

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

JAMES E. ZALEWSKI and DRAFTICS, LTD.,

Plaintiffs,

**1:10-cv-876
(GLS/RFT)**

v.

**T.P. BUILDERS, INC.; THOMAS PAONESSA;
ROXANNE K. HELLER; DERAVERN DESIGN &
DRAFTING; V.S. SOFIA ENGINEERING;
SOFIA ENGINEERING, PLLC; VINCENZO S.
SOFIA; CICERO BUILDING DEV., INC.; LUIGI
CICERO; SHELROC HOMES, LLC; CAPITAL
FRAMING, INC.; JOSEPH M. CLARK; CILLIS
BUILDERS, INC.; and THEODORE CILLIS III,**

Defendants.

APPEARANCES:

OF COUNSEL:

FOR THE PLAINTIFFS:

Delain Law Office, PLLC
107 North College Street
Schenectady, NY 12305

NANCY B. DELAIN, ESQ.

FOR THE DEFENDANTS:

T.P. Builders and Thomas Paonessa
Schmeiser, Olsen Law Firm
22 Century Hill Drive, Suite 302
Latham, NY 12110

ARLEN L. OLSEN, ESQ.

Roxanne Heller and DeRaven Design
Heslin, Rothenberg Law Firm
5 Columbia Circle
Albany, NY 12203

ANNETTE I. KAHLER, ESQ.
CAROLINE B. AHN, ESQ.
SUSAN E. FARLEY, ESQ.

*V.S. Sofia Engineering, Sofia
Engineering, and Vincenzo Sofia*
Sugarman, Wallace Law Firm
211 West Jefferson Street
Syracuse, NY 13202

KEVIN R. VAN DUSER, ESQ.
SAMUEL M. VULCANO, ESQ.

*Shelroc Homes, Capital Framing,
and Joseph Clark*
Harris, Beach Law Firm
One Park Place, 4th Floor
300 South State Street
Syracuse, NY 13202

JAMES R. MULDOON, ESQ.

Cillis Builders and Theodore Cillis
DeGraff, Foy Law Firm
90 State Street
Albany, NY 12207

GEORGE J. SZARY, ESQ.

Cicero Building Dev. and Luigi Cicero
NO APPEARANCE

Gary L. Sharpe
District Court Judge

MEMORANDUM-DECISION AND ORDER

I. Introduction

Plaintiffs James Zalewski and Draftics, Ltd. commenced this action for copyright infringement under the Copyright Act of 1976¹ against defendants T.P. Builders, Inc. and Thomas Paonessa (T.P. defendants);

¹17 U.S.C. § 101, *et seq.*

Roxanne Heller and DeRaven Design & Drafting (DeRaven defendants); V.S. Sofia Engineering, Sofia Engineering, PLLC, and Vincenzo Sofia (Sofia defendants); Cicero Building Dev., Inc. and Luigi Cicero (Cicero defendants); Shelroc Homes, LLC, Capital Framing, Inc., and Joseph Clark (Shelroc defendants); and Cillis Builders, Inc. and Theodore Cillis (Cillis defendants). (See 2d Am. Compl., Dkt. No. 60.) Pending are Shelroc defendants' motion to dismiss, (Dkt. Nos. 76, 77); T.P. defendants' motions to dismiss DeRaven defendants' cross-claims, (Dkt. No. 101), and motion to dismiss or, in the alternative, for summary judgment on plaintiffs' claims, (Dkt. No. 107); DeRaven defendants' motion to dismiss, (Dkt. No. 104); Cillis defendants' motion to dismiss, (Dkt. No. 106); and Sofia defendants' motion to dismiss or, in the alternative, for summary judgment, (Dkt. No. 109). For the reasons that follow, defendants' motions are granted insofar as plaintiffs' complaint is dismissed as insufficiently pled, and plaintiffs are granted limited leave to amend their complaint a third time.

II. Background

Plaintiff James Zalewski is a building designer who specializes in the architectural and floor-plan design of residential homes. (See 2d Am. Compl. ¶ 2, Dkt. No. 60.) Plaintiff Draftics is a New York corporation, of

which Zalewski is the sole shareholder. (See *id.* at ¶¶ 3, 26.) Draftics develops, drafts, and sells home designs for use in new home construction. (See *id.* at ¶ 4.)

Between 1994 and 1998, Zalewski made the following home designs: DRA210; DRA211; DRA212; DRA213; DRA216a; DRA217; DRA218; DRA219; DRA313; DRA 316; and DRA327. (See *id.* at ¶ 27.) According to Zalewski, at some point he “made one single-use license per design to [T.P. defendants] to build each of the homes Zalewski designed.” (*Id.* at ¶ 28.) Zalewski ceased doing business with T.P. defendants in 1998. (See *id.* at ¶ 33.) Since then, Zalewski has not made any assignment or transfer of copyright or “any license to use with any other contractor, builder, architect, engineer, or home designer.” (*Id.* at ¶¶ 29, 31.) Nor has Zalewski entered into any type of agreement with any person or entity “outside of the normal course of business wherein [they] license their customers (who are not parties to the present action) to build one (1) house based on one (1) of [their] designs.” (*Id.* at ¶¶ 30, 32.)

On July 16, 2010, plaintiffs commenced this action, naming ninety defendants, including the owners of record of numerous homes. (See Compl., Dkt. No. 1.) Shortly thereafter, on August 24, 2010, plaintiffs filed

an amended complaint to add an additional defendant. (See Am. Compl., Dkt. No. 11.) Acting on the court's advice, plaintiffs stipulated to the dismissal of all but the T.P. defendants, DeRaven defendants, Sofia defendants, Cicero defendants, and Shelroc defendants. (See Dkt. Nos. 47, 51, 52, 53, 56, 61, 64, 68, 85.) Plaintiffs subsequently filed a second amended complaint, which additionally included Cillis defendants. (See 2d Am. Compl., Dkt. No. 60.)

With minimal detail, plaintiffs allege that after successfully registering copyrights of their original home designs, (see *id.* at ¶¶ 35-38), the defendants unlawfully infringed on these designs. Plaintiffs seek (1) preliminary and permanent injunctive relief against all defendants; (2) actual damages under 17 U.S.C. § 504(b) for each infringement; (3) statutory damages under § 504(c) for each qualifying infringement; (4) treble damages under § 504(c)(2) for each qualifying infringement; and (5) attorneys' fees and costs under § 505. (See *id.* at 22-23.)

In the first cause of action, plaintiffs allege that T.P. defendants currently advertise homes that are being constructed or can be built in accordance with DRA210, DRA211, DRA212, DRA216a, DRA217, and DRA313. (See *id.* at ¶¶ 42-44.) Similarly, plaintiffs allege that Cicero

defendants are advertising to build homes in accordance with DRA217 on the lots available in the “Kaleen Manor” development. (See *id.* at ¶ 45.)

As to the second cause of action, plaintiffs allege that, in reliance on the DRA211 design, Cicero defendants constructed and Sofia defendants designed and drew plans for a home constructed at 9 Kaleen Drive, Ballston Spa, New York. (See *id.* at ¶ 52.) According to plaintiffs, Cicero defendants and Sofia defendants “were, upon information and belief, aware of [his] DRA211 design at the time they made the designs[,] drawings[,] and specifications for ... and [began] construction of the [DRA211 home].” (*Id.* at ¶ 55.) In like conclusory fashion, plaintiffs allege that Cicero defendants and Sofia defendants had access to the DRA211 design through the T.P. defendants’ single-use license, and that they knowingly, willfully, and intentionally participated in the infringing activities. (See *id.* at ¶¶ 56-59.)

In the third cause of action, plaintiffs allege that, based on the DRA212 design, Cillis defendants constructed and DeRaven defendants made the drawings for a home constructed at 11 Nicole Court, Clifton Park, New York. (See *id.* at ¶ 68.) Like the second cause of action, plaintiffs allege that Cillis defendants and DeRaven defendants, “were, upon

information and belief, aware of [his] DRA212 design at the time they made the design and the construction of the [DRA212 home].” (*Id.* at ¶¶ 72-73.) According to plaintiffs, Cillis defendants and DeRaven defendants had access to the DRA212 design because Thomas Cillis had received a copy of the design from Zalewski, whereby Cillis and DeRaven defendants copied the DRA212 design in preparing the architectural drawings and constructing the DRA212 home. (See *id.* at ¶¶ 74-76.) And again, plaintiffs conclusorily allege that Cillis defendants and DeRaven defendants knowingly, willfully, and intentionally participated in the infringing activities. (See *id.* at ¶ 78.) But unlike the second cause of action, plaintiffs allege that construction of the DRA212 home commenced after Zalewski obtained copyright protection of the DRA212 design. (See *id.* at ¶ 68.)

Plaintiffs’ fourth and fifth causes of action largely mirror the second. In the fourth cause of action, plaintiffs allege that T.P. defendants, Shelroc defendants, and DeRaven defendants “[j]ointly and severally, upon information and belief,” designed and constructed two homes based on the DRA217 design, the first located at 24 Arch Street, Albany, New York, and the second at 4186 Albany Street, Albany. (*Id.* at ¶¶ 87-97.) In the fifth cause of action, plaintiffs allege that, using the DRA210 design, DeRaven

defendants made the drawings for and T.P. defendants are currently constructing a home at 23A Thoroughbred Circle, Bethlehem, New York. (See *id.* at ¶¶ 106-13.)

On November 19, 2010, Shelroc defendants filed a motion to dismiss, asserting, among other things, that plaintiffs' claims are barred under the three-year statute of limitations set forth by 17 U.S.C. § 507(b). (See Shelroc Defs. Mem. of Law at 5-7, Dkt. No. 76:6.) Presented with obvious questions regarding when plaintiffs' causes of action accrued, and forecasting a flurry of motions to dismiss from the other defendants, Magistrate Judge Randolph F. Treece ordered that Zalewski submit to a deposition limited to the accrual issue. (See Dec. 7, 2010 Order, Dkt. No. 83.) On December 22, 2010, Zalewski participated in a pre-discovery deposition. (See Delain Jan. 2, 2011 Letter, Dkt. No. 90.) As expected, DeRaven defendants, Cillis defendants, T.P. defendants, and Sofia defendants then moved on Zalewski's claims. (Dkt. Nos. 104, 106, 107, 109.) T.P. defendants also moved to dismiss DeRaven defendants' cross-claims. (Dkt. No. 101.)

III. Standards of Review

The standards of review under the Federal Rules of Civil Procedure

12(b)(6) and 56 are well established and will not be repeated here. For a full discussion of the standards, the court refers the parties to its previous opinions in *Ellis v. Cohen & Slamowitz, LLP*, 701 F. Supp. 2d 215, 217-18 (N.D.N.Y. 2010) (Rule 12(b)(6)); and *Bain v. Town of Argyle*, 499 F. Supp. 2d 192, 194-95 (N.D.N.Y. 2007) (Rule 56).

In bringing a copyright infringement action, the courts in the Second Circuit are generally in agreement that a heightened pleading standard must be met. To sufficiently plead a copyright infringement claim, a plaintiff must allege: “(1) which specific original works are the subject of the copyright claim; (2) that plaintiff owns the copyrights in those works; (3) that the copyrights have been registered in accordance with the statute; and (4) by what acts during what time the defendant infringed the copyright.”

Plunket v. Doyle, No. 99 Civ. 11006, 2001 WL 175252, at *4 (S.D.N.Y. Feb. 22, 2001) (citing, inter alia, *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 36 (S.D.N.Y. 1992)); see also *Jacobs v. Carnival Corp.*, No. 06 Civ. 0606, 2009 WL 856637, at *4 (S.D.N.Y. Mar. 25, 2009); *Krasselt v. Joseph E. Seagram & Sons, Inc.*, No. 01 CV 2821, 2002 WL 1997926, at *1 (S.D.N.Y. Aug. 29, 2002); *In re “Santa Barbara Like It Is Today” Copyright Infringement Litig.*, 94 F.R.D. 105, 108 (D. Nev. 1982); *Gee v. CBS, Inc.*,

471 F. Supp. 600, 643 (E.D. Pa. 1979). At a minimum, “a plaintiff [must] plead with specificity the acts by which a defendant has committed copyright infringement.” *Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 225, 230 (S.D.N.Y. 2000).

Rule 15(a) provides that where a party seeks to amend his pleading before trial, “[t]he court should freely give leave when justice so requires.” FED. R. CIV. P. 15(a)(2). “A motion to amend should be denied only for such reasons as undue delay, bad faith, futility of the amendment, and perhaps most important, the resulting prejudice to the opposing party.” *Richardson Greenshields Sec., Inc. v. Lau*, 825 F.2d 647, 653 n.6 (2d Cir. 1987) (internal quotation marks and citation omitted). “An amendment to a pleading will be futile if a proposed claim could not withstand a motion to dismiss pursuant to Rule 12(b)(6).” *Dougherty v. Town of N. Hempstead*, 282 F.3d 83, 88 (2d Cir. 2002) (citation omitted). Accordingly, where the plaintiff submits a proposed amended complaint, “the district judge may review that pleading for adequacy and need not allow its filing if it does not state a claim upon which relief can be granted.” *Ricciuti v. N.Y.C. Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991). However, the court “should not deny leave to file a proposed amended complaint ... unless it appears

beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief” *Id.* (internal quotation marks and citation omitted).

IV. Discussion

At the threshold, the court is faced with several preliminary legal and procedural issues that must be resolved before this case can move forward. While these issues are specific to an action sounding in copyright infringement, they largely are a result of the manner in which plaintiffs have pursued this action. Particularly concerning is the fact that (1) over seventy-five defendants—many of whom were clearly not amenable to suit—have been dismissed from this action, (2) plaintiffs have already been given two opportunities to amend their complaint, and (3) plaintiffs continue to provide facially insufficient allegations and seek relief that is clearly unavailable under federal law. Stressing the continued insufficiency of plaintiffs’ pleadings, defendants contend that the second amended complaint fails to meet the heightened specificity standard required in copyright infringement actions under FED. R. CIV. P. 8. (See Shelroc Defs. Mem. of Law at 3-5, Dkt. No. 76:6; DeRaven Defs. Mem. of Law at 13-14, Dkt. No. 104:1; Cillis Defs. Mem. of Law at 4-7, Dkt. No. 106:9; T.P. Defs.

Mem. of Law at 5-6, Dkt. No. 107:1; Sofia Defs. Mem. of Law at 9-10, Dkt. No. 109:6.) In response, plaintiffs counter that they should not be held to a heightened pleading requirement, but that if a heightened standard is found to apply, the complaint satisfies—or can be amended to satisfy—such a standard. (See Pls. Resp. Mem. of Law at 7-11, Dkt. No. 89:1; Pls. 2d Resp. Mem. of Law at 14-23, Dkt. No. 122.)

The court fully concurs with defendants that plaintiffs’ second amended complaint is woefully underpled.² See *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988) (“Dismissal ... is usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised.” (citation omitted)). Nonetheless, the court will afford plaintiffs one more opportunity to amend their complaint in full compliance with the above-articulated pleading standards. Additionally, the court offers the following guiding principles and directives.

First, plaintiffs are advised that “an amended complaint supersedes

²Insofar as plaintiffs contend that a heightened pleading standard is not appropriate in copyright cases, the court highlights plaintiffs’ second amended complaint as a perfect example of why a heightened pleading standard is both appropriate and necessary. Because the complaint wholly fails to enable the court to evaluate the claims under the motion to dismiss framework, there can be no question that the complaint equally fails to provide the defendants with any meaningful notice of those claims.

the original complaint,” *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 129 S.Ct. 1109, 1122 n.4 (2009) (citation omitted), and “renders it of no legal effect,” *Int’l Controls Corp. v. Vesco*, 556 F.2d 665, 668-69 (2d Cir. 1977) (citations omitted). Consequently, the court will not consider any of the allegations contained in plaintiffs’ three prior complaints in future motion practice. Moreover, should plaintiffs wish to have any documents attached as exhibits to the complaint, those exhibits must be filed with the newly amended complaint; any already filed exhibits will not relate forward. And having reviewed the myriad exhibits filed with the original complaint, (see Dkt. Nos. 1:1-83), the court warns plaintiffs that any future filings must be clearly labeled and germane to the action and allegations in the complaint. “The [c]ourt will not search through [the] documents looking for evidence” *W. Supreme Buddha Ass’n Inc. v. Oasis World Peace & Health Found.*, No. 08-CV-1374, 2010 WL 3488134, at *1 (N.D.N.Y. Aug. 30, 2010). Nor will the court permit a dump of irrelevant documents into the record.

Second, the court is highly skeptical of whether plaintiffs have an adequate factual basis to establish each defendant’s actual involvement and susceptibility to suit. See *Peter F. Gaito Architecture, LLC v. Simone*

Dev. Corp., 602 F.3d 57, 63 (2d Cir. 2010); *Hamil Am. Inc. v. GFI*, 193 F.3d 92, 99-100 (2d Cir. 1999); *Innovative Networks, Inc. v. Young*, 978 F. Supp. 167, 176 (S.D.N.Y. 1997); *Demetriades v. Kaufmann*, 680 F. Supp. 658, 664 (S.D.N.Y. 1988). The court will not accept conclusory allegations, conjecture, or vague group pleading to serve as a basis for liability. The same goes for the relief and damages sought. In particular, while the request for injunctive relief currently stands on what appears to be infertile ground, the record evidences few—if any—bases for the statutory and treble damages and attorneys’ fees sought by plaintiffs.³

Third, as to the issues regarding accrual under the statute of limitations, the court can only provide some legal observations. There is no dispute that civil actions brought pursuant to the Copyright Act are subject to a three-year statute of limitations, which precludes any action “unless it is commenced within three years after the claim accrued.” 17 U.S.C. § 507(b); see also *Merchant v. Levy*, 92 F.3d 51, 56 (2d Cir. 1996).

However, the parties ardently dispute the scope of the term “accrued”

³In their response papers, plaintiffs essentially admit that various aspects of their relief demands are not actually available. (See Pls. Resp. Mem. of Law at 18-19, Dkt. No. 89:1.) However, plaintiffs argue that it is defendants who “misconstrued” the complaint to assert any unavailable demands. (See *id.*) Again, it is not the defendants’ misconstruction but rather the plaintiffs’ poor draftsmanship that has given rise to the current problems.

under the statute. Plaintiffs contend that accrual is governed by the “discovery rule,” such that a copyright claim begins to accrue when the plaintiff “knows or has reason to know of the injury upon which the claim is premised.” *Merchant*, 92 F.3d at 56 (citation omitted). Defendants, on the other hand, contend that the “injury rule” applies, whereby a claim accrues at the time of the infringement. Defendants’ contention is based principally on the Supreme Court’s decision in *TRW Inc. v. Andrews*, 534 U.S. 19 (2001), and derivatively on a line of decisions that have emerged from the Southern District of New York.

Historically, operating under a presumption that the discovery rule applies “when a statute is silent on the issue,” federal courts have generally followed the discovery rule in the copyright context. See, e.g., *Stone v. Williams*, 970 F.2d 1043, 1048 (2d Cir. 1992); *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 796 (4th Cir. 2001); *Daboub v. Gibbons*, 42 F.3d 285, 291 (5th Cir. 1995); *Zurick v. First Am. Title Ins. Co.*, 833 F.2d 233, 234-35 (10th Cir. 1987). In 2001, however, the Supreme Court—without deciding whether and to what extent the discovery rule presumption still endures—found it erroneous to imply a general discovery rule into the Fair Credit Reporting Act’s statute of limitations where the

statute's text and structure "evinced Congress's intent to preclude judicial implication of a discovery rule" by, inter alia, expressly providing a more limited discovery rule exception. See *TRW*, 534 U.S. at 27-28, 33.

Following the *TRW* decision, several Circuit Courts continued to apply the discovery rule in copyright cases without addressing *TRW*'s applicability. See, e.g., *Comcast of Ill. X v. Multi-Vision Elecs., Inc.*, 491 F.3d 938, 944 (8th Cir. 2007); *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 706-07 (9th Cir. 2004); *Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 621 (6th Cir. 2004); *Gaiman v. McFarlane*, 360 F.3d 644, 653 (7th Cir. 2004); cf. *Guilbert v. Gardner*, 480 F.3d 140, 149 (2d Cir. 2007) ("A federal court generally employs the 'discovery rule'" (citation omitted)). Not surprisingly, it was the district courts that began confronting the interplay of § 507(b) and *TRW*, with the majority finding that the discovery rule still applies in copyright infringement cases. See, e.g., *Frank Betz Assocs., Inc. v. J.O. Clark Constr., LLC*, No. 3-08-0159, 2009 WL 47143, at *1-2 (M.D. Tenn. Jan. 7, 2009); *Thornton v. J Jargon Co.*, 580 F. Supp. 2d 1261, 1286 (M.D. Fla. 2008); *Home Design Servs., Inc. v. B&B Custom Homes, LLC*, 509 F. Supp. 2d 968, 972 (D. Colo. 2007); *Crane Design, Inc. v. Pac. Coast Constr., LLC*, No. C05-251, 2006 WL

692019, at *4 (W.D. Wash. Mar. 17, 2006). The courts of the Southern District of New York, on the other hand, generally found that the legislative history of § 507(b) demonstrated that “Congress intended to adopt a three-year limitations period running from the date of the infringement.” See *Auscape Int’l v. Nat’l Geographic Soc’y*, 409 F. Supp. 2d 235, 244-47 (S.D.N.Y. 2004); see also *Harris v. Simon & Schuster, Inc.*, 646 F. Supp. 2d 622, 630 (S.D.N.Y. 2009); *Broadvision Inc. v. Gen. Elec. Co.*, No. 08 Civ. 1478, 2009 WL 1392059, at *6 (S.D.N.Y. May 5, 2009); *Med. Educ. Dev. Servs., Inc. v. Reed Elsevier Grp., PLC*, No. 05 Civ. 8665, 2008 WL 4449412, at *10 (S.D.N.Y. Sept. 30, 2008); *Vasquez v. Torres-Negron*, No. 06 Civ. 619, 2007 WL 2244784, at *5-7 (S.D.N.Y. July 11, 2007); *Roberts v. Keith*, No. 04 Civ. 10079, 2006 WL 547252, at *2-4 (S.D.N.Y. Mar. 7, 2006). In *C.A. Inc. v. Rocket Software, Inc.*, the Eastern District of New York followed suit, holding that a copyright “claim accrues with the act of infringement.” 579 F. Supp. 2d 355, 360 (E.D.N.Y. 2008). Thus, the district courts in the Second Circuit who have grappled with *TRW*’s impact on § 507(b) have embraced what can best be described as the minority approach. This court, however, is reluctant to do the same.

Although the *Auscape* decision—exhaustive and well reasoned as it

is—is persuasive, this court finds the Third Circuit’s opinion in *William A. Graham Co. v. Haughey* convincingly so. See 568 F.3d 425 (3d Cir. 2009). Most importantly, as to civil copyright claims, the discovery rule best comports with the text and structure of the Copyright Act. See *id.* at 434-35. Specifically, a comparison of the Act’s criminal limitations period, which begins to run when the “cause of action arose” and therefore embodies the injury rule, 17 U.S.C. § 507(a), with the Act’s civil limitations period, which begins to run when “the claim accrued,” *id.* § 507(b), dictates that the term “accrued” carries a meaning different from “arose” and therefore embodies a different rule, namely the discovery rule. See *Haughey*, 568 F.3d at 434-35. Moreover, while the *Auscape* court points out that Congress’s consideration of a statutory exception for fraudulent concealment implicitly demonstrates that Congress intended for accrual to occur at the time of the infringement, since a discovery rule would render a fraudulent concealment exception “superfluous,” *Auscape*, 579 F. Supp. 2d at 246-47, the *Haughey* court highlights “the important fact ... that Congress rejected inclusion of any statutory exceptions to the statute of limitations period,” *Haughey*, 568 F.3d at 436. And despite the policy interest in achieving national consistency with a bright-line rule, the court shares the Third Circuit’s

concern that certain types of infringement may not constitute truly “public acts” that are readily subject to detection. See *id.* at 437.

In sum, notwithstanding the court’s receptiveness to the discovery rule’s continued viability,⁴ plaintiffs are advised to reevaluate their case, the basis for their claims, and their manner of execution. And the court warns plaintiffs that any further failure to adhere to the above-outlined directives will not be tolerated.

V. Conclusion

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that defendants’ motions to dismiss (Dkt. Nos. 76, 77, 101, 104, 106, 107, 109) are **GRANTED** to the extent that plaintiffs’ complaint is **DISMISSED** for failure to meet the pleading requirements under FED. R. CIV. P. 8; and it is further

ORDERED that defendants’ motions are otherwise **DENIED**; and it is further

ORDERED that plaintiffs are **GRANTED** leave to file a third amended

⁴The court’s discussion of accrual under § 507(b) is simply that, a discussion, and should not be interpreted to cut off future argument on the issue or otherwise preclude the parties from attempting to modify the court’s viewpoint. Nor should the court’s observations be interpreted to relieve plaintiffs of their burden to adequately plead their causes of action.

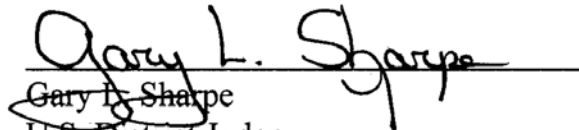
complaint, in full compliance with the terms of this Order, **within thirty (30) days** from the date of the filing of this Order, after which defendants may renew or supplement their motions, or otherwise respond to the complaint as permitted under the Federal Rules of Civil Procedure; and it is further

ORDERED that if plaintiffs fail to file an amended complaint **within thirty (30) days** from the date of the filing of this Order, the Clerk of the Court shall enter judgment dismissing this action without further order of the court; and it is further

ORDERED that the Clerk provide a copy of this Memorandum-Decision and Order to the parties.

IT IS SO ORDERED.

August 2, 2011
Albany, New York



Gary L. Sharpe
U.S. District Judge