherman Act violation), *cert. denied*, 144 S. Ct. 1057 (2024); *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d at 1214 (finding that allegations of an "information sharing and no-poach scheme . . . to suppress wages" raised a plausible inference of a per se anti-

[6] We need not determine today whether this alleged no-poach agreement is actually illegal. That issue has not been briefed and we leave it to the district court to decide in the first instance. Our point is that Defendants probably would have *thought* a no-poach agreement was illegal, which makes it more likely that their determination not to put the agreement in writing was intended to avoid detection.

trust violation). An unwritten gentlemen's agreement to commit an obvious antitrust violation appears much more suspect than an unwritten gentlemen's agreement to do something that presents "extremely difficult and particularly close questions of law."[7] *Boland*, 868 F. Supp. 2d at 516.

IV.

Even though Plaintiffs alleged an affirmative act of concealment with particularity and with the requisite intent, their claim must be dismissed if they failed to exercise due diligence in uncovering the alleged conspiracy.[8] *Pocahontas*, 828 F.2d at 218. We conclude that, at the motion-to-dismiss stage, Plaintiffs have sufficiently alleged due diligence.

"Generally, whether a plaintiff exercised due diligence is a jury issue not amenable to resolution on the pleadings[.]" *Edmonson*, 922 F.3d at 554. And we have "long . . . held that it is possible for a plaintiff to satisfy the due diligence requirement without demonstrating that it engaged in any specific inquiry" because "if the plaintiff was not on inquiry notice, then there is nothing to provoke inquiry." *Edmonson*, 922 F.3d at 554 (cleaned up) (quoting *Marlinton*, 71 F.3d at 128). A plaintiff is on inquiry notice "if the plaintiff (1) believes he might have been harmed and (2) knows who is responsible for that harm." *SD3 II LLC v.*

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[7] Because we hold that the non-ink-to-paper agreement suffices as an affirmative act here, we do not reach Plaintiffs' other allegations of fraudulent concealment, nor Plaintiffs' argument that the district court erred by not granting them leave to amend their complaint to include additional allegations.

[8] Defendants do not contest the second element of the fraudulent concealment analysis: that Plaintiffs failed to discover the "facts that are the basis of the plaintiff's claim . . . within the statutory period." *Edmonson*, 922 F.3d at 548.

Black & Decker (U.S.) Inc., 888 F.3d 98, 113 (4th Cir. 2018).

Here, as Plaintiffs do not allege that they did much of anything during the statutory period, their claim turns on whether they were on inquiry notice. The pleadings indicate that Plaintiffs did not believe they had been harmed until they learned of the no-poach conspiracy through interviews with industry insiders in April 2023. *See Pocahontas*, 828 F.2d at 219 (requiring plaintiff to describe how they learned of the fraudulent concealment). Plaintiffs never allege that they were aware of the no-poach conspiracy before that investigation—on the contrary, they state that they "did not and could not have uncovered Defendants' conspiracy with the exercise of reasonable diligence. The Plaintiffs at all times believed that they were being compensated at competitive levels and were unaware of the agreement to pay sub-competitive wages." J.A. 102.

Defendants nonetheless argue that "Plaintiffs have pled their way into inquiry notice" for two principal reasons. Response Br. at 49. First, Defendants argue that the alleged conspiracy was "widely distributed" because it was "known by *multiple* HR and recruiting employees, managers, and executives at a multitude of companies over two decades." *Id.* at 51. So, the theory goes, Plaintiffs must have caught a whiff of it. It's certainly possible that word of the no-poach agreement trickled down to injured employees, including Plaintiffs. Or maybe Defendants managed to keep the agreement need-to-know. That is an issue of fact "not amenable to resolution on the pleadings." *Edmonson*, 922 F.3d at 558. *Compare id.* at 555 (reversing dismissal even though private litigation had commenced on related issues against some of the defendants during statutory period), *with GO Computer*, 508 F.3d at

178 (affirming summary judgment when plaintiff undisputedly met with FTC investigators during the statutory period about defendant's alleged antitrust violations and an investigator told him "[t]his looks like a textbook case of abuse of monopoly power").

Second, Defendants argue that Plaintiffs were on inquiry notice because they allege "naval engineers generally spend their entire careers without being solicited by a rival firm." Response Br. at 49–50 (quoting J.A. 44). Defendants contend that this was suspicious enough to put Plaintiffs on notice of the conspiracy. Plaintiffs' complaint, on the other hand, goes on to state that "this would not have been enough for a reasonable plaintiff to suspect and uncover" the no-poach agreement. J.A. 102. Again, this is a question of fact. Based on the complaint alone, we cannot say that the named Plaintiffs should have known about the conspiracy because they were never recruited by another company. They may have thought that fact reflected deficiencies in their own employability, or the vagaries of chance, rather than an indication of a widespread conspiracy.[9]

V.

We conclude that Plaintiffs have adequately alleged fraudulent concealment. Accordingly, we reverse the judgment of the district court and remand this case for further proceedings.

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[9] As Defendants note, Plaintiffs allege that one applicant for jobs at "other naval engineering firms" was "required to specify that he had independently pursued the opportunity and not been solicited," although that applicant was still "unaware of the no-poach agreement." J.A. 75; *see* Response Br. at 50–51. Regardless of whether this requirement put that applicant on inquiry notice, there is no allegation that Plaintiffs were ever asked a similar question.

REVERSED AND REMANDED

DIAZ, Chief Judge, dissenting:

To invoke the fraudulent concealment tolling doctrine, a plaintiff in an antitrust action "must demonstrate: (1) the party pleading the statute of limitations fraudulently concealed facts that are the basis of the plaintiff's claim, and (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." *Supermarket of Marlinton, Inc. v. Meadow Gold Diaries, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995). When "determining whether antitrust plaintiffs have satisfied the first element of this test," courts have developed three standards: "the 'self-concealing' standard, the 'separate and apart' standard, and the intermediate, 'affirmative acts' standard." *Id.*

The majority correctly explains that "the circuits that have spoken on the issue," including our own, "have largely adopted the affirmative-acts standard." Majority Op. at 11. Under this standard, "a plaintiff must prove that the defendants affirmatively acted to conceal their antitrust violations." *Marlinton*, 71 F.3d at 122.

My colleagues purport to hew to this standard. But because they effectively apply the self-concealing standard, collapsing the analysis down to the sole question of whether a conspiracy existed, I respectfully dissent.

I.

Susan Scharpf and Anthony D'Armiento worked in the naval shipbuilding industry from 2007 to 2013 and 2002 to 2004, respectively. In 2023, they sued seventeen defendants on behalf of themselves and a putative class consisting of "all persons employed as naval

architects and/or marine engineers."[1] J.A. 41. Scharpf and D'Armiento allege that the defendants—including "shipbuilders that produce military vessels large and small, specialized consulting firms, and a recruiting firm that sometimes serves these companies," J.A. 41 ¶ 3—enforced an "unwritten 'gentlemen's agreement'" "not to actively recruit, or 'poach,' each other's employees," J.A. 41 ¶ 1.[2]

Though the origins of this "gentlemen's agreement" are "obscure," the plaintiffs allege that "by at least 2000[,] all major players in the industry had reached a mutual understanding that they would not poach each other's employees." J.A. 79 ¶ 160. This "unwritten, broad secret agreement," J.A. 96 ¶ 206, survived "an astonishing number of sales, spin-offs, reorganizations, and other corporate events," J.A. 79 ¶ 160.

The majority neatly outlines the recruiters, industry insiders, hiring managers, and others who attested to the existence of this "gentlemen's agreement," or otherwise acknowledged the defendants' "non-ink-to-paper" no-poach agreement. *See, e.g.*, Majority Op. at 6–7, 18–19. But the majority doesn't rely on these allegations just to find that the plaintiffs have adequately alleged the existence of a conspiracy between the defendants. Rather, it relies on them to conclude that the plaintiffs have "adequately allege[d] that [the]

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[1] "Naval architects design vessel hulls and are responsible for a vessel's overall stability and performance, while marine engineers design onboard systems such as propulsion mechanics, electrical systems, water purification, heating systems, and air conditioning." *Scharpf v. Gen. Dynamics Corp.*, No. 1:23-cv-01372, 2024 WL 1704665, at *2 (E.D. Va. Apr. 19, 2024) (internal quotations omitted).

[2] The plaintiffs allege that the defendants' no-poach agreement didn't apply to those employees who applied to a competitor "on their *own* initiative." Majority Op. at 6.

[d]efendants engaged in affirmative acts [of concealing the conspiracy]," *id.* at 18, sufficient to toll (indefinitely, it seems) the statute of limitations on the plaintiffs' otherwise time-barred antitrust claims.

Respectfully, this is error. The fraudulent concealment doctrine explains why.

II.

"The purpose of [the] fraudulent concealment doctrine is to 'ensure that wrongdoers are not permitted, or encouraged, to take advantage of the limitations period to commit secret illegal conduct without penalty." *Edmonson v. Eagle Nat'l Bank*, 922 F.3d 535, 549 (4th Cir. 2019) (quoting *Marlinton*, 71 F.3d at 125). Thus, the doctrine "applies in situations where the defendant has wrongly deceived or misled the plaintiff in order to conceal the existence of a cause of action." *Id.* (cleaned up).

Recall that a plaintiff seeking to invoke the fraudulent concealment doctrine must show that "(1) the party pleading the statute of limitations fraudulently concealed the facts that are the basis of the plaintiff's claim, and (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." *Marlinton*, 71 F.3d at 122 (cleaned up). Fraudulent concealment requires "a plaintiff [to] prove that the defendants affirmatively acted to conceal their antitrust violations," though "the plaintiff's proof may include acts of concealment involved in the antitrust violation itself." *Id.*

We've declined to adopt the so-called "self-concealing" standard, which turns simply on whether the plaintiffs proved "that a self-concealing antitrust violation has occurred."[3] *Id.* My colleagues ex-

[3] "[I]n the Second, Eleventh, and D.C. Circuits, a plaintiff can

plain the difference between the standards with a vase analogy first described by the Fifth Circuit. *See* Majority Op. at 11 n.3 (citing *Texas v. Allan Constr. Co.*, 851 F.2d 1526 (5th Cir. 1988)). But the majority's "helpful hypothetical" also illustrates its mistake in this case. *Id.*

Under the hypothetical, "[s]elling a fake vase as if it were an antique' is a self- concealing violation because 'deception is an essential element of the wrong, and one that is not intended merely to cover up the wrong itself.'" *Id.* (cleaned up). "By contrast, 'stealing a vase' and 'replacing it with a worthless replica is not self-concealing' because 'the wrong is the theft of the vase; the replacement is an act separate from the wrong itself and aimed only at concealing the fact that the real vase has been stolen." *Id.* (cleaned up).[4]

The problem for the majority (and for the plaintiffs) is that the complaint alleges that the defendants did no more than sell a fake vase.

The plaintiffs allege that the defendants engaged in a sprawling, multi-decade "unwritten 'gentlemen's agreement'" not to poach one another's employees. J.A. 41 ¶ 1. This "non-ink-to-paper," J.A. 46 ¶ 12, "unwritten, broad secret agreement," J.A. 96 ¶ 206, captured an "industry wide" unspoken rule not to recruit from rivals, J.A. 96 ¶ 205. *See also* J.A. 46 ¶ 12 (alleging that "[the defendants] don't put that in writ-

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either show an affirmative act of concealment or that the defendant committed a self-concealing violation." Majority Op. at 11 n.4.

[4] We have similarly clarified that "[t]he self-concealing standard is only proper when deception or concealment is a necessary element of the antitrust violation." Detrick v. Panalpina, Inc., 108 F.3d 529, 541 n.24 (4th Cir. 1997).

ing. You'd be hard pressed to find that in writing."); J.A. 76 ¶ 149 (alleging that agreement was "never reduced to writing").

In other words, "an essential element" of the alleged conspiracy is that it was unwritten. *Allan Constr.*, 851 F.2d at 1529. Deceit was always the beating heart of this "non-ink-to-paper" agreement. *See* Majority Op. at 23 (recognizing the "obvious illegality of [the defendants'] no-poach agreement").

Look no further than what the majority relies on to revive the plaintiffs' claims. The majority recounts the multitude of witnesses who verified "the existence of a 'non-ink-to- paper' agreement" between the defendants that they "would not poach from each other." *Id.* at 18 (cleaned up); *see also id.* at 7 ("Several of the interviewees described the conspiracy as a 'gentlemen's agreement.'" (cleaned up)); *id.* at 18 ("Managers with hiring authority repeatedly and independently confirmed the existence of an industry-wide 'gentlemen's agreement.'" (cleaned up)).

The majority also credits the plaintiffs' "claim that 'at least one witness' verified each [defendant's] 'adherence to the industry's no-poach regime.'" *Id.* at 18 (cleaned up). And in pleading fraudulent concealment, the plaintiffs emphasize that their claims were "not time-barred because [the defendants] affirmatively concealed the existence, true nature, and scope of their industry-wide 'gentlemen's agreement.'" J.A. 95 ¶ 204.

While we're bound to take those allegations as true at this stage, they all go to the defendant's alleged *conspiracy*, which, again, is an "*unwritten 'gentlemen's agreement*'" not to recruit from one another. J.A. 41 ¶ 1 (emphasis added). It follows then that broad evidence that the conspiracy was oral or se-

cret or unwritten or understood among the defendants shows no more than the "inherently deceptive" nature of the conspiracy.[5] *Marlinton*, 71 F.3d at 123 n.1. Simply put, the vase was always fake.

To be sure, the affirmative acts standard allows "the plaintiff's proof [to] include acts of concealment involved in the antitrust violation itself." *Marlinton*, 71 F.3d at 122. But here, the acts of concealment and the antitrust violation itself, at least as alleged by the plaintiffs and described by the majority, exist in concentric circles of evidence supporting the defendants' "decision to participate in a secret conspiracy." *Scharpf v. Gen. Dynamics Corp.*, No. 1:23-cv-10372, 2024 WL 1704665, at *8 (E.D. Va. Apr. 19, 2024).

And while it's also true that a general anticompetitive or wage-fixing scheme is "not inevitably deceptive or concealing," as we've found necessary for the "application of the self-concealing standard," *Marlinton*, 71 F.3d at 123, the plaintiffs have chosen to allege a scheme that *is* self-concealing. By casting the defendants' antitrust scheme repeatedly and forcefully as an

[5] The majority cursorily references the plaintiffs' allegations (stemming from the testimony of a single third-party recruiter) that unidentified "hiring managers" used broadly by the "[D]efendants[]" "often use[d] coded language to discuss the set of competitors whose employees the hiring manager did not want to recruit." J.A. 46 ¶ 12; *see also* Majority Op. at 7. The majority also mentions the plaintiffs' allegation that "the agreement was enforced 'through private phone calls between high-level executives and official retribution.'" Majority Op. at 7 (quoting J.A. 101 ¶ 220). While these allegations are more like "affirmative acts" of concealment by the defendants, they are inadequate under the particularity requirements of Rule 9(b). *Infra* p.36. The plaintiffs provide no information about when, or among whom, this "coded language" was used or these "private phone calls" were made, or how either related to the alleged conspiracy.

"unwritten, 'gentlemen's agreement,'" the plaintiffs effectively admit that its "deceptive aspect" was *part of* the conspiracy, and not "intended solely to 'cover up' the illegal act," *Marlinton*, 71 F.3d at 123 (quoting *Allan Constr.*, 851 F.2d at 1530). *See also Royal Canin U.S.A., Inc. v. Wullschleger*, 604 U.S. 22, 35 (2025) ("Begin from the beginning: The plaintiff is the master of the complaint[] and therefore controls much about her suit." (cleaned up)).

In short, the district court was right to reject the plaintiffs' argument that the defendants' "unwritten rule" was an affirmative act of concealment.[6] *Id.*

III.

Beyond misapplying the affirmative acts standard, the majority ignores contrary precedent based on perceived "ambiguities," Majority Op. at 15, or "uncertainty," *id.* at 17, in the cases' holdings. For example, my friends reject application of our seminal holding on fraudulent concealment in *Pocahantas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987). There, we explained that a defendant's "failure to own up to illegal conduct" was insufficient to toll the statute of limitations. *Id.* at 218–19. But to the majority, because *Pocahantas* didn't "expressly adopt" one of the three fraudulent concealment standards, Majority Op. at 15, its holding on the in-

[6] The plaintiffs trot out other allegations that they say show fraudulent concealment, including the defendants' "general public and non-public representations" about their "competitive" compensation and active recruitment; their "general statements that they comply with antitrust laws and are essentially law-abiding and ethical"; and their non- solicitation clauses in permissible teaming agreements that were allegedly "'cover' for the unlawful no-poach scheme." *Scharpf*, 2024 WL 1704665, at *7. The majority doesn't address these alternative claims, but, like the district court, I would find them unpersuasive.

sufficiency of the failure-to-admit-wrongdoing allegations is somehow "ambiguous," *id.* at 14.

Likewise, the majority brushes off our decision in *Robertson v. Sea Pines Real Estate Cos.*, where we affirmed a district court's conclusion that "plaintiffs failed to 'allege affirmative acts of concealment or affirmative steps to mislead' and that [the] 'plaintiffs' allegations amount[ed] to no more than a failure to admit wrongdoing, which does not suffice.'" 679 F.3d 278, 291 n.2 (4th Cir. 2012) (quoting *Pocahantas*, 828 F.2d at 218– 19).[7] The alleged affirmative acts that the district court rejected included "meeting secretly, giving pretextual reasons for the costs of real estate services, and agreeing at meetings not [t]o discuss their illegal scheme publicly." *Boland v. Consol. Multiple Listing Serv., Inc.*, 868 F. Supp. 2d 506, 517–18 (D.S.C. 2011).

But because we summarily affirmed the district court's decision in a footnote, the majority claims "uncertainty" as to what we "properly concluded," and so rejects the case without further discussion. Majority Op. at 17. Tellingly though, as the district court here explained, *Robertson* "specifically affirmed the [*Boland*] court's conclusion," which it quoted from *Pocahantas*, that the plaintiffs' allegations "amount[ed] to no more than a failure to admit wrongdoing, which does not suffice [for fraudulent concealment]." *Scharpf*, 2024 WL 1704665, at *6 (quoting *Robertson*, 679 F.3d at 291 n.2). All three cases (*Pocahantas* and *Boland*/*Robertson*) deserve more respect than the majority gives them.

My colleagues also substantially relax the required showing under Rule 9(b) that the plaintiffs must sat-

[7] *Robertson* consolidated interlocutory appeals from two related class action complaints.

isfy to plead any affirmative acts of fraudulent concealment. They do so by allowing the plaintiffs to repackage overlapping and general descriptions of a single conspiracy, rather than requiring them to allege discrete and particularized acts by the defendants to conceal the conspiracy. Majority Op. at 18–19.

The majority repeats that unnamed "industry insiders" "acknowledge[d] the existence of the no-poach agreement," although those insiders made no mention of when— or among whom—that agreement was made. *Id.* at 18. And they cite the—again, largely unidentified—"interviewees" who "support the proposition that [the defendants] carefully avoided putting their alleged no-poach agreement in writing," *id.*, along with the "[m]anagers with hiring authority" who "confirmed the existence of an industry-wide 'gentlemen's agreement,'" *id.* at 18. Around and around we go.

Worse yet, my friends excuse the plaintiffs from having to show any diligence whatsoever in pursuing claims in an alleged decades-long conspiracy, *id.* at 24–26, despite the plaintiffs' own allegations that collusion within the industry may have caused a "shortage of naval engineers," a lack of "labor mobility," and "relatively uniform compensation structures" that were "far below what would be available in a competitive market," *id.* at 5 (citing complaint).

The majority doesn't simply accept the plaintiffs' allegations as true; it does the plaintiffs' work for them. I agree that the law does, and should, prevent "conspirators who cunningly avoid creating evidence of their conspiracy" from escaping liability for their illegal conduct. *Id.* at 17. But plaintiffs alleging a conspiracy don't get a free pass on time- barred claims. In our circuit—at least for now—they must show that the defendants affirmatively acted to con-

ceal the conspiracy. Otherwise, we needn't bother having a statute of limitations defense at all.

Plaintiffs failed to make the requisite showing for fraudulent concealment. And the majority compounds that omission by applying the wrong standard in evaluating the fraudulent concealment claims. The district court correctly dismissed the complaint.

Because the majority holds otherwise, I respectfully dissent.

APPENDIX B

No. 23-1372

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

SUSAN SCHARPF, on behalf of herself and all others similarly situated, et al.,

Plaintiffs,

v.

GENERAL DYNAMICS CORP., et al.,

Defendants.

Signed April 19, 2024

MEMORANDUM OPINION AND ORDER

Anthony J. Trenga, Senior United States District Judge

In this antitrust putative class action, Defendants[1] have filed a Joint Motion to Dismiss for Failure to State a Claim, [Doc. No. 178] (the "Joint Motion"), and, separately, various individual Motions to Dis-

[1] The Defendants are General Dynamics Corp., Bath Iron Works Corp., Electric Boat Corp., General Dynamics Information Technology, Inc., Huntington Ingalls Industries, Inc., Newport News Shipbuilding and Dry Dock Co., Ingalls Shipbuilding, Inc., HII Mission Technologies Corp., HII Fleet Support Group LLC, Marinette Marine Corporation, Bollinger Shipyards, LLC, Gibbs & Cox, Inc., Serco, Inc., CACI International Inc., The Columbia Group, Inc., Thor Solutions, LLC, Tridentis, LLC, BMT International, Inc., Technology Financing, Inc., and Faststream Recruitment Ltd. BMT and Technology Financing have been dismissed from this action, [Doc. No. 200], and Plaintiffs have filed a notice of settlement with Faststream and a motion for the Court to preliminarily approve of that settlement, certify a settlement class, and appoint settlement class counsel. [Doc. Nos. 201, 219].

miss for Failure to State a Claim, [Doc. Nos. 180, 181, 184, 187, 189, 191, 193] (the "Individual Motions"). For the reasons stated below, the Joint Motion is GRANTED on the grounds that the claims by the named plaintiffs are barred by the applicable statute of limitations.[2]

I. BACKGROUND

In this antitrust action, Plaintiffs Susan Scharpf and Anthony D'Armiento (together, "Plaintiffs") brought suit on October 6, 2023 on behalf of themselves individually and, under Federal Rule of Civil Procedure 23(a), (b)(2), and (b)(3), on behalf of a class "consisting of all persons employed as naval architects and/or marine engineers in the United States by Defendants" (the "Class"). [Doc. No. 1] at 1 (the "Complaint").[3] Scharpf worked in the alleged relevant market from 2007 to 2013, first, as a naval architect at Alion Science & Technology Corporation from 2007 to 2009, then, as a naval marine engineer with Computer Sciences Corporation from 2009 to 2011, and finally, as a marine engineer with Gibbs & Cox, Inc. from 2011 to 2013. *Id.* ¶ 19. D'Armiento worked in the alleged relevant market from 2002 to 2004 when

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[2] Because the Court will grant the Joint Motion, it does not need to reach the Individual Motions, which will be denied as moot.

[3] More specifically, the Complaint purports to include in the proposed Class "[a]ll naval architects and marine engineers employed by Defendants (except Defendant Faststream Recruitment Ltd.), their predecessors, subsidiaries, and/or related entities in the United States at any time from January 1, 2000, until Defendants' unlawful conduct ceases." *Id.* ¶ 227. The proposed Class excludes "Defendants' executives, human resources managers, and human resources staff; Defendants, co-conspirators, and any of their subsidiaries, predecessors, officers, or directors; and federal, state, or local governmental entities." *Id.* ¶ 228.

he was employed as a naval architect with Northrop Grumman Ship Systems[4] from 2002 to 2004. *Id.*, 20.

The Complaint alleges as its sole cause of action a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, which provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Id.

Briefly summarized, the Complaint alleges in support of that Section 1 claim that Defendants—who comprise approximately "75 percent of the relevant market"—entered into a conspiracy in restraint of trade that consists of an " 'unwritten gentlemen's agreement' not to affirmatively recruit one another's naval engineers" or naval architects, *id.* ¶¶ 244, 242, and that this agreement "suppressed wages for naval engineers below competitive levels, depriving Plaintiffs and the Class of hundreds of millions of dollars in compensation," *id.* ¶ 1.

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[4] Northrop Grumman Ship Systems was a former division of Northrop Grumman Corporation that has since been spun off into a new entity named "Huntington Ingalls Industries, Inc." *Id.* ¶ 20.

A. The Naval Industry

Plaintiffs' Section 1 conspiracy claim pertains only to that part of the naval industry involved with the design and manufacture of the United States "public fleet," that is, vessels owned or operated by federal and state governments or agencies, which are built domestically, while most commercial vessels are built overseas. *Id.* ¶ 116. The domestic shipbuilding industry generates approximately $30 billion a year, nearly 80% of which is derived from military shipbuilding, maintenance, and repairs, and employs approximately 108,000 workers. *Id.* ¶ 117. Thus, the country's major and minor shipbuilding yards rely predominantly on contracts with the U.S. military. *Id.* ¶ 116. As of 2020, about 10,000 of those workers were employed as naval architects or marine engineers. *Id.* ¶ 121.

"Naval architects" design vessel hulls and are responsible for a vessel's overall stability and performance, while "marine engineers" design onboard systems such as propulsion mechanics, electrical systems, water purification, heating systems, and air conditioning. *Id.* ¶ 122. While personnel within these two categories are employed under various titles, the Complaint refers to all of them as "naval engineers." *Id.* Naval engineers earn a median salary of $100,000, and generally must have a bachelor's degree in engineering and U.S. citizenship; but some roles additionally require either master's degrees, doctoral degrees, other specialized training, or security clearances. *Id.* ¶¶ 123-25. Most of the naval engineers in the United States work for (1) shipbuilders, (2) dedicated engineering consultancies, or (3) the federal government directly. *Id.* ¶¶ 127-31. Naval engineering skills are highly transferable, and consequently, Defendants are "horizontal competitors" in this labor market for the same pool of talent. *Id.* ¶¶

132-33. According to the Complaint, given that limited pool of talent, together with job characteristics that ordinarily promote job mobility such as at-will employment agreements and the industry's geographic concentration, one would expect a competitive environment in which Defendants would "headhunt" experienced candidates, but they did not do so because of their no-poach conspiracy. *Id.* ¶ 126.

The Complaint further alleges that the nature of the domestic ship-building industry encourages the type of anticompetitive conduct at issue here. In that regard, construction projects in the industry typically require collaborative participation from a plethora of contractors, subcontractors, and firms, *see id* ¶¶ 119, 129; thus, consultancies and shipbuilders often work together across multiple projects, *id.* ¶ 137. As described in the Complaint:

> This repeat-player dynamic encourages close and cooperative inter-firm relationships that extend to the individual level—so much so that one industry veteran described the various firms as "allied places." It also ensures that competing firms' fates are bound to each other by networks of obligation and favoritism that provide each firm with many opportunities to help friends and punish rivals who are perceived as competing "out of bounds."

Id. This environment also produces industry groups, conferences, and other regular events at which competitors are free to "interact privately without any digital record." *Id.* ¶ 138. Moreover, industry executives are geographically concentrated in the Washington, D.C., Northern Virginia, and East Coast areas, which further "facilitated Defendants' no-poach conspiracy." *Id.* ¶¶ 139-40.

B. The No-Poach Conspiracy

The Complaint alleges that, though the "origins [of the conspiracy] are obscure," all major industry players had joined in the conspiracy by 2000, *id.*, ¶ 160, and the conspiracy has continued despite "sales, spinoffs, reorganizations, and other corporate events during the Class Period" because business units maintained continuity through legacy names, personnel, operating practices, and culture. *Id.* ¶¶ 160-61.

In support of Plaintiffs' claim that a conspiracy was formed and continues to this day, the Complaint alleges the statements of a wide range of industry participants:

> Managers with hiring authority repeatedly and independently confirmed the existence of an industry-wide "gentlemen's agreement," using that term, not to actively poach from competitors. Another senior employee conveyed that a company that had broken the rules was "not supposed to do that." Each Engineering Defendant in this action is tied to the conspiracy through the testimony of at least one witness who verified the party's adherence to the industry's no-poach regime.

Id. ¶ 142. The Complaint also cites similar statements by several other unnamed witnesses. *See, e.g., id.* ¶¶ 143, 146-48, 150-58. Moreover, Plaintiffs allege that each of the Defendant entities or business units were connected to the conspiracy by at least one witness who either (1) named the individual Defendant as a part of the conspiracy, (2) discussed how the conspiracy related to an individual seeking to change employment in the industry, or (3) acknowledged that the Defendant had a policy or practice of not recruiting competitors' employees. *Id.* ¶ 159.

A main feature of the alleged conspiracy is that the Defendants actively avoided recruiting from other Defendants' naval engineers, except when naval engineers made the initial approach to a Defendant, in which case Defendants could and did hire them. *Id.* ¶ 161. "No Engineering Defendant, much less *all Engineering Defendants*, would arrive at such a combination of practices independently without a mutual understanding that the other Engineering Defendants would restrict themselves to the same policies."[5] *Id.* ¶ 162. Moreover, according to one witness, "[t]here was so much more demand [for employees] than there was talent," *id.* (second alteration in original), and thus, the Complaint alleges, Defendants should have been engaged in a "war for talent in which Defendants offered regular promotions and pay increases, attempted to lure talent away from rivals, and matched offers from competitors trying to do the same," *id.* ¶ 163. "[T]he only explanation for firms' parallel failure to actively recruit from competitors is an unlawful agreement," *id.* ¶ 164, and the following "plus factors" indicate an unlawful conspiracy rather than merely parallel action based on independent decision making:

(1) high barriers to entry;

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[5] The Complaint defines "Engineering Defendants" as "the group of business units operated by Defendants other than Faststream Recruitment Ltd.—i.e., the units that employ or employed naval engineers during the Class Period." *Id.* ¶ 22. The Complaint uses "each Engineering Defendant" to refer to "such functional business unit that exists or existed with an independent identity at the relevant time(s)." *Id.* And the Complaint uses "All Engineering Defendants" to "refe[r] to all such business units that exist or existed with an independent identity at the relevant time(s)." *Id.*

(2) shared financial incentives to maintain low salaries industry-wide;

(3) shared pressure from government customers to keep costs low;

(4) extensive repeat-player working relationships among competitors, with opportunities for a range of informal punishments that can be used to enforce the unlawful no-poach agreement;

(5) social ties between key personnel, encouraging trust and cooperation among competitors;

(6) opportunities to collude at industry events, social events, and frequent informal meetings among key personnel; and

(7) a culture of secrecy that insulates the industry from rigorous oversight and enables collusion.

Id. ¶ 166-75.

Defendants are also alleged to have participated in the conspiracy by sharing sensitive compensation information, both at in-person events, *id.* ¶¶ 178-81, and through third parties such as Faststream, *id.* ¶¶ 182-83. This information sharing scheme "enabled Defendants to confirm that their no-poach agreement was continuing to have its desired effect of suppressing compensation and that their competitors' compensation was not indicative of true competition for labor." *Id.* ¶ 183. Notably, this information was not provided to Defendants' employees. *Id.* ¶ 182.

Plaintiffs also allege several ways in which the Defendants concealed their conspiracy, specifically, that Defendants (1) avoided putting the alleged agreement in writing, *id.* ¶ 205; (2) entered pretextual teaming agreements that contained limited no-hire clauses,

id. ¶ 206; (3) represented that they offer "competitive" compensation, *id.* ¶¶ 207-08; (4) made "public and private" representations to "direct attention away" from the alleged conspiracy, such as one Defendant's reference to a "grow our own" workplace development approach, *id.* ¶ 209; (5) represented that they adhere to ethical standards, federal laws, and antitrust laws in particular, *id.* ¶¶ 210-15; (6) represented that they preserve confidential business and employee information, *id.* ¶ 216; and (7) represented that they actively recruit potential employees, *id.* ¶ 217.

II. LEGAL STANDARD

Under Rule 12(b)(6), "a complaint must be dismissed when a plaintiffs allegations fail to state a claim upon which relief can be granted." *Adams v. NaphCare, Inc.*, 244 F. Supp. 3d 546, 548 (E.D. Va. 2017). In addressing a Rule 12(b)(6) motion, a court must assume the truth of all facts alleged in the complaint and construe the factual allegations in favor of the plaintiff. *Robinson v. Am. Honda Motor Co.*, 551 F.3d 218, 222 (4th Cir. 2009). However, to survive a motion to dismiss, the facts alleged in the complaint "must be enough to raise a right to relief above the speculative level" and "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). "[A] plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (internal quotation marks and citations omitted). Dismissal of a complaint is appropriate when the "well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). While the well-pleaded facts within a complaint are considered by the Court to be true, legal conclusions

are not afforded the same presumption. *Id.* at 678. Further, the Court may consider the assertion of the statute of limitations as an affirmative defense pursuant to Federal Rule of Civil Procedure 12(b)(6) "if the time bar is apparent on the face of the complaint." *Dean v. Pilgrim's Pride Corp.*, 395 F.3d 471, 474 (4th Cir. 2005); *see also Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (noting that it is appropriate to rule on an affirmative statute of limitations defense "in the relatively rare circumstances where facts sufficient to rule on an affirmative defense are alleged in the complaint").

III. ANALYSIS

In the Joint Motion, Defendants seek dismissal based on the statute of limitations.[6] [Doc. No 178-1] at 10; *see* 15 U.S.C. § 15b. As alleged in the Complaint, the Plaintiffs' employment and participation in the relevant market ended no later than 2004 (as to D'Armiento) and 2013 (as to Scharpf). [Doc. No. 1] ¶¶ 19-20. The expiration of the Sherman Act's applicable four-year statute of limitations as to both Plaintiffs, without any tolling, is therefore clear from the face of the Complaint. Plaintiffs contend, however, and the Defendants dispute, that the Complaint sufficiently alleges fraudulent concealment to toll the statute of limitations.[7]

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[6] Defendants also seek dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Given the Court's dismissal based on the applicable limitations period, the Court will not rule on this asserted alternative ground for dismissal.

[7] While the Complaint also raises the continuing violation doctrine to toll the statute of limitations, *see Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997), it does so in reference to the interests of potential class members, *see* [Doc. No. 1] at ¶ 202; and Plaintiffs concede that the doctrine does not relate to acts prior to the last four years. [Doc. No. 202] at 42. Therefore, it

A. Fraudulent Concealment in the Fourth Circuit

To plead fraudulent concealment, Plaintiffs must sufficiently allege that "(1) the [Defendants] fraudulently concealed facts which are the basis of a claim, and that (2) the [Plaintiffs] failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 218 (4th Cir. 1987). Although the circumstances constituting fraudulent concealment, as with all allegations of fraud, must be pleaded with particularity, *see* Fed. R. Civ. P. 9(b), the Fourth Circuit has recognized that, "[i]n cases involving alleged fraud by omission or concealment, it is well-nigh impossible for plaintiffs to plead all the necessary facts with particularity, given that those facts will often be in the sole possession of the defendant." *Corder v. Antero Res. Corp.*, 57 F.4th 384, 402 (4th Cir. 2023). Accordingly, "plaintiffs may partly rely on information and belief without running afoul of Rule 9(b)" as long as they "state the factual allegations that make their belief plausible." *Id.* However, "this relaxed standard 'does not *eliminate* the particularity requirement.' " *Id.* (quoting *Devaney v. Chester*, 813 F.2d 566, 569 (2d Cir. 1987)).

In a series of cases, the Fourth Circuit has discussed the sufficiency of factual allegations for the purpose of tolling based on fraudulent concealment. In *Pocahontas*, the plaintiff sued various coal-mining

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appears to be undisputed that the named Plaintiffs do not allege that the continuing violation doctrine applies to their individual claims. As such, "[Plaintiffs'] only hope is to invoke fraudulent concealment doctrine to start the limitations period later than [four years prior to the instatement of the action]; if this argument fails, there is no need to reach the others." *GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170, 177 (4th Cir. 2007).

companies after the statute of limitations had expired for, as is relevant here, price-fixing under the Sherman Act.[8] *Id.* In an effort to avoid dismissal of the action as untimely, the plaintiff argued that the defendants had "employed techniques of secrecy" to conceal the conspiracy. In support of that claim, plaintiffs pointed to the defendants' response when asked why the price for delivered coal was so low and why the defendants refused to accept certain deliveries of coal; that is, rather than admit the conspiracy, the defendants lied. *Id.* at 218; *see Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 123 (4th Cir. 1995) (discussing *Pocahontas).* Explaining that "[i]t can hardly be imagined that illegal activities would ever be so gratuitously revealed," *Pocahontas*, 828 F.2d at 219, the Fourth Circuit dismissed as "sophistry" the plaintiff's argument that such a "failure to own up to illegal conduct" in response to a "timid inquiry" was enough to toll the statute of limitations. *Id.* at 218-19.

In *Marlinton*, the Fourth Circuit formalized its approach to fraudulent concealment. There, food store plaintiffs alleged that several large dairy defendants had concealed their conspiracy to fix milk prices. 71 F.3d 121. The Fourth Circuit rejected the "separate and apart" standard, which "consider[s] only those acts of concealment completed *subsequent in time* to the wrong," *id.* at 125 (quoting *Texas v. Allan Construction Co.*, 851 F.2d 1526, 1532 (5th Cir. 1988)), and held that the proper standard for such claims is the "intermediate, affirmative acts" standard, which requires plaintiffs to provide evidence of affirmative

[8] The plaintiff theorized that the defendants had conspired to monopolize the metallurgical coal trade in certain West Virginia counties, thereby eliminating the plaintiff (a competing contract coal miner) from the market. 828 F.2d at 215.

acts of the defendants' concealment but allows for the consideration of conduct both before and after the completion of the conduct constituting the offense.[9] 71 F.3d at 125.

In *Robertson v. Sea Pines Real Estate Companies, Inc.*, 679 F.3d 278 (4th Cir. 2012), *aff'g sub nom. Boland v. Consolidated Multiple Listing Service, Inc.*, 868 F. Supp. 2d 506 (D. S.C. 2011), the plaintiffs alleged a conspiracy between several defendants to restrain competition and raise prices for real estate services. *Boland*, 868 F. Supp. 2d at 509. The plaintiffs argued that they had adequately pleaded fraudulent concealment by alleging "acts of concealment such as meeting secretly, giving pretextual reasons for the costs of real estate services, and agreeing at meetings" to not discuss the conspiracy publicly. *Id.* at 517–18. The district court rejected these allegations as insufficient under Rule 9(b), finding, as the Fourth Circuit did in *Pocahontas*, that such allegations "amount to no more than a failure to admit wrongdoing, which does not suffice." *Id.* at 518. On

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[9] *Marlinton* also suggested that *Pocahontas* did not exclude the possibility of a third, "self-concealing" standard, which would permit a plaintiff to satisfy the "affirmative acts" element of fraudulent concealment simply by demonstrating that the underlying antitrust violation was inherently deceptive. *Id.* at 123 n.1. Ultimately, the Fourth Circuit held that the "intermediate, affirmative acts" standard was applicable because "[a]lthough [price-fixing] is generally secretive, it need not be so." *Id.* A later decision clarified that "[t]he self-concealing standard is only proper when deception or concealment is a necessary element of the antitrust violation." *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 541 n.24 (4th Cir. 1997). As far as the Court could determine, no court in this circuit has applied the "self-concealing" standard; in any event, Plaintiffs and Defendants appear to agree that the intermediate, affirmative acts standard applies here. *See* [Doc. No. 1] ¶ 204-26; [Doc. No. 178-1] at 13–19.

appeal, the Fourth Circuit specifically affirmed the district court's conclusion on this issue. *Robertson*, 679 F.3d at 291 n.2 (citing *Pocahontas*, 828 F.2d at 218-19).

Finally, in *Edmonson v. Eagle National Bank*, 922 F.3d 535, 553 (4th Cir. 2019), the Fourth Circuit applied *Marlinion's* "intermediate, affirmative acts" standard to allegations that the defendants had employed "trick[s] or contrivance[s]" to conceal a kickback scheme prohibited by the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq*. The Fourth Circuit found that the plaintiffs had sufficiently pleaded affirmative acts constituting a fraudulent concealment of their scheme when they alleged with sufficient particularity under Rule 9(b) that the defendants (1) "created and used 'sham' entities to channel the allegedly unlawful cash kickbacks"; (2) entered sham, "back-dated" agreements to conceal the scheme from investigators; and (3) omitted reporting the kickback payments on plaintiffs' settlement statements, "notwithstanding that governing regulations *required* reporting such payments." *Id.* at 553-54.

B. Plaintiffs' Allegations Do Not Sufficiently Plead Affirmative Acts of Concealment

Relying on the Fourth Circuit's pronouncements regarding the fraudulent concealment doctrine in *Edmonson* and *Marlinton*, and the relaxed pleading standard for fraud under Rule 9(b) as set out by *Corder*, Plaintiffs point to the following categories of allegations in their Complaint that reflect how the Defendants affirmatively concealed their "no-poach" conspiracy:

(1) Defendants agreed to keep the alleged agreement secret, *see, e.g.*, [Doc. No. 1] ¶ 205 (alleg-

ing Defendants avoided putting the alleged agreement in writing);

(2) Defendants made general public and non-public representations that they offer "competitive" compensation and actively recruit employees, *see, e.g., id.* ¶¶ 207-09 (alleging Defendants represented that they offer "competitive" compensation); *id.* ¶ 217 (alleging Defendants represented that they actively recruit potential employees);

(3) Defendants made general statements that they comply with antitrust laws and are essentially law-abiding and ethical, *see, e.g., id.* ¶¶ 207-17 (alleging Defendants failed to admit illegal conduct in web pages, published reports, and codes of conduct); *id.* ¶¶ 210-15 (alleging Defendants represented that they adhere to ethical standards, federal laws, and antitrust laws in particular); *id.* ¶ 216 (alleging Defendants represented that they preserve confidential business and employee information); and

(4) Defendants included non-solicitation clauses in teaming agreements as "cover" for the unlawful no-poach scheme, *see, e.g., id.* ¶ 206.

The holdings and pronouncements in *Pocahontas, Marlinton, Boland* and *Robertson*, and *Edmonson* require a rejection of all four of these categories of allegations as insufficient to plead fraudulent concealment at the motion to dismiss stage.

In *Boland* and *Robertson*, the district court and the Fourth Circuit rejected as insufficient to toll the statute of limitations plaintiffs' allegations that defendants (1) met secretly, (2) gave pretextual reasons for real estate costs, and (3) agreed to keep secret the nature of their communications to conceal their illegal

agreement. *See Boland*, 868 F. Supp. 2d at 518; *Robertson*, 679 F.3d at 291 n.2. The allegations here that Defendants agreed to keep the conspiracy secret (category one) fare no better than those in *Boland* and *Robertson;* and while Plaintiffs here allege certain "pretextual reasons" and public misrepresentations (categories two and three) with more specificity than the plaintiffs in *Boland* and *Robertson*, these allegations are, in substance, claims that Defendants lied and "fail[ed] to own up to illegal conduct." *See Pocahontas*, 828 F.2d at 218. In fact, these statements have even less connection to the alleged conspiracy than the allegations in *Pocahontas* regarding the defendants' purportedly false responses to the plaintiff's inquiry. *See id.* As the Fourth Circuit explained in *Marlinton*, it is not enough to allege that "the defendants ... lied" upon "general inquiry." *Marlinton*, 71 F.3d at 123. Here, the allegations are that Defendants simply failed to admit or disclose their conspiracy without *any* inquiry of them at all. As such, the allegations are insufficient to plead affirmative acts of concealment.

Plaintiffs attempt to distinguish *Boland* by pointing to an allegation in the underlying complaint that the defendants had agreed "to develop, implement, enact, and facilitate the enforcement of unlawful CMLS Rules, regulations, by-laws, policies, and procedures." *See Boland*, 868 F.Supp.2d at 513. Plaintiffs argue that the Fourth Circuit's affirmance of the district court's statute of limitations ruling was therefore based on the district court's recognition that the challenged agreements were not *affirmatively* concealed, but rather were "memorialized," "adopted in non-public meetings," and simply "not publicized." [Doc. No. 202] at 32-33. In other words, the challenged agreements were presumably discoverable,

while the "gentlemen's agreement" here was unwritten, concealed and therefore undiscoverable. *See id.* at 33.

This argument falls short. First, rather than relying on the memorialized nature of the challenged agreements for its rejection of any tolling, as Plaintiffs suggest, the district court in *Boland* focused on whether the plaintiffs' allegations that the defendants "used means and methods designed to avoid detection" sufficiently alleged affirmative acts of concealment and concluded that they did not.[10] *Boland*, 868 F. Supp. 2d at 518. Second, to the extent that Plaintiffs argue that the decision to participate in a secret conspiracy is *itself* an affirmative act, *see* [Doc. No. 1] ¶ 204 (asserting as an affirmative act that "Defendants had established an 'unwritten rule' that no one Defendant would affirmatively recruit the other's naval engineers"), the Fourth Circuit in *Marlinton* explained that antitrust violations that are not "inherently deceptive" are subject to the "intermediate, affirmative acts" standard, not the "self-concealing" standard. *Marlinton*, 71 F.3d at 123 n. 1. As this Court has explained, the "self-concealing" standard does not apply here, nor do Plaintiffs contend that it does, *see supra* note 9, and they therefore may not

[10] Similarly problematic is Plaintiffs' apparent reliance, *see* [Doc. No. 202] at 33, on *Robertson's* recognition that the "concerted conduct" in that case was "both plainly documented and readily available so that plaintiffs can describe the factual content of the agreement without the benefit of extended discovery." *Robertson*, 679 F.3d at 290. But that aspect of the decision related to whether the plaintiffs had pleaded facts sufficient to establish the *conspiracy itself. See id.* at 288 (holding that "the complaints satisfied the pleading requirements set forth in *Twombly*"). Here, by contrast, the question is whether Plaintiffs point to *affirmative acts* that concealed facts that are the basis of their claim.

succeed on their claim that, by the creation of and participation in a secret conspiracy, the Defendants committed an act of concealment that tolls the statute of limitations. At bottom, the first three categories of allegations are simply alleged failures to admit wrongdoing, and as such, are insufficient to plead affirmative acts under Rule 9(b).

Plaintiffs are therefore left with their argument that the no-hire clauses in the teaming agreements are "sham provisions" that constitute affirmative acts of concealment. *See* [Doc. No. 1] ¶ 206. In that regard, Plaintiffs contend that the no-hire clauses are "shams" because they are "duplicative"; that is, they "occlude the conspiracy by presenting an explanation for the industry's lack of recruitment in which the teaming agreement tail wags the no-poach dog."[11] [Doc. No. 202] at 35.

Plaintiffs' no-poach dog won't hunt. In *Edmonson*, the underlying complaints alleged that the "sham" business entities were used "for the *sole* purpose of receiving the [kickback] payments," and that those payments were further disguised by "sham" agreements that set a fee schedule that was not followed when payments were made, and under which the referring brokers performed no services. *Edmonson*,

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[11] Plaintiffs also allege that the no-hire clauses "misled Plaintiffs" by "creat[ing] the false impression that workers could be solicited and recruited by rivals who were *not* working on their projects." [Doc. No. I] ¶¶ 206, 13. But the Complaint does not allege *which* Defendants entered the teaming agreements containing these no-hire clauses, or that the Plaintiffs were even aware of such agreements when working for certain Defendants between 2002 and 2013. *See* [Doc. No. 1] ¶¶ 19-20. In short, there are no allegations as to how the Plaintiffs were misled, and their conclusory claim thus fails to "state the factual allegations that make their belief plausible." *Corder*, 57 F.4th at 402.

922 F.3d at 542 (emphasis added). But the no-hire clauses alleged here have none of the features of the "sham" entities and instruments in *Edmonson*. *See Sham*, Black's Law Dictionary (11th ed. 2019) ("A false pretense or fraudulent show; an imposture. 2. Something that is not what it seems; a counterfeit."). Indeed, these no-hire clauses-whose lawfulness Plaintiffs do not challenge—plainly serve the presumably valid purpose of prohibiting solicitation for the duration of a teaming agreement. *See* [Doc. No. 1] ¶ 13 ("These written teaming agreements were used to cover up the Defendants' unlawful 'gentlemen's agreement' with more credibly defensible project-based limitations."). Perhaps more importantly, there is no allegation that these Plaintiffs were "diverted away" from litigation by, or were even aware of, these provisions.[12]

For these reasons, Plaintiffs have not pleaded facts sufficient to satisfy the affirmative acts element of the Fourth Circuit's fraudulent concealment doctrine, and the Complaint therefore fails to allege facts sufficient to toll the expiration of the applicable statute of limitations apparent on the face of the Complaint.[13]

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[12] Plaintiffs take the position, itself unsupported, that "reliance [on affirmative acts] is not required for this element of fraudulent concealment." *See* [Doc. No. 202] at 36. But a plaintiff's exposure to an affirmative act and its misleading effect is a core aspect of this element of the test that certainly has some aspect of exposure and reliance built into it. *See, e.g., Edmonson*, 922 F.3d at 549 (noting that the fraudulent concealment doctrine applies "where the defendant has wrongfully deceived or misled *the plaintiff*") (emphasis added) (quoting *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987)).

[13] Because the Court holds that the Plaintiffs have failed to plead facts sufficient to support the affirmative acts element, the Court does not reach the due diligence element.

IV. CONCLUSION

Accordingly, for the above reasons, it is hereby

ORDERED that the Joint Motion to Dismiss, [Doc. No. 178], be, and the same hereby is, **GRANTED;** and this action is dismissed as time-barred under the applicable statute of limitations; and it is further

ORDERED that the Individual Motions, [Doc. Nos. 180, 181, 184, 187, 189, 191, 193], be, and the same hereby are, **DENIED** as moot; and it is further

ORDERED that the Motion for Preliminary Approval of Settlement, [Doc. No. 219], be, and the same hereby is, **DENIED** as moot.

APPENDIX C

No. 24-1465

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUSAN SCHARPF; ANTHONY D'ARMIENTO, on behalf of themselves and all others similarly situated,

Plaintiffs - Appellants,

v.

GENERAL DYNAMICS CORP.; BATH IRON WORKS CORP.; ELECTRIC BOAT CORP.; GENERAL DYNAMICS INFORMATION TECHNOLOGY, INC.; HUNTINGTON INGALLS INDUSTRIES, INC.; NEWPORT NEWS SHIPBUILDING AND DRY DOCK CO.; INGALLS SHIPBUILDING, INC.; HII MISSION TECHNOLOGIES CORP.; HII FLEET SUPPORT GROUP LLC; MARINETTE MARINE CORPORATION; BOLLINGER SHIPYARDS, LLC; GIBBS & COX, INC.; SERCO, INC.; CACI INTERNATIONAL, INC.; THE COLUMBIA GROUP, INC.; THOR SOLUTIONS, LLC; TRIDENTIS, LLC; FASTSTREAM RECRUITMENT LTD.,

Defendants - Appellees.

COMMITTEE TO SUPPORT THE ANTITRUST LAWS,

Amicus Supporting Appellants.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Amicus Supporting Rehearing Petition

FILED: June 13, 2025

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 40. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk