Stolen Plausibility

Marcus Alexander Gadson*

Access to justice advocates worry that heightened pleading standards best represented by Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal are a difficult hurdle for plaintiffs. But they have entirely ignored a related development that may be an insurmountable one: the doctrine of stolen plausibility. Born at the same time the legal system has raised pleading standards, this doctrine holds that it is inherently illegitimate for plaintiffs to rely on litigation materials from third parties in their complaints, even where those materials furnish the only realistic source of information that would help plaintiffs satisfy heightened pleading standards and when the borrowed materials would make the complaint meritorious. To do this, courts have drawn on Federal Rules of Civil Procedure 11 and 12(f). This Article steps back from the narrow lens of these two Rules to examine the doctrine of stolen plausibility with broader considerations of fairness in mind. It makes a normative case for allowing plaintiffs to rely on third-party materials in their complaints to throw them a necessary lifeline in their struggles to survive motions to dismiss their complaints, to treat them the same as other parties in the legal system that rely on third parties' work product, and to let them profit from government litigation materials designed to serve them above all else. It then demonstrates that neither the text nor the history of Rules 11 and 12(f) supports the doctrine of stolen plausibility. Finally, it asserts that the policy justifications that might support the doctrine of stolen plausibility—such as incentivizing plaintiffs to conduct diligent pre-suit investigations—are not strong enough to outweigh this Article's fairness concerns.

Table of Contents

* Assistant Professor of Law, Campbell University Law School. I would like to thank Veronica C. Gonzales-Zamora, Shawn Fields, James Yacovelli, Bobbi Jo Boyd, Greg Wallace, Melissa Essary, Zach Bolitho, Lisa Lukasik, Anthony Ghiotto, Tim Zinnecker, Ashley Campbell, Roger Manus, and Brooke Coleman for helpful feedback on, and discussions about, previous drafts of this Article. I would also like to thank the editors of *The Georgetown Law Journal* who provided invaluable help throughout the process. For outstanding research assistance, I thank Hannah Crater, Cara Beth Thierbach, and Lucy Campbell.

INTRODUCTION

Imagine the following situation: a company has fired a Black woman from her job purely because of her race and gender. Her subsequent employment-discrimination complaint alleges that there is an internal company memorandum documenting an interview where her supervisor used derogatory language to describe her and other Black women and statistical evidence that over a twenty-year period, he had fired or refused to promote every Black woman who ever worked for him. Further, imagine the complaint acknowledges that its allegation of the memorandum came from the Equal Employment Opportunity Commission's (EEOC) investigation and subsequent complaint the agency filed against the company for discrimination against minority employees. Finally, assume that when the parties settled, the judge said she found the evidence "highly credible" and that she was "profoundly troubled" by the company's behavior. Most of us would find the Black woman's complaint of employment discrimination plausible. Many courts would find that the complaint's plausibility came from the wrong source, remove the plausible allegations from the complaint, and then dismiss the complaint as implausible.

The doctrine of stolen plausibility[1] explains this surprising result. This doctrine holds that it is impermissible for plaintiffs to rely on third-party litigation materials[2] to prove that their claims are plausible. Its effect in many cases is dismissal of complaints that either are or might be meritorious. The doctrine is built upon two premises. The first premise is the rise of stringent pleading standards requiring plaintiffs to draft detailed complaints that judges find plausible to survive a motion to dismiss.

The second premise is many courts' longstanding tendency to police the source material plaintiffs can use in their complaints. Specifically, they have often prevented plaintiffs from relying on, either in whole or in part, materials drafted by third parties—often in previous lawsuits—that are relevant to their cases.[3] Plaintiffs have attempted to use previous complaints,[4] administrative findings,[5] settlement orders,[6] and government investigations.[7] The goal is to use their

1. You will not find the term "stolen plausibility" in judicial opinions. I have coined the term to describe a phenomenon that has occurred frequently. And it is a phenomenon that occurs in a variety of cases, from employment discrimination to securities fraud to antitrust.

2. These materials encompass, at a minimum, complaints, letters from government or foreign regulatory agencies, and settlement agreements.

3. *See, e.g.*, *id.* at 1005–06.

4. *See, e.g.*, Geinko v. Padda, No. 00 C 5070, 2002 WL 276236, at *5–6 (N.D. Ill. Feb. 27, 2002) (holding a Rule 11 violation where an amended complaint attached and relied on two other complaints, and dismissing the amended complaint as a sanction).

5. *See, e.g.*, Chapman v. Duke Energy Carolinas, LLC, No. 3:09–cv–37RJC, 2009 WL 1652463, at *2–3 (W.D.N.C. June 11, 2009) (granting a motion to strike portions of an EEOC determination letter).

6. *See, e.g.*, Waterford Twp. Police & Fire Ret. Sys. v. Smithtown Bancorp., Inc., No. 10–CV–864 (SLT) (RER), 2014 WL 3569338, at *4 (E.D.N.Y. July 18, 2014) (striking references to a consent order the defendant entered into with the FDIC prior to the lawsuit).

7. *See generally* Richard Casey & Jared Fields, *Piggybacking Through the Pleading Standards: Reliance on Third-Party Investigative Materials to Satisfy Particularity Requirements in Securities*

content to persuade the judge that the complaint is meritorious. Courts have treated plaintiffs trying to rely on such materials as thieves deserving punishment.[8] In so doing, they have primarily used Rules 11 and 12(f) of the Federal Rules of Civil Procedure.[9] These Rules, respectively, permit courts to sanction lawyers for filing complaints without conducting sufficient investigations and to strike references to "immaterial" allegations.[10] As a result, in today's pleading environment, courts routinely treat the plausibility that plaintiffs have taken from third-party materials as stolen.[11]

Surprisingly, scholars have almost entirely ignored how the doctrine of stolen plausibility threatens to prevent plaintiffs from obtaining relief on plausible claims, even as scholarship on pleading has become voluminous. That is, the doctrinal development regarding pleading that may pose the biggest barrier to access to justice has received the least scholarly attention. Much scholarship that is somewhat relevant to this subject primarily focuses on how "piggybacked" or "tag-along" private complaints affect regulatory goals or on how they should affect government behavior and has often considered the question in the context of different pleading standards than now prevail.[12] Scholarship bearing more directly on how a court should treat using third-party materials in complaints considers either a narrow slice of applicable case law[13] or only particular types of materials.[14]

This Article is the first to make normative claims about stolen plausibility—that allowing plaintiffs to rely on third-party materials is now a basic matter of fairness considering how pleading standards have evolved. Lower courts themselves have constructed the doctrine of stolen plausibility by mechanically—erroneously, as I will argue—applying Rules 11 and 12(f), often with a jaundiced eye toward vulnerable plaintiffs. At the same time, courts and Congress have continually raised the standard for pleading a complaint that survives a motion to dismiss—the Supreme

Class Actions, SEC. LITIG. REP., June 2010, at 11 (discussing the reliance on third-party investigators).

8. *See, e.g.*, Garr v. U.S. Healthcare, Inc., 22 F.3d 1274, 1280–81 (3d Cir. 1994).

9. FED. R. CIV. P. 11, 12(f).

10. *See id.*

11. *See, e.g.*, *In re* Connetics Corp. Sec. Litig., 542 F. Supp. 2d 996, 1005–06,1014 (N.D. Cal. 2008) (granting a motion to strike a portion of a complaint relying exclusively on a previous Securities and Exchange Commission (SEC) complaint after finding that such exclusive reliance violated Rule 11).

12. *See, e.g.*, John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 221–26, 222 n.16 (1983); Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 27–35 (2000).

13. *See generally* Laurence A. Steckman & Joseph T. Johnson, *When May a Litigant Rely in Its Own Complaint on Allegations from Another Complaint?*—Lipsky v. Commonwealth United Corp. *and Its Progeny – Still an Unresolved Question*, 32 TOURO L. REV. 351 (2016) (examining how courts have considered motions to strike in the U.S. Court of Appeals for the Second Circuit, and arguing that an expansive interpretation of *Lipsky v. Commonwealth United Corp.* was best).

14. *See generally* Kevin Levenberg, Comment, *Read My* Lipsky*: Reliance on Consent Orders in Pleadings*, 162 U. PA. L. REV. 421 (2014) (examining how courts have considered Rule 11 and Rule 12(f) challenges to pleadings relying on consent orders).

Court's decisions in *Bell Atlantic Corp. v. Twombly*[15] and *Ashcroft v. Iqbal*[16] are but the tip of the iceberg. Plaintiffs must now provide detailed factual support for their allegations to avoid dismissal before being able to conduct the discovery that would provide that factual support. Unless they are large corporations or government agencies, those plaintiffs are unlikely to be able to afford the time-consuming and expensive investigations that would furnish that detail. In many cases, third-party materials will provide the only realistic source of facts to support ultimately meritorious claims. We should not think of plaintiffs who attempt to rely on third-party materials as thieves. Or, if we insist on viewing them that way, we should acknowledge that they have a necessity defense. As a result, I like to think of the plausibility as *borrowed* instead of *stolen*.

An important caveat is in order. I do not question the legal system's embrace of heightened pleading standards. Much ink has been spilled on that topic and what needs to be said has mostly already been said.[17] Instead, I accept that heightened pleading standards are here to stay for the foreseeable future.

This Article proceeds in five Parts. Part I examines how courts have treated plaintiffs who rely on third-party materials in their complaints. Part II traces the rise of heightened pleading standards and illustrates how they have intersected with the courts' treatment of borrowing from third-party materials in complaints. Part III asks judges to step back from a narrow view of Rules 11 and 12(f) to consider the broader issue of fairness. It then lays out a case that the doctrine of stolen plausibility is unfair for three reasons. First, allowing plaintiffs to borrow plausibility from third parties in their complaints will often be the only way they can plausibly allege ultimately meritorious claims. Second, allowing plaintiffs to borrow plausibility equalizes their treatment with that of other litigants. Specifically, judges and well-resourced law firms frequently rely on third-party materials to make it more likely that their work product accomplishes its objectives. Moreover, the doctrine of stolen plausibility has unfairly imposed an evidentiary burden—materials relied upon must be admissible at trial—that litigants at the summary judgment stage do not bear, even though plaintiffs facing a motion to dismiss have not taken discovery while plaintiffs facing a motion for summary judgment have. Third, in most cases where plaintiffs have borrowed plausibility from government litigants, plaintiffs are entitled to use those materials because they helped pay for their creation and because those materials were designed to

15. 550 U.S. 544 (2007).

16. 556 U.S. 662 (2009).

17. *Compare* Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 66–67 (2007) (arguing in favor of *Twombly* because "the case for terminating litigation earlier in the cycle gets ever stronger, and should be realized, especially in those cases where the plaintiff relies on public information, easily assembled and widely available, that can be effectively rebutted by other public evidence"), *with* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 336 (2013) (criticizing *Twombly* and *Iqbal* for "appeal[ing] too much to judicial subjectivity, which inevitably depends (at least in part) on an individual judge's background, values, preferences, education, and attitudes").

benefit the public at large. Part IV examines the basis for the doctrine of stolen plausibility on its own terms and the texts of Rules 11 and 12(f) and concludes that fairly reading them undercuts the doctrine. Part V considers policy concerns that might justify the doctrine of stolen plausibility and finds them wanting.

I. HOW COURTS HAVE TREATED BORROWING FROM THIRD PARTIES IN COMPLAINTS

In this Part, this Article demonstrates that courts have long allowed motions to strike and Rule 11 sanctions to prevent plaintiffs from borrowing from third-party materials.

A. MOTIONS TO STRIKE UNDER 12(F)

Almost as soon as the Federal Rules of Civil Procedure went into effect, courts grappled with what to do when plaintiffs used information gleaned from consent decrees or other complaints in their pleadings. The proposed 1937 Rules included 12(f), which allowed a court,

> [U]pon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, within 20 days after the service of the pleading upon him, or of its own initiative, at any time, order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading.[18]

That Rule remains substantively unchanged today.[19] From the beginning, courts have been divided over whether to strike references to prior complaints and consent decrees. An early case granting a motion to strike was *Alden-Rochelle, Inc. v. American Society of Composers, Authors, & Publishers*.[20] There, the plaintiffs operated movie theaters, and the defendants (an unincorporated association) licensed rights to certain musical compositions.[21] The plaintiffs brought Sherman Act and Clayton Act antitrust claims, alleging that the defendants conspired to fix the licensing fees unlawfully.[22] The government had previously sued the defendants for antitrust violations and then entered into a consent decree with them.[23] The government also prosecuted the defendants, and they

---

18. ADVISORY COMM. ON RULES FOR CIV. PROC., REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE 33 (1937).

19. *See* FED. R. CIV. P. 12(f). The Rule reads:

> The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:
>
> (1) on its own; or
>
> (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

Id.

20. 3 F.R.D. 157 (S.D.N.Y. 1942).

21. *Id.* at 158.

22. *Id.*

23. *Id.* at 159.

pled no contest.[24] The plaintiffs included references to the consent decree and judgment in the criminal case in their complaint.[25] The district court granted the defense's motion to strike the references.[26] It found that the defendants might be prejudiced by allowing the references to remain in the complaint.[27] To the extent the references helped the plaintiffs establish "the history and activity of the defendant," the court held that it was unnecessary to provide such evidence in the complaint; instead, the plaintiffs could wait until trial to introduce them.[28] The court further suggested that whether the plaintiffs could reference other proceedings in their complaint hinged on if there had been a trial or if the litigation settled.[29] Because the nolo contendere plea and consent decree did not result in a merits adjudication, they could not be cited in a complaint.[30] The court's reason for drawing this distinction was that the Clayton Act allowed a final judgment to serve as evidence in future proceedings and, implicitly, made no such provision for consent decrees or nolo contendere pleas.[31]

By contrast, another early case denied a motion to strike references to a prior government complaint. In *Sinaiko Bros. Coal & Oil Co. v. Ethyl Gasoline Corp.*, a plaintiff sought treble damages from the Ethyl Gasoline Corporation under the Clayton Act for antitrust violations.[32] There had already been litigation between Ethyl and the U.S. government that resulted in a judgment against Ethyl.[33] Sixteen paragraphs of the plaintiff's complaint repeated the same allegations the government made earlier, using similar language.[34] The complaint devoted a further ten paragraphs to detailing the litigation between Ethyl and the government, which culminated in a Supreme Court decision.[35] The court refused to strike references to the government's complaint.[36] It suggested that Ethyl would not suffer any prejudice from allowing the references because the complaint was not itself evidence and would therefore not influence a jury.[37] Interestingly, the court faulted the plaintiffs for including *too much* detail in the complaint.[38]

24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *See id.*
31. *Id.*; *see* 15 U.S.C. § 16(a).
32. 2 F.R.D. 305, 307 (S.D.N.Y. 1942).
33. *See* Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 450–51 (1940).
34. *Sinaiko*, 2 F.R.D. at 306.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* ("It should be noted, however, that a complaint containing the amount of evidentiary and other matter here included, is not favored, and it is only because of the particular character of the action and the lack of any showing of prejudice to the defendants that this complaint will not be disturbed.").

Over the next decades, several other district courts considered whether to strike references to prior complaints and consent decrees and reached conflicting conclusions.[39] They had little to no guidance from appellate courts.

That changed to a limited extent with the Second Circuit's 1976 decision in *Lipsky v. Commonwealth United Corp*.[40] There, celebrity singer Walden Robert Cassotto (also known as Bobby Darin) was the sole stockholder of a New York corporation that held musical copyrights and publishing and recording rights to various songs.[41] At some point, he agreed to transfer his shares to Commonwealth United Corporation (CUC) and Commonwealth United Music in exchange for shares with them.[42] After a disagreement over CUC's performance, Cassotto demanded the contract's rescission.[43] As part of his complaint, Cassotto referenced the Securities and Exchange Commission's (SEC) objections to CUC's behavior in other cases and attached an SEC complaint against CUC in another case, which alleged that CUC had violated various securities laws.[44] A consent decree eventually resulted in the earlier complaint's dismissal.[45] The district court struck both under Rule 12(f) without providing an opinion.[46] It also dismissed his complaint with prejudice.[47]

On appeal, the Second Circuit considered whether the reference to the SEC complaint and its objections were "immaterial" and "impertinent" within Rule 12 (f)'s meaning.[48] After cautioning that motions to strike should rarely be granted and that evidentiary questions "should especially be avoided at such a preliminary stage of the proceedings," the court affirmed striking the complaint.[49] It held that "neither a complaint nor references to a complaint which results in a consent judgment may properly be cited in the pleadings under the facts of this case."[50] To support its holding, the court reasoned that under Federal Rule of Evidence

39. *See* Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 402 F. Supp. 636, 637–38 (S.D.N.Y. 1975) (denying motion to strike a complaint's reference to facts in a decree from an earlier government antitrust action on grounds that the references to the decree did not unduly prejudice the defendant, and refusing to decide whether facts from the decree would be admissible at the motion to dismiss stage); Illinois v. Sperry Rand Corp., 237 F. Supp. 520, 521, 524 (N.D. Ill. 1965) (granting motion to strike recitations from a petition in a civil case where the defendants changed their pleas of not guilty to pleas of nolo contendere and motion to strike language from the judgment the court entered); Tivoli Realty, Inc. v. Paramount Pictures, Inc., 80 F. Supp. 800, 804–06 (D. Del. 1948) (striking a reference to violations of a consent decree in the plaintiff's complaint, but declining to strike reference to the consent decree itself or the circumstances surrounding its entry, and declining to strike reference to proceedings under the National Recovery Administration); Revere Camera Co. v. Eastman Kodak Co., 81 F. Supp. 325, 333 (N.D. Ill. 1948) (granting a motion to strike references to other proceedings involving Kodak).

40. 551 F.2d 887 (2d Cir. 1976).

41. *Id.* at 890.

42. *Id.*

43. *Id.*

44. *Id.* at 892.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 893.

50. *Id.*

410, nolo contendere pleas were inadmissible in subsequent proceedings and then likened consent decrees to nolo contendere pleas.[51] Consent decrees and nolo contendere pleas were inadmissible because there had been no adjudication on the merits.[52] The court then found that because a complaint that resulted in a consent decree would be inadmissible at trial, it was necessarily "immaterial" under Rule 12(f).[53]

The Second Circuit also seems to have affirmed striking the references to SEC objections to CUC's behavior in other instances. Despite finding that the SEC's objections "may be relevant and may be admissible," it concluded, without meaningful explanation, that the complaint should not have included them.[54] The court did not try to justify its assumption that anything inadmissible at trial was "immaterial" or "impertinent" within the meaning of Rule 12(f).[55]

The court did note that the reason consent decrees were inadmissible at trial was because there had been no underlying adjudication on the merits.[56] Perhaps the court believed that the lack of adjudication of the SEC's complaint and objections brought their reliability and accuracy into question. If they had been adjudicated as being true, then there would arguably be a higher likelihood that they helped the plaintiff's case. But because there had been no such adjudication, they were merely allegations that were no more likely to be true than what Cassotto could have alleged. Perhaps the court also wanted to preserve incentives for defendants to settle lawsuits. Rule 410 encourages defendants to settle litigation with the knowledge that the plea will not be used against them in subsequent litigation.[57] If CUC had thought that a different plaintiff could use the SEC's complaint against it in future litigation, perhaps *Lipsky* worried that CUC might have been unwilling to settle, to the detriment of judicial economy.

Lipsky left great uncertainty. For one thing, it held that the complaint and SEC objections were properly stricken "under the facts of this case,"[58] though it did not explain what about the case's facts were dispositive. For another, the decision seemed to hinge on whether the material borrowed from other litigants would be admissible at trial. Two schools of thought developed about how to apply *Lipsky*. One read it for the broad proposition that a plaintiff's reliance on third-party materials in a complaint is always improper.[59] Courts in this group have frequently found that under *Lipsky*, prior complaints are necessarily "immaterial"

51. *Id*. at 893–94.
52. *Id*.
53. *Id*. at 894.
54. *Id*.
55. *See id*. at 893–94.
56. *Id*.
57. *See* United States v. Williams, 642 F.2d 136, 139 (5th Cir. Unit B Apr. 1981).
58. *Lipsky*, 551 F.2d at 893.
59. *E.g*., RSM Prod. Corp. v. Fridman, 643 F. Supp. 2d 382, 403 (S.D.N.Y. 2009); Ledford v. Rapid-Am. Corp., No. 86 Civ. 9116 (JFK), 1988 WL 3428, at *1–2 (S.D.N.Y. Jan. 8, 1988).

under Rule 12(f).[60] They have applied this reasoning to strike references to other litigation materials as well.[61] Another school of thought has read *Lipsky* more narrowly and sometimes allowed plaintiffs to use third-party materials in their complaints, though usually with caveats.[62] Just as courts have been undecided on how to read *Lipsky* in the Second Circuit,[63] they have been divided over how to read it in other jurisdictions.[64]

B. RULE 11 SANCTIONS

In preventing plaintiffs from borrowing in their complaints, courts have also invoked Rule 11, which provides that "[b]y presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances."[65] By submitting a pleading, a lawyer certifies that the pleading "is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation"[66] and that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."[67]

---

60. *E.g.*, *In re* Platinum & Palladium Commodities Litig., 828 F. Supp. 2d 588, 593–94 (S.D.N.Y. 2011) (granting motion to strike references to a Commodities Futures Trading Commission (CFTC) order's findings that one of the parties had attempted to manipulate prices for palladium and platinum where the CFTC's proceedings resulted in a consent decree and the CFTC's allegations were not adjudicated on the merits); *In re* Merrill Lynch & Co. Rsch. Reps. Sec. Litig., 218 F.R.D. 76, 78–79 (S.D.N.Y. 2003) (striking portions of a complaint relying on a prior complaint); Sec. Inv. Prot. Corp. v. Stratton Oakmont, Inc., 234 B.R. 293, 336–37 (Bankr. S.D.N.Y. 1999).

61. *See, e.g.*, *Ledford*, 1988 WL 3428, at *1–3.

62. For example, in *Marvin H. Maurras Revocable Trust v. Bronfman*, in a first round of litigation, the Minnesota Attorney General investigated the defendants' debt collection practices in Minnesota. Nos. 12 C 3395, 12 C 6019, 2013 WL 5348357, at *3 (N.D. Ill. Sept. 24, 2013). It then filed a complaint that led to a consent order with the Minnesota Department of Commerce whereby the defendants agreed to stop debt collection in the state. *See id.* at *13. In subsequent litigation against a private plaintiff, the defendants went so far as to argue that many allegations were "simply copied-and-pasted or paraphrased from the Attorney General's pleadings and press announcements." *Id.* at *15. The court found that *Lipsky* prohibited using a previous litigant's complaint only when using it for a purpose that would be inadmissible at trial. *Id.* at *16. Thus, allegations about the content of a prior complaint were impermissible because they would be inadmissible, but "piggyback[ing]" off a prior complaint with independently sourced facts *would* be admissible. *Id.* The court was unperturbed because the complaint contained the same factual allegations as the Minnesota Attorney General's. *Id.* at *16–17. So long as the complaint left open the possibility that the plaintiff could present admissible evidence of the defendant's conduct, the court was unwilling to strike the allegations. *Id.* In sum, *Marvin* was unwilling to read *Lipsky* as a per se bar on all references to pleadings in other litigation. *Id.*

63. *Compare In re Platinum*, 828 F. Supp. 2d at 593–94, *with In re* Fannie Mae 2008 Sec. Litig., 891 F. Supp. 2d 458, 471–72 (S.D.N.Y. 2012) (holding an SEC complaint inadmissible but not the factual allegations derived therefrom).

64. *Compare* L.C. v. Cent. Pa. Youth Ballet, No. 1:09–cv–2076, 2010 WL 2650640, at *7 (M.D. Pa. July 2, 2010) (appearing to adopt broad reading of *Lipsky*), *with Bronfman*, 2013 WL 5348357, at *16.

65. FED. R. CIV. P. 11(b).

66. *Id.* 11(b)(1).

67. *Id.* 11(b)(3).

Some courts have sanctioned lawyers for referring to, or borrowing allegations from, prior complaints. Perhaps the most well-known case is *Garr v. U.S. Healthcare, Inc*.[68] After reading a *Wall Street Journal* article about the behavior of U.S. Healthcare shareholders, James Malone, a partner at Greenfield & Chimicles, consulted a variety of sources including financial disclosure statements, SEC filings, and analyst reports to investigate U.S. Healthcare and decided there were grounds for a securities action.[69] Malone relayed his findings to a U.S. Healthcare stockholder in Florida and filed a complaint once the shareholder agreed to sue.[70]

Subsequently, Fred Isquith, a partner at Wolf Haldenstein Adler Freeman & Herz, received a call from another investor's personal attorney expressing concern about the decline of his U.S. Healthcare stock's value.[71] Isquith said he reviewed the same materials Malone had before concluding that a class action was appropriate.[72] Isquith reached out to see if Greenfield & Chimicles would serve as local counsel for a class action, and it agreed.[73] Greenfield & Chimicles filed a complaint on the class's behalf, which Malone signed.[74] The complaint was a verbatim copy of what Malone filed in the first action.[75] Finally, Arnold Levin and Harris Sklar filed a complaint on behalf of a married couple, copying the first two complaints verbatim.[76]

U.S. Healthcare requested Rule 11 sanctions, alleging that all of the plaintiffs' attorneys violated their duty to conduct a reasonable investigation.[77] As relevant here, the court found that Malone had conducted an adequate investigation into the substance of the claims.[78] It found, however, that Levin and Sklar had violated Rule 11.[79] Importantly, the court held that Levin and Sklar could not delegate their duty to conduct a reasonable investigation to Malone[80] and, hence, that copying his complaint was impermissible under Rule 11.[81] The court sanctioned

68. *See generally* 22 F.3d 1274 (3d Cir. 1994).

69. Greenfield v. U.S. Healthcare, Inc., 146 F.R.D. 118, 120 (E.D. Pa. 1993).

70. *Id*. The stockholder later instructed Malone to withdraw the complaint after realizing he had a conflict of interest. *Id*. at 122.

71. *Id*. at 121.

72. *Id*.

73. *Id*.

74. *Id*.

75. *Id*.

76. *Id*.

77. *Id*.

78. *Id*. at 125. The court did find that Malone had not adequately investigated whether the named plaintiffs in the first two actions would adequately protect the class. *Id*. at 125–26.

79. *Id*. at 127.

80. *Id*. Here, the court drew on the Supreme Court's decision in *Pavelic & LeFlore v. Marvel Ent. Grp*., 493 U.S. 120 (1989). In that case, the district court found that there was insufficient evidence to support forgery allegations and issued Rule 11 sanctions against the individual lawyer who drafted pleadings as well as his law firm. *Id*. at 122. The Supreme Court ultimately held that the district court erred in imputing the individual lawyer's Rule 11 misconduct to the entire firm. *Id*. at 124–27. In support of its holding, the Court observed, "Where the text establishes a duty that cannot be delegated, one may reasonably expect it to authorize punishment only of the party upon whom the duty is placed." *Id*. at 125.

81. *Greenfield*, 146 F.R.D. at 127.

Malone, Levin, and Sklar by (1) requiring them to pay the defendants' costs incurred in the actions, (2) referring them to the Pennsylvania bar for a disciplinary investigation, and (3) dismissing two of the three complaints.[82] Notably, the district court never found that the complaints lacked merit.

The Third Circuit affirmed.[83] The Third Circuit found the reliance on Malone's complaints inadequate.[84] The court emphasized that Sklar and Levin "filed the complaint Malone had prepared, changing only the name of the plaintiffs and the number of shares owned"[85] and rejected the argument that any independent investigation would have been superfluous in light of Malone's earlier one.[86] The court also suggested that sanctions were warranted even if the underlying complaints were meritorious.[87] Because Rule 11's purpose was to deter baseless filings, the court would need to impose sanctions even when attorneys had filed meritorious pleadings when the attorneys had conducted an inadequate investigation.[88] That is, because ensuring that attorneys conducted sufficient investigations was the only way to accomplish Rule 11's purpose of discouraging unsupported filings, courts would need to punish all lawyers who produced insufficiently investigated complaints (even if ultimately meritorious) to encourage attorneys to make the required investigation.[89] Thus, "A shot in the dark [wa]s a sanctionable event, even if it somehow hit[] the mark."[90]

Judge Roth dissented, noting that the majority never found that Levin and Sklar's complaints were unmeritorious.[91] Drawing on cases from the Second and Seventh Circuits, Judge Roth argued that Rule 11 sanctions should only lie if the claim lacked merit.[92] Even if the attorney conducted an inadequate investigation, there should not be sanctions if the pleadings proved ultimately meritorious.[93] Several other courts have granted Rule 11 sanctions for relying on a third party's complaint.[94]

---

82. *Id.* at 129.
83. Garr v. U.S. Healthcare, Inc., 22 F.3d 1274, 1281 (3d Cir. 1994).
84. *Id.* at 1280.
85. *Id.*
86. *Id.*
87. *Id.* at 1279.
88. *Id.*
89. *See id.*
90. *Id.* (quoting Vista Mfg., Inc. v. Trac–4, Inc., 131 F.R.D. 134, 138 (N.D. Ind. 1990)).
91. *Id.* at 1282 (Roth, J., dissenting).
92. *See id.*
93. *See id.*
94. *See, e.g.*, Brown v. Ameriprise Fin. Servs., Inc., 276 F.R.D. 599, 601, 607–08 (D. Minn. 2011) (holding a Rule 11 violation where the plaintiff alleged race discrimination in a "detailed and far-reaching" complaint that copied allegations from different plaintiffs that brought race-discrimination claims against a different company years before, and dismissing the complaint as a sanction); Del Giudice v. S.A.C. Cap. Mgmt., LLC, No. 06–1413 (SRC), 2009 WL 424368, at *2, *11–12 (D.N.J. Feb. 19, 2009) (holding a Rule 11 violation, and dismissing without prejudice a complaint that "parroted [a previous] complaint almost verbatim" and admitted the complaint was "[b]ased on the facts set forth in the publicly filed complaint" in another related case (second alteration in original)); *In re* Connetics Corp. Sec. Litig., 542 F. Supp. 2d 996, 1005–06 (N.D. Cal. 2008) (granting a motion to strike a portion of a complaint relying exclusively on a previous SEC complaint after holding that such exclusive

II. HEIGHTENED PLEADING STANDARDS COLLIDE WITH COURT CONCERNS OVER COMPLAINTS' SOURCE MATERIAL

In this Part, this Article traces both how pleading standards have risen in the last several decades and explains how those heightened pleading standards have combined with source material policing to create the doctrine of stolen plausibility.

A. THE GROWTH OF HEIGHTENED PLEADING STANDARDS

While courts developed their rationales for punishing litigants who tried to borrow in their complaints, a revolution in pleading standards began taking shape. For many years, *Conley v. Gibson* provided a familiar test for assessing complaints.[95] In *Conley*, the Supreme Court interpreted Rule 8[96] to prohibit a complaint's dismissal "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."[97]

There is a common story that the Supreme Court decisions in *Bell Atlantic Corp. v. Twombly*[98] and *Ashcroft v. Iqbal*[99] raised pleading standards.[100] The reality is more complicated. There has been an upward trajectory in pleading standards for decades. Well before *Twombly* and *Iqbal*, plaintiffs had to plead more detail for fraud claims in accordance with Rule 9(b) than they would have to plead under Rule 8.[101] Courts have *sub silentio* raised pleading standards under

reliance violated Rule 11); Geinko v. Padda, No. 00 C 5070, 2002 WL 276236, at *5–6 (N.D. Ill. Feb. 27, 2002) (holding a Rule 11 violation where an amended complaint attached and relied on two other complaints). *But see de la Fuente v. DCI Telecomms., Inc.*, 259 F. Supp. 2d 250, 259 (S.D.N.Y. 2003), where the defendant argued that the court should sanction the plaintiff under Rule 11 for "simply cop [ying]" an SEC complaint, presumably because the complaint did not evince an adequate investigation. The court rejected the argument that relying on and copying from an SEC complaint was necessarily improper under Rule 11. *Id.* at 260. The court observed that "[t]he [Private Securities Litigation Reform Act of 1995] does not require that a plaintiff re-invent the wheel before filing a complaint; and one could argue that a complaint predicated on the results of an SEC investigation has far more 'evidentiary support' than one based on rumor and innuendo gleaned from 'Heard on the Street.'" *Id.*

95. 355 U.S. 41, 45–46 (1957).

96. FED. R. CIV. P. 8(a) ("A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.").

97. *Conley*, 355 U.S. at 45–46, 48 (reversing dismissal of class of Black railroad workers' claim under the Railway Labor Act).

98. 550 U.S. 544 (2007).

99. 556 U.S. 662 (2009).

100. *E.g.*, Ashcroft v. Iqbal*: The New Federal Pleading Standard*, JONES DAY INSIGHTS (June 2009), https://www.jonesday.com/en/insights/2009/06/iashcroft-v-iqbali-the-new-federal-pleading-standard [https://perma.cc/46DY-Z64Q] ("On May 18, 2009, in a 5-to-4 decision in *Ashcroft v. Iqbal*, the Supreme Court stiffened the federal pleading standard under Rule 8 of the Federal Rules of Civil Procedure.").

101. *See* FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."); *see, e.g.*, Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1105 (9th Cir. 2003) (observing that "only allegations ('averments') of fraudulent conduct must satisfy the heightened pleading requirements of Rule 9(b). Allegations of non-fraudulent conduct need satisfy only the ordinary notice pleading standards of Rule 8(a)."); Comput. Network Corp. v. Spohler, No. 82-

Rule 8 as well. In an antitrust case, the Seventh Circuit observed that the "costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint."[102]

Courts had also begun requiring more from civil-rights plaintiffs. One lower court acknowledged that, for some time, courts had found that Civil Rights Acts claims stood outside of the normal notice pleading framework.[103] The reason was that there "ha[d] been an increasingly large volume of cases brought under the Civil Rights Acts. A substantial number of these cases [we]re frivolous or should [have] be[en] litigated in the State courts; they all cause[d] defendants—public officials, policemen and citizens alike—considerable expense, vexation and perhaps unfounded notoriety."[104] A primary consideration in such cases had to be "weed[ing] out the frivolous and insubstantial cases at an early stage in the litigation."[105]

In other cases, Congress has mandated heightened pleading standards. An example is the Private Securities Litigation Reform Act of 1995 (PSLRA).[106] By the 1990s, Congress worried that the transaction cost of filing securities fraud claims was too low to deter plaintiffs from filing frivolous claims.[107] Plaintiffs were allegedly bringing unmeritorious claims and coercing defendants into settling to avoid incurring high defense costs.[108] To dam the deluge of cases, Congress required plaintiffs to plead all elements of securities fraud claims with particularity, including scienter—the idea that the defendant either knew or intended for certain representations to be false.[109] Perhaps most importantly, the PSLRA stayed discovery while any motion to dismiss was pending, unless "particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party."[110] Courts have usually denied requests for discovery while a motion to dismiss is pending because, in the PSLRA, "Congress clearly intended that complaints in these securities actions should stand or fall based on the actual knowledge of the plaintiffs rather than information produced by the defendants after the action has been filed."[111] Scholars worried that the cumulative effect of

---

0287, 1982 WL 1296, at *1 (D.D.C. Mar. 23, 1982) (holding that "Rule 9(b) runs contrary to the general approach of simplified notice pleading within the federal system").

102. Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984).

103. *See* Valley v. Maule, 297 F. Supp. 958, 960 (D. Conn. 1968).

104. *Id.*

105. *Id.*

106. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

107. *See* Hillary A. Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA's Internal-Information Standard on '33 and '34 Act Claims*, 76 WASH. U. L.Q. 537, 552–53 (1998).

108. *Id.* at 553.

109. *Id.* at 561.

110. *Id.* at 558.

111. Medhekar v. U.S. Dist. Ct., 99 F.3d 325, 328 (9th Cir. 1996); *see also* SG Cowen Sec. Corp. v. U.S. Dist. Ct., 189 F.3d 909, 912 (9th Cir. 1999) (reversing a district court order allowing the plaintiff to

these changes was to prevent plaintiffs from bringing meritorious claims and to leave securities fraud unaddressed.[112]

The Supreme Court arguably raised the PSLRA standard even higher in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*[113] There, shareholders alleged that Tellabs (and other defendants) schemed to deceive the public about the value of Tellabs shares.[114] In interpreting the PSLRA's requirement that a plaintiff "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind,"[115] the Court held that a scienter allegation must be "more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent."[116] The Court rejected as too lenient the Seventh Circuit's standard—"the 'strong inference' standard would be met if the complaint 'allege[d] facts from which, if true, a reasonable person could infer that the defendant acted with the required intent.'"[117]

In 2007, the Court explicitly extended the burgeoning movement for heightened pleading standards to Rule 8. In *Twombly*, the plaintiffs argued that the defendants violated the Sherman Act by conspiring to restrain trade.[118] The complaint's basic thrust was that the defendants' parallel conduct was grounds to infer a conspiracy.[119] The Court found the claim appropriately dismissed because "[w]ithout more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."[120] Although it was certainly possible that the defendants had conspired, the Court held that "without some further factual enhancement [the allegation] stops short of the line between possibility and plausibility."[121]

The Court acknowledged that its holding was in tension with *Conley*'s admonition that courts should only dismiss complaints if "it appears beyond doubt that

take discovery while a motion to dismiss was pending "so that they might uncover facts sufficient to satisfy the Act's pleading requirements").

112. *See, e.g.*, Sale, *supra* note 107, at 578 (worrying that "the combination of a strict pleading standard with a stay of discovery creates a pleading barrier so high that few complaints will survive it").

113. *See* 551 U.S. 308, 314 (2007).

114. *Id.* at 314–15.

115. *Id.* at 314 (quoting 15 U.S.C. § 78u–4(b)(2)(A)).

116. *Id.*

117. *Id.* (alteration in original) (quoting Makor Issues & Rts, Ltd. v. Tellabs, Inc., 437 F.3d 588, 602 (7th Cir. 2006)).

118. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 550 (2007).

119. *Id.* at 551 ("The complaint couches its ultimate allegations this way: 'In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.'" (alterations in original) (quoting Consolidated Amended Class Action Complaint ¶51, at 19, Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 Civ. 10220 (GEL)))).

120. *Id.* at 556–57.

121. *Id.* at 557.

the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[122] But the Court did not present its decision as a break from tradition. Instead, it claimed to be the latest in a long line of appellate courts, going back to at least the 1970s, that had "balked at taking the literal terms of the *Conley* passage as a pleading standard."[123] It was "best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[124] The Court did not explain how the new plausibility standard was consistent with Rule 8's simple requirement that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief,"[125] something the dissent alluded to.[126]

What drove *Twombly* was a policy concern: the ease of stating a claim under *Conley* was untenable given discovery's immense costs.[127] The concern took on even more force in antitrust cases.[128] Underlying this concern in part was solicitude for defendants; *Twombly* worried that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings."[129] At first, some observers thought *Twombly* might only apply in antitrust cases.[130]

But, two years later, *Iqbal* put such speculation to rest.[131] There, Javaid Iqbal was a Pakistani Muslim arrested after the September 11 attacks.[132] Because he was of "high interest" to the investigation of the attacks, the government locked him in his cell twenty-three hours a day.[133] Iqbal subsequently filed a *Bivens* action against thirty-four current or former federal officials and nineteen correctional officers.[134] He alleged that the federal officials designated him a "high interest" target of investigation because of his race, religion, and national origin.[135]

---

122. *Id.* at 561 (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)). The court observed "[o]n such a focused and literal reading of *Conley*'s 'no set of facts,' a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Id.* (second alteration in original).

123. *Id.* at 562.

124. *Id.* at 563.

125. FED. R. CIV. P. 8(a)(2).

126. *Twombly*, 550 U.S. at 573 (Stevens, J., dissenting) ("Rule 8(a)(2) of the Federal Rules requires that a complaint contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.' The Rule did not come about by happenstance, and its language is not inadvertent." (quoting FED. R. CIV. P. 8(a)(2))).

127. *See id.* at 558 (majority opinion).

128. *Id.* ("[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." (citation omitted)).

129. *Id.* at 559.

130. *E.g.*, Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1862 n.62 (2008).

131. *See* Ashcroft v. Iqbal, 556 U.S. 662, 682–86 (2009).

132. *Id.* at 666.

133. *Id.* at 667–68.

134. *Id.* at 668.

135. *Id.* at 668–69.

He alleged that then-Attorney General John Ashcroft and then-FBI Director Robert Mueller ordered detainees under investigation to be kept in harsh conditions.[136] Finally, Iqbal alleged that Ashcroft and Mueller ordered that he be held under such harsh conditions specifically because of his race, religious belief, and national origin.[137] The Court found that though Iqbal's factual allegations may be "conceivable," they were not enough to state a plausible claim because they did not establish that discriminatory purpose was a better explanation for Ashcroft and Mueller's actions than alternatives.[138] Instead, the Court held that there was an "obvious alternative explanation" for why the government disproportionately targeted Iqbal and other Muslims: Muslim members of Al-Qaeda perpetrated the attacks, so it made sense that those investigated for links to the attackers would also be Muslims.[139]

In extending *Twombly* outside the antitrust context, the Court again emphasized discovery's burdens.[140] Although litigation was "necessary to ensure that officials comply with the law," it "exact[ed] heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government."[141]

Twombly and *Iqbal* have provoked a heated scholarly debate.[142] There is considerable evidence that the decisions have hurt plaintiffs. In a study of 1,039 cases decided at the district court level,[143] Professor Hatamyar found that *Iqbal* had a large effect on dismissal rates.[144] The effect was particularly pronounced in certain types of cases.[145] Where courts dismissed civil rights cases 50% of the time

136. *Id.* at 669.

137. *Id.*

138. *Id.* at 681, 683 ("Taken as true, these allegations are consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.").

139. *Id.* at 682.

140. *Id.* at 685 ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)).

141. *Id.*

142. *See, e.g.*, Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 43–44 (2010) (criticizing *Twombly* and *Iqbal*); Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust*, 52 B.C. L. REV. 871, 916 (2011) (praising *Twombly*).

143. Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 585 (2010) (analyzing 444 cases decided under *Conley*, 422 under *Twombly*, and 173 under *Iqbal*).

144. *See id.* at 624. ("This study provides some evidence that district courts are taking *Twombly* and *Iqbal* to heart. Especially after *Iqbal*, they appear to be granting 12(b)(6) motions at a significantly higher rate than they did under *Conley*—which was already a sizeable 49% in the Database in the two-year period before *Twombly*. In addition, *Twombly* and *Iqbal* are poised to have their greatest impact on civil rights cases, simply because those cases are by far the most likely type of case to be attacked by a 12(b)(6) motion."). *But see* Jill Curry & Matthew Ward, *Are* Twombly *&* Iqbal *Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State*, 45 TEX. TECH L. REV. 827, 872 (2013) ("[T]his study does not find support for an effect of *Twombly* and *Iqbal* on the rate of removal in notice-pleading states compared to fact-pleading states . . . .").

145. *See* Hatamyar, *supra* note 143, at 607.

under *Conley*, they dismissed them 53% of the time under *Twombly* and 58% under *Iqbal*.[146] Professor Hatamyar found an even larger effect on pro se plaintiffs. In her study, courts dismissed 67% of pro se complaints under *Conley*, 69% under *Twombly*, and 85% under *Iqbal*.[147] In a study of 478 district court decisions on disability claims, Professor Seiner found that 64.4% of cases applying *Conley* granted motions to dismiss at least in part, while 78.5% of decisions applying *Twombly* granted motions to dismiss at least in part.[148]

B. HEIGHTENED PLEADING STANDARDS RUB UP AGAINST SOURCE MATERIAL POLICING

Lipsky v. Commonwealth United Corp.'s holding on the SEC objections also appears premised on the prevailing pre-*Iqbal*/*Twombly* standards. In affirming striking these objections, it observed that "[q]uite frankly, we do not understand how Darin [the plaintiff] is harmed by the elimination of the SEC references."[149] It then noted that Cassotto need not have alleged these objections in his complaint to introduce them at trial.[150] Implicitly, because Cassotto only needed a "short and plain statement of the claim,"[151] and did not need to plead specific evidence to survive a motion to dismiss, his complaint already did enough without references to the objections. In other words, the decision on the motion to strike was low-stakes. The court's decision reversing dismissal of the complaint supports this view.[152] That is, it found the complaint sufficient absent reference to the SEC complaint or objections. But the pleading standard it applied was that a "complaint should not be dismissed for insufficiency unless it appears to be a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim."[153]

Courts have applied *Lipsky* even as pleading standards changed. At the same time, they have cast aspersions on those seeking to borrow plausibility. The Seventh Circuit, for example, has excoriated lawyers trying to borrow plausibility from another lawsuit for attempting to skate by while "doing little more than reading a daily law bulletin."[154] In so doing, lower courts have created the

146. *Id.*; *see also* Raymond H. Brescia, *The* Iqbal *Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 286 (2011) (finding that *Iqbal* (but not *Twombly*) substantially increased the number of dismissals for employment and housing-discrimination cases).

147. Hatamyar, *supra* note 143, at 615 ("It appears that the boilerplate language that *pro se* plaintiffs' complaints should be treated with leniency is not taken very seriously." (footnote omitted)).

148. Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 118 (2010).

149. Lipsky v. Commonwealth United Corp., 551 F.2d 887, 894 (2d Cir. 1976).

150. *Id.*

151. FED. R. CIV. P. 8(a)(2).

152. *Lipsky*, 551 F.2d at 899.

153. *Id.* at 894 (quoting 2A MOORE'S FEDERAL PRACTICE ¶ 12.08, at 2271 (2d ed. 1975) (discussing the standard under Rule 12(b)(6))).

154. Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. Walgreen Co., 631 F.3d 436, 444 (7th Cir. 2011); *see also* Polly v. Adtalem Glob. Educ., Inc., No. 16 CV 9754, 2019 WL 587409, at *5 (N.D. Ill. Feb. 13, 2019) (finding that allegations from a government lawsuit "do little to move the needle of plausibility" in part because fraud claims must be based "on something more than 'reading a daily law bulletin'" (quoting *Pirelli*, 631 F.3d at 444)).

doctrine of stolen plausibility that threatens to burden many plaintiffs.[155] These district courts are scattered throughout the country and go well beyond the Second Circuit, where *Lipsky* was decided.[156] However, they have rarely considered how decisions on the motion to strike will affect the plaintiff's ability to meet heightened pleading standards.[157]

III. FAIRNESS REQUIRES ALLOWING PLAINTIFFS TO BORROW PLAUSIBILITY

This Article advocates that in assessing complaints, courts ignore the source of their factual allegations and focus instead on whether the complaints are meritorious. This framework shift ensures fairness to plaintiffs in the following ways: (1) allowing them the only information they may realistically be able to obtain that helps them meet heightened pleading standards, (2) treating plaintiffs who attempt to borrow plausibility fairly vis-à-vis other litigants, and (3) letting them benefit from the investigative resources they have helped to fund with their taxes, and which were created to benefit them.

A. NECESSITY

Disallowing reliance on third-party materials in complaints risks shutting the courthouse door on certain claims. Examples abound. One is securities fraud claims. Plaintiffs must allege scienter under the PSLRA, for example, that the defendant knew or intended a representation to be false.[158] And even before the PSLRA, they had to meet heightened pleading requirements under Rule 9(b) to show that a statement was false.[159] Where possible, courts expected plaintiffs to specify "the roles of the individual defendants in the misrepresentations."[160] Records that would supply facts to support an allegation of scienter will only be accessible to defendants. The only way plaintiffs could access them was through discovery. One district court considering a securities fraud claim against a memory chip manufacturer for making misleading statements about how well the company was doing even acknowledged that it was "cognizant of the fact that it may be difficult for securities plaintiffs to access internal corporate documents

155. *See, e.g.*, Shouq v. Norbert E. Mitchell Co., 3:18-cv-00293 (CSH), 2018 WL 4158382, at *6–7 (D. Conn. Aug. 30, 2018); *In re* Platinum & Palladium Commodities Litig., 828 F. Supp. 2d 588, 595–96 (S.D.N.Y. 2011); RSM Prod. Corp. v. Fridman, 643 F. Supp. 2d 382, 403–04 (S.D.N.Y. 2009).

156. *See, e.g.*, Fraker v. Bayer Corp., No. CV F 08–1564 AWI GSA, 2009 WL 5865687, at *3–6 (E.D. Cal. Oct. 6, 2009).

157. As an exception to this trend, *Tucker v. American International Group Inc.*'s analysis of whether to strike certain materials from a complaint was informed by the reality that under *Iqbal* and *Twombly*, the plaintiff had to "allege unfair settlement practices committed or performed by the Defendants with such frequency as to indicate a general business practice." 936 F. Supp. 2d 1, 22 (D. Conn. 2013).

158. *See* 15 U.S.C. § 78u–4(f)(10).

159. *See, e.g.*, Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989); *see also* Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994) (discussing how the heightened standard serves Rule 9(b)'s purposes); Melder v. Morris, 27 F.3d 1097, 1100 (5th Cir. 1994) ("The heightened pleading standard of Rule 9(b) serves an important screening function in securities fraud suits.").

160. *Moore*, 885 F.2d at 540.

prior to discovery."[161] The court nonetheless felt compelled to dismiss the complaint because it did not "refer[] to any particular corporate document or data [that contained representations different from what the company made to the public]."[162] Nor did it "show when these documents were created, by whom they were drafted" or "explain precisely what was in the alleged documents."[163] The exacting scrutiny to which courts subject securities fraud complaints has led some plaintiffs' lawyers to lament that "it is now more difficult to plead a securities fraud case than it is to prove one at trial [to a jury]."[164] When plaintiffs have provided such information, they have been subjected to Rule 11 sanctions when they relied on a government agency to procure the information. The district court in *In re Connetics Corp. Securities Litigation* sanctioned a plaintiff for relying entirely on an SEC complaint because the attorneys did not perform an independent investigation into the SEC's factual allegations.[165] It struck large portions of the complaint and then dismissed the securities fraud claims the SEC complaint might have helped the plaintiffs plausibly allege.[166]

Another example is discrimination cases, where courts usually require a showing of intent. For example, in Title VI cases, the Supreme Court has held that "Title VI itself directly reach[es] only instances of intentional discrimination."[167] In assessing whether it can prove discrimination, the Department of Justice suggests looking at two forms of evidence. The first is direct evidence. It "often involves a statement from a decision-maker that expresses a discriminatory motive," and as such, direct evidence will often be rare.[168] The second type is statistical or circumstantial evidence. "For example, statistics can be used [to] show that an ostensibly race-neutral action actually causes a pattern of discrimination, a racially disproportionate impact, or foreseeably discriminatory results."[169] But mere disparate impact is usually not enough.[170] Instead, disparate impact often needs to be coupled with knowledge or foreseeability.[171]

---

161. Hockey v. Medhekar, No. C–96–0815 (MHP), 1997 WL 203704, at *8 (N.D. Cal. Apr. 15, 1997).

162. *Id.*

163. *Id.*

164. Casey & Fields, *supra* note 7, at 13.

165. 542 F. Supp. 2d 996, 1005–06 (N.D. Cal. 2008).

166. *Id.* at 1006.

167. Alexander v. Sandoval, 532 U.S. 275, 281 (2001) (alteration in original) (quoting Alexander v. Choate, 469 U.S. 287, 293 (1985)). The Court held that individual plaintiffs could not use the Department of Justice's disparate impact regulations to challenge Alabama's decision to administer driver's license tests only in English. *Id.*

168. *Section VI: Proving Discrimination- Intentional Discrimination*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/fcs/T6Manual6 [https://perma.cc/B73V-3LF2] (last updated Feb. 3, 2021).

169. *Id.*

170. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (finding that "impact alone is not determinative" in "[d]etermining whether invidious discriminatory purpose was a motivating factor" in denying a rezoning request from minority plaintiffs).

171. *E.g.*, Almendares v. Palmer, 284 F. Supp. 2d 799, 807–08 (N.D. Ohio 2003) (denying motion to dismiss Title VI claim where plaintiffs alleged defendant purposefully adopted a policy of not providing bilingual services under Ohio's food stamp program although "knowing of its impact on Spanish-

When alleging indirect evidence of discrimination, plaintiffs will often compare their treatment to the treatment of members of other groups. But courts have dismissed complaints that did not demonstrate that the comparators were "similarly situated" to the plaintiff in every material respect.[172] Without access to corporate records, it would be difficult to gain the detailed demographic information about comparators that courts require. Similarly, proof of the discriminator's true motivation that would allow a complaint to survive today's pleading standards "is generally only known by the employer and need not be shared with the adversely affected at-will employee before discovery."[173] Recognizing this difficulty, one court refused to grant a motion for summary judgment on an employment-discrimination claim on the basis that the plaintiff could not point to similarly-situated employees treated differently where "[i]nformation about which individuals might be similarly situated and the extent to which they received discipline, if any, is solely within the possession of Defendant."[174] In the context of gender discrimination in pay, the dissenters in *Ledbetter v. Goodyear Tire & Rubber Co.* recognized that "[c]omparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials."[175]

Plaintiffs borrowing allegations from a government investigation have often conjured up images of greedy and lazy class counsel swarming in like vultures to prey on defendants.[176] But much of the time, the borrower has been a single plaintiff alleging discrimination. In *Ledford v. Rapid-American Corp.*, for example, the plaintiff alleged that the defendant illegally terminated him because of his age.[177] In his complaint, he cited a New York Division of Human Rights investigation that found probable cause he had suffered age discrimination.[178] Drawing on *Lipsky*, the court found that a determination of probable cause was "an initial

speaking food stamp recipients" because the court "could logically infer that the policy was implemented and is being continued 'because of' its impact on national origin").

172. Guy v. MTA N.Y.C. Transit, 407 F. Supp. 3d 183, 194 (E.D.N.Y. 2016) (faulting a complaint that alleged "white employees of the MTA[] had 'no problems' being promoted and that [plaintiff] 'couldn't help [but] notice that all the train operators, conductors and cleaners' going through the demotion process 'were all black'" (second alteration in original)).

173. Michael J. Zimmer, *Title VII's Last Hurrah: Can Discrimination Be Plausibly Pled?*, 2014 U. CHI. LEGAL F. 19, 78.

174. Gover v. Speedway Super Am. LLC, 254 F. Supp. 2d 695, 703 (S.D. Ohio 2002); *see also* Kale v. Combined Ins. Co. of Am., 861 F.2d 746, 760 (1st Cir. 1988) (affirming a district court's decision not to impose sanctions on a plaintiff alleging age discrimination where the district court recognized "the defendant's intent is difficult to establish except through discovery; imposing sanctions in cases such as this runs the risk of chilling meritorious litigation").

175. 550 U.S. 618, 645 (2007) (Ginsburg, J., dissenting).

176. *See* Coffee, Jr., *supra* note 12, at 223 ("Typically, the sequence begins with an SEC injunctive action or an antitrust indictment, which within a brief period elicits a horde of plaintiffs' attorneys — sometimes numbering well over 100 — all seeking to participate in a private class action, the allegations of which largely parallel and sometimes literally parrot those set forth in the agency's complaint.").

177. No. 86 Civ. 9116 (JFK), 1988 WL 3428, at *1 (S.D.N.Y. Jan. 8, 1988).

178. *Id.*

non-adjudicative step in the administrative process."[179] Because there had never been a determination on the merits, the Division of Human Rights' finding was similar to the SEC's complaint and objections to CUC's registration statements in *Lipsky*.[180] The court struck the reference to the investigation.[181] Courts have continued to do this even after *Twombly* and *Iqbal*,[182] even if allowing the plaintiffs to use the investigation might help survive a motion to dismiss.

A final example comes from antitrust. In *Twombly*, the Court found that pointing to parallel business conduct could supply circumstantial evidence of a conspiracy to restrain trade but was insufficient to make a Sherman Act claim plausible.[183] The Court also observed that "[e]ven 'conscious parallelism,' a common reaction of 'firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions' is 'not in itself unlawful.'"[184] The plaintiffs needed to plead facts

---

179. *Id.*; *see also* Mitchell v. Bendix Corp., 603 F. Supp. 920, 921–22 (N.D. Ind. 1985) (not relying on *Lipsky*, but granting a motion to strike the portion of a complaint citing the Indiana Employment Security Division's finding that the plaintiff was not fired for "proven just cause"). In *Mitchell*, there is nothing to suggest that the district court ever decided whether the complaint, shorn of its reference to the agency's findings, stated viable claims. *See* 603 F. Supp. at 921–22. *But see* Catruch v. Picture Peoples, No. Civ.04–CV–00118–G–C, 2004 WL 2370646, at *1 (D. Me. Sept. 7, 2004) (denying a motion to strike references to a Maine Human Rights Commission investigation, and sanctioning the defense lawyers $300 for "inject[ing] into this case a completely bogus issue of no merit whatever requiring the devotion of the time, concentration, and effort of opposing counsel and of the Court to a fruitless enterprise").

180. *See Ledford*, 1988 WL 3428, at *1–2.

181. *Id.* at *3.

182. *See, e.g.*, Chapman v. Duke Energy Carolinas, LLC, No. 3:09–cv–37RJC, 2009 WL 1652463, at *2–3 (W.D.N.C. June 11, 2009) (granting a motion to strike portions of an EEOC determination letter, stating among other things that race probably explained the plaintiff's treatment compared to white coworkers and that it was likely the defendant had violated the law). In this case, the court ultimately dismissed the plaintiff's retaliation claim for want of exhaustion because she did not check the "retaliation" box on her EEOC charge form and did not specifically make a retaliation claim to the EEOC. Chapman v. Duke Energy Carolinas, L.L.C., Civil No. 3:09–CV–37–RJC–DCK, 2010 WL 411141, at *4–5 (W.D.N.C. Jan. 28, 2010). However, if the court had been willing to consider the EEOC determination letter, it would have seen that the EEOC determined that she was retaliated against for filing charges. This would have been particularly relevant because, under Fourth Circuit precedent, claims "developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII lawsuit." *Id.* at *5 (quoting Chacko v. Patuxent Inst., 429 F.3d 505, 506 (4th Cir. 2005)); *see also* Chancey v. N. Am. Trade Schs. Inc., Civil No. WDQ–10–0032, 2010 WL 4781306, at *2–3 (D. Md. Nov. 17, 2010), where the court struck part of a race-discrimination complaint quoting an EEOC determination letter. The letter stated that the plaintiff,

> confronted and challenged his [commercial driving] supervisor's [*sic*] for an incident of improper conduct and a violation of company rules that included a sever[e] episode of racial harassment and calling a senior employee the 'N' word; and proceeded to express his opposition and objection to the Supervisor[']s conduct by filling out a 'Disciplinary Action Notice' [and] giving his supervisor a copy.

Id. at *2 (alterations in original). It then found the plaintiff did not adequately allege that he alerted management that the epithet had been used against an employee. *Id.* at *6.

183. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 552–54 (2007).

184. *Id.* at 553–54 (alteration in original) (quoting Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993)).

directly suggesting a conspiratorial agreement.[185] As Justice Stevens noted in dissent, "in antitrust cases, [such] 'proof is largely in the hands of the alleged conspirators.'"[186] As before, courts have refused to allow plaintiffs to borrow plausibility,[187] even when doing so would arguably help them state plausible claims.[188]

What the above claims all have in common is that plaintiffs are unlikely to have access to the facts they need to satisfy heightened pleading standards before discovery. To the extent it *is* possible to gain such facts without discovery, investigative resources far exceeding the average plaintiff's are required. In many of these cases, the plaintiff cannot even afford a lawyer, let alone an expensive pre-suit investigation. At the federal level in recent years, close to thirty percent of plaintiffs have been pro se.[189] In state court, seventy-five percent of cases in 2012 involved a pro se litigant.[190] Moreover, the number of pro se litigants has increased dramatically in the past decades at the same time that courts have demanded more of their complaints.[191] That aside, most litigants are individual plaintiffs and not corporate entities.[192] One would expect that there are limits to how much a typical middle-class or even relatively wealthy plaintiff could afford to spend just on a pre-suit investigation before even filing a complaint. So, assuming that an employer intentionally discriminated against an employee and that there is internal email correspondence documenting this or that a high-ranking officer has notes corroborating the allegation that two corporations conspired to restrain trade, who *would* have access to such information?

Somebody with the resources and money to launch a lengthy investigation or somebody who came across such information in discovery in a prior lawsuit. Often, these will be government agencies such as the SEC or a state attorney general's office. Tellingly, many of the complaints that courts have stricken referenced SEC complaints from prior litigation. "The SEC frequently gains access to nonpublic information, either through cooperation or through administrative

185. *See id*. at 564–65.

186. *Id*. at 586 (Stevens, J., dissenting) (quoting Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746 (1976)).

187. *See In re* Rough Rice Commodity Litig., No. 11 C 618, 2012 WL 473091, at *5 (N.D. Ill. Feb. 9, 2012) (finding that allegations taken from a CFTC order could not be the sole basis of a manipulation claim); *In re* Platinum & Palladium Commodities Litig., 828 F. Supp. 2d 588, 597 (S.D.N.Y. 2011).

188. *See In re Platinum & Palladium Commodities Litig*., 828 F. Supp. 2d at 597.

189. Davis G. Yee, *The Professional Responsibility of Fair Play When Dealing with a Pro Se Adversary*, 69 S.C. L. REV. 377, 386 (2017).

190. *Id*. State court practices are beyond this Article's scope in part because pleading standards in the states are diverse. However, it is worth noting that several state courts have applied *Lipsky*. *E.g*., Chappuis v. Ortho Sport & Spine Physicians Savannah, LLC, 825 S.E.2d 206, 212 (Ga. 2019). To the extent states do follow heightened federal pleading standards, the concern about forbidding borrowed plausibility takes on even more force.

191. Katherine S. Wallat, *Reconceptualizing Access to Justice*, 103 MARQ. L. REV. 581, 594 (2019) (finding that as recently as the 1970s, only 10–20% of litigants in state court were pro se).

192. Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 148 (2011). Professor Hollander-Blumoff found that seventy percent of plaintiffs in nonprisoner and nonstudent loan cases were individual plaintiffs. Professor Hollander-Blumoff further observed that prisoner and student loan cases always involve at least one individual. *Id*.

subpoenas before the filing of a complaint."[193] These powers give the SEC access to information the average plaintiff will have no practical way of obtaining without discovery. Similarly, state agencies investigating discrimination have the practical ability to gain information the average plaintiff cannot without discovery.

Allowing plaintiffs to borrow plausibility could be an important way those plaintiffs satisfy this era's heightened pleading standards. Refusal to permit them to do so has transformed Rules 11 and 12(f) into de facto motions to dismiss in many cases. As one court recognized, the decision to strike every portion of a complaint based on an earlier consent decree or FTC order was "equivalent to a determination that [the p]laintiff has failed to adequately support her allegations of false or deceptive advertising by failing to allege factual grounds that are not derived solely from prior proceedings."[194] It acknowledged that "since *Twombly,* the requirement for fact pleading has been significantly raised."[195] Just as courts have limited plaintiffs' options to draft meritorious complaints, they have increased defendants' options to dismiss them. Defendants already had a conventional weapon to seek dismissal of an unmeritorious complaint; now, they have a nuclear weapon to blow up meritorious pleadings and then win dismissal.

It is worrisome enough that in precluding borrowed plausibility, courts could be forced to dismiss meritorious complaints. It is perhaps even more worrisome that some plaintiffs might be deterred from bringing meritorious claims in the first place. If they are pro se, as many litigants are, they will see that the only realistic source of factual allegations in some cases—litigation materials prepared by third parties—is one they might not be able to use, and thus, they may ultimately decide against filing a complaint. If they have lawyers, responding to a motion to strike and a motion for Rule 11 sanctions could drive up the litigation's cost to a point where they feel compelled to give up. In other cases, those lawyers fearing monetary penalties or bar discipline could choose not to represent plaintiffs who would need to borrow plausibility to survive a motion to dismiss, forcing the plaintiffs to navigate a complex legal system pro se, which will often be tantamount to condemning their lawsuits to failure.

B. TREATING LITIGANTS FAIRLY VIS-À-VIS OTHER LITIGANTS

1. Plaintiffs Who Use Other Litigants' Materials in Their Complaints Should Not Be Treated Differently than Other Actors Who Use Third-Party Work Product in the Legal System

Allowing plaintiffs to borrow plausibility is typically consistent with legal practice. Indeed, "if copying by authors and scholars is to be damned, it is to [be] praised among lawyers."[196] Sure, courts have sometimes criticized or sanctioned

193. Casey & Fields, *supra* note 7, at 16.

194. Fraker v. Bayer Corp., No. CV F 08–1564 AWI GSA, 2009 WL 5865687, at *6 (E.D. Cal. Oct. 6, 2009).

195. *Id.*

196. Jeanne L. Schroeder, *Copy Cats: Plagiarism and Precedent* 58 (Benjamin N. Cardozo Sch. of L., Jacob Burns Inst. for Advanced Legal Stud., Working Paper No. 185, 2007), http://ssrn.com/abstract=970365.

lawyers for plagiarism, but these examples do not take away from the legal practice encouraging, and often requiring, reliance on others' work. If litigants could not rely on or cite documents from others, there would be little advocacy. In briefs supporting motions to dismiss, defendants routinely quote and cite court decisions in other cases to support their positions.[197] Similarly, it is common practice to look at arguments other parties have made and then adopt those arguments wholesale or tweak them for a particular case. In fact, one might expect courts worried about stolen plausibility in complaints to be as worried about stolen merit in briefs where a defendant sees a successful motion to dismiss from another case, pulls the helpful case law and arguments out of the briefing with minimal effort and expense, and wins a case. That has not happened.

Instead, courts themselves often cite to and draw on other courts' decisions in writing their opinions. Indeed, a lower court would be remiss if it did not explain why binding precedent supported its decision, and it will frequently borrow passages wholesale from prior decisions. This raises the troubling prospect that the only parties forbidden from borrowing from third parties' work product to make their cases as persuasive as possible in the legal system will be the people who most need to borrow in order to receive their day in court. By contrast, the parties who can most afford independent investigations and research will still be permitted to borrow from others throughout the litigation process.

In this vein, it makes little sense to bar plaintiffs from relying on third-party litigation materials while permitting them to rely on other material. If a reputable news organization had done an in-depth investigation that provided facts supporting a plaintiff's claim, we would not describe the article as "immaterial." Indeed, as one district court noted in denying a motion to strike because of reliance on a prior complaint containing a relevant detailed study, "[i]t makes little sense to say that information from such a study—which the [complaint] could unquestionably rely on if it were mentioned in a news clipping or public testimony—is immaterial simply because it is conveyed in an unadjudicated complaint."[198] If two parties had the same allegations, but one set came from a newspaper investigation and the second set from a government investigation, some courts would strike the latter but not the former. Two similarly situated litigants would be treated differently.

Permitting plaintiffs to borrow plausibility in their complaints would equalize how the legal system treats reliance on third-party materials.

197. K.K. DuVivier, *Nothing New Under the Sun—Plagiarism in Practice*, 32 COLO. LAW. 53, 53 (2003) ("Lawyers frequently borrow ideas as well as the language in forms. Our precedent-based system emphasizes consistency over originality and bases ideas on those of others in the past. If the goal is to convince a court of the merit of an argument, and the idea comes from another court or an influential source, attributing the idea to that source bolsters the argument.").

198. *In re* Bear Stearns Mortg. Pass-Through Certificates Litig., 851 F. Supp. 2d 746, 768 n.24 (S.D.N.Y. 2012).

2. Plaintiffs Should Not Bear a Higher Evidentiary Burden on a Motion to Dismiss than They Do on a Motion for Summary Judgment

Preventing borrowed plausibility creates an inequality in evidentiary standards. Specifically, it imposes a burden on a motion to dismiss that plaintiffs do not bear on a motion for summary judgment. As will be demonstrated below, courts have often granted motions to strike under Rule 12(f) because allegations borrowed from other parties are "immaterial."[199] As courts have claimed, the allegations are immaterial because the complaint or government investigation from which they were drawn cannot be evidence at trial. But to succeed on a motion for summary judgment, the moving party cannot merely object that the nonmoving party relies on evidence that would be inadmissible at trial. Instead, it must argue that "the material cited to support or dispute a fact *cannot be presented in a form that would be admissible* in evidence."[200] In line with this, courts have allowed plaintiffs to rely on inadmissible material to defeat a motion for summary judgment.[201]

Two plaintiffs could both have identical allegations, and both could have taken them from a government investigation. The plaintiff facing a motion to dismiss would have the allegations stricken and risk dismissal because they cannot show "a reasonable expectation that discovery will reveal evidence."[202] The plaintiff facing a motion for summary judgment would be permitted to rely on the material (say, if it were uncovered during discovery) to show that a reasonable factfinder could rule in its favor at trial.[203] It is anomalous to place a higher evidentiary burden on plaintiffs at the motion to dismiss stage, before they have taken discovery, than at the motion for summary judgment stage *after* they have taken discovery.

C. PLAINTIFFS ARE ENTITLED TO USE GOVERNMENT LITIGATION MATERIALS

Most cases where plaintiffs have tried to borrow plausibility have involved government litigants.[204] When the government investigates a defendant for employment discrimination or antitrust violations or brings a lawsuit, it uses taxpayer dollars to do so. Moreover, it is conducting those investigations and launching those lawsuits to protect the public, and in many instances, individuals. For example, when the EEOC investigates an individual's charge of employment discrimination, it is vindicating a general public interest in fighting workplace racism and in stepping in to (potentially) protect an individual minority from

199. *See infra* Section IV.A.1.

200. FED. R. CIV. P. 56(c)(2) (emphasis added).

201. *E.g.*, Sphere Drake Ins. v. All Am. Life Ins., 300 F. Supp. 2d 606, 614 (N.D. Ill. 2003), *aff'd*, 376 F.3d 664 (7th Cir. 2004) (granting a motion for summary judgment after rejecting argument that the plaintiff relied on inadmissible evidence because "[t]he material that is submitted in support of a summary judgment motion is not necessarily itself admissible at trial, but must set forth evidence that would be admissible if presented in appropriate form at trial"); Nasrallah v. Helio De, No. 96 CIV. 8727 (SS), 1998 WL 152568, at *4 (S.D.N.Y. Apr. 2, 1998) (denying the defendant's motion for summary judgment even though "technically, the plaintiffs have presented no admissible evidence to oppose the summary judgment motion").

202. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

203. *See* Kautz v. Met-Pro Corp., 412 F.3d 463, 465 (3d Cir. 2005).

204. *See supra* Part II.

workplace racism. Insofar as a plaintiff who is seeking to borrow from those investigations and lawsuits helped pay for them, we can no longer think of those plaintiffs as stealing anything. Indeed, we might hesitate even to say that they are borrowing anything. Instead, they are merely taking advantage of work they helped fund and from which they are supposed to benefit. We might think of the taxes they pay to support government investigations and lawsuits as a substitute for fees they would ordinarily pay a lawyer to investigate their claims.

A rejoinder to this is that some people do not pay taxes. Perhaps a plaintiff relying on an SEC investigation did not pay income taxes during the timeframe the SEC conducted its investigation and commenced its lawsuit. Even there, we should still think of the plaintiff trying to use the SEC complaint as entitled to its plausibility. We do not condition a citizen's ability to benefit from government services on their ability to pay. More importantly, the government is not a private litigant pursuing its own interests. Instead, it is investigating defendants and suing them to serve a public purpose. If it sues a company for violating the securities laws, it is doing so at least in part to stop the company from harming the shareholders those securities laws are meant to protect. When a plaintiff who was harmed by the company's securities law violations uses the SEC's complaint to unlock the doors of discovery for a meritorious claim, they are using the complaint exactly as it was intended: to redress a harm done to people like them.

IV. COURTS HAVE UNFAIRLY INTERPRETED THE RULES OF CIVIL PROCEDURE TO PUNISH BORROWING PLAUSIBILITY

In this Part, this Article explains why, fairness considerations aside, courts have misread and misapplied Rules 12(f) and 11 to create the doctrine of stolen plausibility. Specifically, it demonstrates why neither the text, history, nor purpose of the Rules supports the doctrine.

A. RULE 12(F)

Recall that Rule 12(f) allows courts to strike from a pleading an insufficient defense or "any redundant, immaterial, impertinent, or scandalous matter."[205] The Rule's text belies the construction that courts striking complaints for borrowing plausibility have given it. Namely, courts have interpreted a "material" allegation to be one that has evidence the court would admit at trial.[206] Dictionaries do not support such a narrow definition. Merriam-Webster's dictionary defines "material" as "of or relating to the subject matter of reasoning" or "having real importance or great consequences."[207] The Cambridge University dictionary defines "material" as "important or having an important effect."[208] Collins

205. FED. R. CIV. P. 12(f).

206. *See supra* note 60 (collecting cases).

207. *Material*, MERRIAM WEBSTER DICTIONARY, https://merriam-webster.com/dictionary/material [https://perma.cc/L7C9-AJY5] (last visited Oct. 7, 2021).

208. *Material*, CAMBRIDGE UNIV. PRESS DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/material [https://perma.cc/P2XH-B8AW] (last visited Oct. 7, 2021) (The dictionary

Dictionary defines "material" as "directly relevant and important in a legal or academic argument."[209] As far as evidence goes, Black's Law Dictionary defines "material evidence" as "[e]vidence having some logical connection with the facts of the case or the legal issues presented."[210] Tellingly, it has another entry for "admissible evidence," which it defines as "[e]vidence that is relevant and is of such a character (e.g., not unfairly prejudicial, based on hearsay, or privileged) that the court should receive it."[211] It explicitly contemplates that material evidence might not always be admissible.

In fact, although courts in the last several decades have read "immaterial" to mean anything that would be inadmissible at trial, early courts interpreting Rule 12(f) nearly unanimously took the opposite view. Motions to strike, they held, were not the place to make evidentiary or legal determinations.[212] In defining the word "material" in the context of a defendant's answer, one early case observed that the term meant "[h]aving no essential or important relationship to the averment intended to be denied. A statement of unnecessary particulars in connection with, and as descriptive of, what is material."[213] When such definitions are combined with early courts refusing to make evidentiary and legal determinations on the pleadings, we can see that they used "material" in a much broader light. If a statement in the pleadings was relevant,[214] it should be allowed to stay, regardless of whether the court might later exclude it at trial.

In any event, references to third-party materials in other lawsuits can plainly be relevant in the way the term "material" contemplates. If a government investigation produced a detailed complaint alleging securities fraud that a defendant felt compelled to settle, that would make most of us see an individual's claim alleging securities fraud as more plausible regardless of whether the court ruled on the

uses "material" in the following example: "If you have any information that is material to the investigation, you should state it now" (emphasis omitted)).

209. *Material*, COLLINS DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/material [https://perma.cc/899B-LGZA] (last visited Oct. 7, 2021).

210. *Material Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

211. *Admissible Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

212. *E.g.*, Burke v. Mesta Mach. Co., 5 F.R.D. 134, 139 (W.D. Pa. 1946) (refusing to strike a defendant's answer because "[a] motion to strike was never intended to furnish an opportunity for the determination of disputed and substantial questions of law, and, therefore, without attempting to pass upon the question whether the allegations of the Answer in this case to which the motion to strike is addressed constitute a defense and, without intimating that they do, I conclude only that the allegations are of such a character that their sufficiency ought not to be determined summarily upon a motion to strike"); Sbicca-Del Mac, Inc. v. Milius Shoe Co., 36 F. Supp. 623, 626 (D. Mass. 1940) (motion to strike "is not ordinarily an appropriate remedy to test the legal sufficiency of a pleading"); United States v. Edward Fay & Son, 31 F. Supp. 413, 414 (E.D. Pa. 1939) (denying a motion to strike on the grounds that it was being used as a 12(b)(6) motion for failure to state a claim); O'Reilly v. Curtis Publ'g Co., 22 F. Supp. 359, 361 (D. Mass. 1938) ("A motion to strike was never intended to furnish an opportunity for the determination of disputed and substantial questions of law.").

213. *Burke*, 5 F.R.D. at 138.

214. *See* D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 9–10 n.20 (1976).

merits.[215] It would be relevant to the question of whether, under *Twombly* and *Iqbal*, there is "a reasonable expectation that discovery will reveal evidence"[216] of tortious or illegal conduct of which a government investigation has already produced considerable evidence.

In ignoring this reality, courts have created unfairness in at least two ways: (1) they have ignored the motion to strike's origins in equity with its focus on avoiding the rigidities of law to do substantial justice, and (2) they have embraced an unbalanced view of prejudice.

1. Interpretations of Rule 12(f) Should Create, Not Impede, Equity

The motion to strike has equitable origins.[217] Before the 1937 Rules of Civil Procedure merged law and equity, the 1842 Federal Rules of Equity required that "[e]very bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, *in haec verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit."[218] The Rule allowed a judge to refer pleadings to a master, who would in turn determine whether impertinent material should be "expunged."[219] In 1912, the rules changed to allow a court, even "upon motion or its own initiative," to "order any redundant, impertinent or scandalous matter stricken out, upon such terms as the court shall think fit."[220] The 1912 version was modeled on an English version of the rule, which allowed striking a portion of a pleading "which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action."[221] English practice at the time appears to have required that "unnecessary" statements in pleadings cause a litigant prejudice before a judge could strike them.[222]

Under equitable principles, plaintiffs received wide latitude in crafting their pleadings.[223] In modifying a lower court's order striking portions of pleadings, New York's First Department of the Appellate Division observed that "[t]he nature of the relief itself frequently requires, not only that the ultimate facts from which the right to relief arises should be stated, but that facts which are somewhat

215. *See In re* Connetics Corp. Sec. Litig., 542 F. Supp. 2d 996, 1005–06 (N.D. Cal. 2008) (suggesting that evidence taken from a previous SEC complaint made a plaintiff's allegations more plausible than other sources would).

216. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

217. *See* Risinger, *supra* note 214, at 8 n.20 (referring to rules on equity pleadings to define the word "immaterial"); *Sbicca-Del Mac*, 36 F. Supp. at 626 ("Motions to strike have been allowed in equity apart from any rule of court, and they were not unknown in actions at common law.").

218. THE NEW FEDERAL EQUITY RULES: PROMULGATED BY THE UNITED STATES SUPREME COURT AT THE OCTOBER TERM, 1912, at 87 (James Love Hopkins ed., 5th ed. 1925).

219. *Id.*

220. *Id.* at 161.

221. *Id.*

222. *Id.* ("It is, therefore, important to note that in the English practice, if the matter is otherwise harmless, it will not be struck out merely because it is unnecessary.").

223. *See* John D. Park & Sons Co. v. Nat'l Wholesale Druggists' Ass'n, 52 N.Y.S. 475, 477 (App. Div. 1898).

collateral should be laid before the court."[224] That is, even if something pleaded in the complaint might ultimately not be directly relevant to the court (and perhaps inadmissible at trial), if it added helpful context to the allegations, a court should not strike it. After all, in equity, "greater latitude and liberality are allowed in the preparation of pleading than in other actions."[225] This is a theme treatise writers of the era echoed. Justice Story observed that "[t]he pleadings in equity, although framed with a regard to certainty and uniformity, were always, in their style and character, of a more liberal and less technical cast than those at the common law."[226] William Meade Fletcher took it as a given that "[a] bill will not be held bad on demurrer, merely because it contains many vague and irrelevant averments, if, taken as a whole, it states facts entitling complainant to relief."[227] He affirmed the principle that pleading standards were more liberal in equity than they were under the common law.[228]

Courts that considered striking pleadings in equity cases show that these principles precluded making evidentiary and legal determinations on a motion to strike.[229] In line with equity's overarching focus on doing justice to the parties and rejecting rigid rules, New York's Appellate Division even warned that the power to strike pleadings should not be "exercised in such a way as to make the pleading, which otherwise would be good, defective upon demurrer."[230] This is exactly what granting motions to strike because the plaintiff borrowed plausibility has accomplished in some cases and what it likely will accomplish more often in the future.[231] A defendant could convince a court to strike out factual details

---

224. *Id.*

225. *Id.*

226. JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS AND THE INCIDENTS THEREOF.: ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY OF ENGLAND AND AMERICA 19 (Isaac F. Redfield ed., 8th ed. 1870).

227. WILLIAM MEADE FLETCHER, A TREATISE ON EQUITY PLEADING AND PRACTICE WITH ILLUSTRATIVE FORMS AND PRECEDENTS § 62 (1902).

228. *Id.*

229. *See, e.g.*, Haberman v. Kaufer, 47 A. 48, 49, 50 (N.J. Ch. 1900) (faulting lawyers for framing a motion to strike as if "it presented the question of the sufficiency in law of the challenged facts set forth in the answer to constitute a defense," and denying motion to strike an answer, because if the facts alleged in the answer were true, they would be relevant to the defense); Perkins v. Center, 35 Cal. 713, 726 (1868) (reversing trial court order striking portions of complaint as irrelevant where the allegations stricken related the entire history of an allegedly fraudulent transaction and, if true, demonstrated that the defendant committed fraud); Goodrich v. Parker, 1 Minn. 195, 197–98 (1854) (observing that an equity pleading was "also an examination of the defendant on oath, for the purpose of obtaining evidence to establish, or tending to establish, the complainant's case, or to countervale [sic] the allegations contained in the defendant's answer" and that "where the allegations or statements contained in the bill may thus affect the decision of the cause, if proved or admitted by the defendant, it is relevant, and cannot be excepted to as impertinent"). *But see* Woods v. Morrell, 1 Johns. Ch. 103, 106 (N.Y. Ch. 1814) (suggesting that the proper test of the term "impertinent" was "whether the subject of the allegation could be put in issue, and would be matter proper to be given in evidence between the parties"). The court in *Morrell* ended up striking parts of an answer that the judge found unrelated to the lawsuit. *Id.* at 108–09.

230. John D. Park & Sons Co., 52 N.Y.S. at 477.

231. *See In re* Platinum & Palladium Commodities Litig., 828 F. Supp. 2d 588, 595 (S.D.N.Y. 2011) (finding, after striking a complaint relying on a CFTC order, that "many of the parties' arguments are

that would allow a plaintiff to survive today's heightened pleading standards and then prevail on a motion to dismiss.[232] Should a defendant be able to edit a plaintiff's plausible complaint into an implausible one? We would all answer, "no." We would likely all share the intuition that this is unfair. Yet that is precisely the outcome we can expect, so long as we countenance motions to strike based merely on a plaintiff's borrowed plausibility.

2. Courts Have Adopted an Unfairly Skewed Definition of Prejudice

As a threshold matter, courts are supposed to consider whether leaving the pleadings intact will prejudice the other party.[233] Some courts have treated prejudice as a prerequisite to striking pleadings.[234] Others treat it as one consideration among others.[235] Notably, courts that have stricken pleadings under Rule 12(f) have often not even considered prejudice.[236] If they did, they would find themselves unable to strike complaints. There are three ways allowing a plaintiff to borrow plausibility might prejudice a defendant. First, one might worry that allowing such reliance would lead to juries making unfair inferences at trial. That is, a juror might see reference to a government investigation in a securities case and say, "if the government went after the defendant before and accused it of the

difficult to evaluate" because "references permeate the Complaint, and their absence denudes the Complaint of the specifics of the alleged manipulative trading scheme"). The court specifically suggested that the plaintiffs pleaded enough facts to support finding an illegal agreement but then dismissed the claim because those facts came from the CFTC order, and without those facts, the claim was implausible. *Id.* at 597; *see* Fraker v. Bayer Corp., No. CV F 08–1564 AWI GSA, 2009 WL 5865687, at *5 (E.D. Cal. Oct. 6, 2009).

232. *See In re Platinum & Palladium Commodities Litig.*, 828 F. Supp. 2d. at 597; *Fraker*, 2009 WL 5865687, at *5, 10.

233. 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1380 (3d ed. 2021) ("Thus, in order to succeed on a Rule 12(f) motion to strike surplus matter from an answer, the federal courts have established a standard under which it must be shown that the allegations being challenged are so unrelated to the plaintiff's claims as to be unworthy of any consideration as a defense and that their presence in the pleading throughout the proceeding will be prejudicial to the moving party.").

234. *E.g.*, Godfredson v. JBC Legal Grp., P.C., 387 F. Supp. 2d 543, 556–57 (E.D.N.C. 2005) (denying a motion to strike portions of a complaint where the defendant had made no showing of prejudice); Vial v. First Com. Corp., No. 83-1908, 1983 WL 1896, at *9–10 (E.D. La. May 4, 1983); Fleischer v. A.A.P. Inc., 180 F. Supp. 717, 721 (S.D.N.Y. 1959) (holding that "immaterial allegations, and likewise verbose, conclusory, or evidentiary allegations, need not be stricken unless their presence in the complaint prejudices the defendant"); Tivoli Realty, Inc. v. Paramount Pictures, Inc., 80 F. Supp. 800, 803 (D. Del. 1948) ("Motions to strike are rather strictly considered and have often been denied even when literally within the provisions of Rule 12(f) where there is no showing of prejudicial harm to the moving party."); *see also id.* (collecting cases).

235. *E.g.*, Berke v. Presstek, Inc., 188 F.R.D. 179, 180–81 (D.N.H. 1998) (observing that pleadings should not be stricken "absent clear immateriality or prejudice to the moving party," and denying a motion to strike where the defendants "have not shown any possible prejudice").

236. *See* Lipsky v. Commonwealth United Corp., 551 F.2d 887, 892–94 (2d Cir. 1976); *In re Platinum & Palladium Commodities Litig.*, 828 F. Supp. 2d at 594–95 (striking references to a CFTC order finding that the defendants had manipulated palladium and platinum futures contracts without indicating that what was in the order prejudiced the defendants in some way); Ledford v. Rapid-Am. Corp., No. 86 Civ. 9116 (JFK), 1988 WL 3428, at *1–3 (S.D.N.Y. Jan. 8, 1988) (striking a reference in a complaint that the New York State Division of Human Rights found probable cause to believe plaintiff was terminated because of his age without analyzing prejudice).

same conduct it's on trial for now, it must be liable to the plaintiff. Where there's smoke, there's fire." Or the juror may say, "the defendant would only have settled with the government if it did something wrong and wanted to avoid trial." Concern that jurors will make incorrect or unfair inferences is an important reason for many evidentiary rules in the first place.[237] Even if we grant the premise that jurors would make improper use of evidence and that it is therefore appropriate to withhold relevant evidence in some instances, that would not justify striking pleadings. Because "a complaint is not submitted to the jury,"[238] there is no chance that it will influence the jury's decisionmaking.

Second, we might worry that allowing certain evidence in complaints will unduly influence judges. Perhaps if they see references to an earlier government investigation making the same allegations that the plaintiff is, they will assume the defendant is liable. That assumption could then color how they conduct the proceedings. But if that is really the concern, motions to strike do not mitigate it. In calling attention to the plaintiff's reliance on a consent decree or prior complaint that made detailed findings, a motion to strike might cause the judge to spend more time thinking about that prior complaint and consent order than the judge would have otherwise.

If motions to strike do not cure either instance of prejudice, what prejudice could they prevent? The third and only answer is that striking portions of complaints that make them more plausible prevents prejudice by keeping defendants from having to litigate meritorious claims. After all, if the complaint, even including the references to third-party litigation materials, fails to state a claim, the court would dismiss it. Normatively, we should hesitate to allow a defendant to claim prejudice for having to defend against a meritorious lawsuit.

In other contexts, courts have refused to consider having to litigate a potentially meritorious claim in the first place as prejudice. For example, whenever a court grants a party leave to amend, it arguably allows them a greater chance to win than they would have otherwise. In *Beeck v. Aquaslide 'N' Dive Corp.*, the Eighth Circuit affirmed a trial court's decision allowing a defendant to amend an answer claiming it had not manufactured the slide that caused the plaintiff's injury after the statute of limitations had expired.[239] The plaintiff argued the amendment was prejudicial because if the defendant successfully argued it had not manufactured the slide, the plaintiff would be time-barred from suing the real

237. Kenneth S. Klein, *Why Federal Rule of Evidence 403 Is Unconstitutional, and Why That Matters*, 47 U. RICH. L. REV. 1077, 1080 (2013) ("Evidentiary exclusionary rules such as these unambiguously are based on a distrust of juries. As the American Law Institute ('ALI'), in promulgating its first Model Code of Evidence, indelicately reported concerning the 'common wisdom' of the day, 'The low intellectual capacity of the jury is commonly put forward to justify some, if not all, of our exclusionary rules. . . . [J]urors are treated as if they were low grade morons.'" (alterations in original) (quoting Edmond M. Morgan, *Foreword to* AM. L. INST., MODEL CODE OF EVIDENCE AS ADOPTED AND PROMULGATED BY THE AMERICAN LAW INSTITUTE 8–10 (1942))).

238. Johnson v. M & M Commc'ns, Inc., 242 F.R.D. 187, 190 (D. Conn. 2007).

239. 562 F.2d 537, 539, 541 (8th Cir. 1977).

manufacturer.[240] The Eighth Circuit refused to treat this possibility as prejudice. Instead, all allowing the amendment did was introduce an issue the parties could dispute at trial.[241] Similarly, when it comes to complaints, all allowing a complaint that borrows plausibility does is let the plaintiff argue a claim on the merits that the other party can disprove.

This atypical view of prejudice would be particularly problematic because it overlooks possible prejudice to plaintiffs. A plaintiff who has portions of a complaint stricken that would defeat a motion to dismiss has suffered prejudice to the extent that they can no longer pursue a meritorious claim. Yet courts that have granted motions to strike that have sounded the death knell for potentially meritorious claims have not considered this prejudice to plaintiffs.[242] Rule 12(f) is supposed to be a shield protecting litigants from unfair pleadings, not a sword to shred meritorious ones.

B. RULE 11

Like Rule 12(f), a motion for Rule 11 sanctions has the potential to become a de facto motion to dismiss.[243] Even where courts do not dismiss the complaints outright, levying monetary sanctions could increase the litigation's cost to the point where plaintiffs of modest means cannot pursue their cases. Courts have unfairly interpreted Rule 11 to transform it into a motion to dismiss by another name in two ways: (1) they have imposed a duty on litigants that the Rule's text does not support, and (2) they set aside the principle that Rule 11 inquiries are only appropriate for unmeritorious pleadings.

1. Courts Have Unfairly Suggested a Duty for Lawyers to Gather Facts Personally

In granting Rule 11 sanctions, courts have found that lawyers needed to personally investigate all the facts they seek to use when borrowing in their complaints.[244] In other words, if they took facts from an SEC complaint, Rule 11

240. *Id.* at 540–41.

241. *Id.* at 541 ("The [district] court reasoned that the amendment would merely allow the defendant to contest a disputed factual issue at trial, and further that it would be prejudicial to the defendant to deny the amendment."); *see also* Patton v. Guyer, 443 F.2d 79, 86 (10th Cir. 1971) ("There is invariably some practical prejudice resulting from an amendment, but this is not the test for refusal of an amendment. . . . The inquiry again is whether the allowing of the amendment produced a grave injustice to the defendants."). As I suggest above, having to defend a meritorious lawsuit is not a "grave" injustice, as suggested in *Patton*.

242. *See, e.g.*, *In re* Platinum & Palladium Commodities Litig., 828 F. Supp. 2d 588, 595 (S.D.N.Y. 2011); Fraker v. Bayer Corp., No. CV F 08–1564 AWI GSA, 2009 WL 5865687, at *5 (E.D. Cal. Oct. 6, 2009).

243. *See generally* Garr v. U.S. Healthcare, Inc., 22 F.3d 1274, 1278 (3d Cir. 1994) (noting the district court had dismissed the complaints without prejudice).

244. *E.g.*, *In re* Connetics Corp. Sec. Litig., 542 F. Supp. 2d 996, 1005 (N.D. Cal. 2008) (faulting the plaintiff for not "contend[ing] that they conducted independent investigation into the facts alleged in the SEC complaint"); Geinko v. Padda, No. 00 C 5070, 2002 WL 276236, at *6 (N.D. Ill. Feb. 27, 2002) (finding that attorneys who relied entirely on an SEC complaint needed to "conduct [their] own independent analysis of the facts").

required them to show that they independently verified them. Rule 11 requires lawyers to certify after an "inquiry reasonable under the circumstances" that "factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information."[245] If, after a years-long, resource-intensive investigation, the SEC made detailed factual findings, this would suggest that allegations based on them have evidentiary support. Moreover, such findings could furnish an attorney with a reasonable belief that allegations based on them have evidentiary support. The only basis for a court to find a duty to personally investigate the facts is Rule 11's language that lawyers make an "inquiry reasonable under the circumstances."[246] However, what constitutes a reasonable inquiry "under the circumstances" is by definition a fact-intensive inquiry that does not lend itself to easy per se rules. An SEC complaint could have factual allegations that were the product of investigative resources and manpower the average litigant cannot marshal. A reasonable inquiry "under the circumstances" of such a case surely does not require that a plaintiff's attorney launch an unrealistic quest to personally substantiate those allegations, especially not without the benefit of discovery rules to compel the cooperation likely necessary to do so. Instead, an attorney could perform a reasonable investigation by ensuring that the allegations came from a reputable source that used a rigorous methodology to unearth them.[247] The SEC and most government agencies would likely satisfy this investigation in most cases.

2. Courts Have Abandoned the Tradition of Not Applying Rule 11 to Meritorious Pleadings

In sanctioning plaintiffs for borrowing plausibility, courts have neglected a longstanding consensus that Rule 11 sanctions should only lie when the underlying pleading is unmeritorious.[248] Possibly, the refusal to grant Rule 11 sanctions

245. FED. R. CIV. P. 11(b), (b)(4).

246. *Id.* 11(b).

247. *See In re* BankAtlantic Bancorp, Inc. Sec. Litig., 851 F. Supp. 2d 1299, 1311 (S.D. Fla. 2011) (observing that "an attorney has a nondelegable duty to *analyze* the facts and law that support a pleading or motion, not necessarily to personally *gather* those facts").

248. *E.g.*, Sussman v. Bank of Isr., 56 F.3d 450, 459 (2d Cir. 1995) (noting that "[a] party should not be penalized for or deterred from seeking and obtaining warranted judicial relief merely because one of his multiple purposes in seeking that relief may have been improper," and rejecting argument that the plaintiff's argument in trying the case was improper); Burkhart v. Kinsley Bank, 852 F.2d 512, 514–15 (10th Cir. 1988) ("There is the suggestion by the Bank that counsel brought the action to harass the Bank, but that part of the rule is, in our view, subsumed in the language appearing in section (3) of our breakdown of Rule 11. In other words, if counsel filed an amended complaint which *was* 'warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law,' then any suggestion of harassment would necessarily fail."); Nat'l Ass'n of Gov't Emps., Inc. v. Nat'l Fed'n of Fed. Emps., 844 F.2d 216, 223 (5th Cir. 1988) (reversing sanctions order because "[t]he filing of an original complaint, as we noted above, presents no such redundancy and, therefore, when the allegations of the complaint are well grounded, cannot generally serve as a basis for imposing sanctions"); Zaldivar v. City of Los Angeles, 780 F.2d 823, 832 (9th Cir. 1986), *overruled on other grounds by* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) ("We hold that a defendant cannot be harassed under Rule 11 because a plaintiff files a complaint against that defendant which complies with the 'well grounded in fact and warranted by existing law' clause of the Rule."). *But see* Szabo Food Serv., Inc. v. Canteen

in meritorious cases reflects two related intuitions. The first is a concern with judicial economy. The second is the difficulty of assessing whether an attorney's investigation was sufficient or if the litigation was initiated for an improper purpose.

As to the first, the 1983 amendment to Rule 11 came to exist amid a perception that too many lawyers were abusing the litigation process with frivolous cases.[249] Allowing courts to sanction attorneys for bringing a lawsuit for an improper purpose or without having made an adequate investigation would encourage lawyers to think carefully about pleadings they file and thereby "skim off the frivolous and improperly motivated lawsuits, motions and discovery that are polluting the federal system."[250] Each time a court granted Rule 11 sanctions, it would further deter attorneys from behaving improperly.[251] This all comes at a cost: satellite litigation. When a party moves for Rule 11 sanctions, this will often necessitate briefing and additional investment of court time. The other side might then bring its own Rule 11 motion charging that the original Rule 11 motion was improperly brought.[252] If Rule 11 sanction motions occur too often, the satellite litigation could cancel out the benefits from deterring unmeritorious cases.

This is a risk courts themselves have recognized. For example, in *Golden Eagle Distributing Corp. v. Burroughs Corp.*, a district court sanctioned the defendant's counsel for bringing a summary judgment motion that was legally and factually supportable because counsel implied that the motion was warranted by existing law when, in fact, it "was grounded in a 'good faith argument for the extension, modification, or reversal of existing law.'"[253] Notably, the district court found that the motion was "nonfrivolous."[254] The Ninth Circuit reversed, observing that "[a]sking judges to grade accuracy of advocacy in connection with every piece of paper filed in federal court multiplies the decisions which the court must make as well as the cost for litigants."[255] The court further catalogued the expenses that litigation over the sanctions had caused: two rounds of briefing at

Corp., 823 F.2d 1073, 1083 (7th Cir. 1987) (suggesting the district court could sanction a plaintiff under Rule 11 if it pursued its racial-discrimination claim for improper reason).

249. *See* Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1316 (1986) ("Much of the specific criticism of lawyers' behavior during this period focused on discovery tactics that subvert the spirit, if not the letter, of the rules. There was also a more general concern that lack of effective judicial oversight and tactical considerations in litigation—manipulating the process to gain an advantage for clients—had clogged the courts with frivolous suits and unnecessary pretrial activity." (footnote omitted)).

250. *Id.* at 1323 (quoting ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 18–19 (1984)).

251. *See id.* at 1325.

252. *See, e.g.*, Claudet v. First Fed. Credit Control, Inc., No. 6:14-cv-2068-Orl-41DAB, 2015 WL 7984410, at *3 (M.D. Fla. Nov. 17, 2015) (finding that the Rule 11 sanction was brought for an improper purpose and that a "degree of unprofessionalism persisted between plaintiff and defense counsel").

253. 801 F.2d 1531, 1534, 1538 (9th Cir. 1986) (quoting Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124, 126 (N.D. Cal. 1984), *rev'd*, 801 F.2d 1531 (9th Cir. 1986)).

254. *Id.* at 1538.

255. *Id.* at 1540.

the district court and an appeal where the sanctioned counsel hired an expensive law firm to defend them.[256] In urging that Rule 11 move away from mandatory sanctions—which it ultimately did—Professor Nelken observed that in many cases, "the volume of Rule 11 satellite litigation [was] impos[ing] a significant burden of cost and delay at both the district and the circuit court level."[257] Her concern was widespread.[258] Granting Rule 11 sanctions because a plaintiff has borrowed plausibility further adds to the decisions courts must make; not only must they "grade [the] accuracy"[259] of every complaint but also scrutinize whether every complaint was appropriately sourced.

One way to keep satellite litigation in check is to "skim off" the patently meritorious cases from the pool to which courts apply Rule 11. Courts do not have time to consider whether every case or every pleading satisfies Rule 11. In attempting to prevent abuses to the system, courts should focus their limited time on those cases most likely to contain sanctionable behavior and ignore those most unlikely to contain sanctionable behavior. Because Rule 11 is concerned with frivolous cases,[260] eliminating nonfrivolous cases from consideration would be a good start.

We should also be mindful of Rule 11's historic effect on particular litigants. In one study, Professor Vairo found that civil rights plaintiffs were over seventeen percent more likely than other plaintiffs to be sanctioned under Rule 11.[261] Professor Vairo also found that Rule 11 sanctions were disproportionately likely in "securities fraud cases brought by investors, and antitrust cases brought by smaller companies."[262] Other scholars have found similar effects.[263] That is, Rule 11 sanctions have typically been deployed against precisely the sort of plaintiffs already struggling with heightened pleading standards. Litigants with limited resources will usually be unable to engage in the rigorous pre-discovery investigation that government agencies can, and which courts increasingly seem to expect. The only way, in many cases, to provide detailed factual allegations will be to borrow them. Telling litigants that they cannot borrow such allegations may be tantamount to telling them that they cannot bring their claims.

---

256. *Id.* at 1541.

257. Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 408 (1990).

258. *See, e.g.*, Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 598–99, 621 (1998) (describing an "explosion" in the number of Rule 11 sanctions because "many attorneys were unable to pass up the opportunity to force their adversaries to justify the factual and legal bases underlying motions and pleadings," and concluding that "excessive satellite litigation undermined the goal of improving lawyer conduct as a means for streamlining litigation").

259. *Golden Eagle Distrib. Corp.*, 801 F.2d at 1541.

260. Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 197–98 (1988).

261. *Id.* at 200–01.

262. Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 483 (1991).

263. *See* Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 490 (1988); Robert S. Peck & Erwin Chemerinsky, *The Right to Trial by Jury as a Fundamental and Substantive Right and Other Civil-Trial Constitutional Protections*, 96 OR. L. REV. 489, 513 (2018) (observing that "[c]ivil rights cases in particular suffered under the 1983 version of Rule 11").

The 1993 amendments sought to rein in the satellite litigation and attendant abuses that the 1983 amendment had caused,[264] in part by making sanctions discretionary instead of mandatory. Treating borrowed plausibility as automatically sanctionable, as some courts have done, takes us back to that same repudiated 1983 regime.

V. POLICY CONCERNS DO NOT JUSTIFY THE DOCTRINE OF STOLEN PLAUSIBILITY

What really accounts for courts stopping plaintiffs from borrowing plausibility from other litigants, I suspect, is a set of policy concerns.

First, there is a concern about judicial economy. The worry is that the transaction costs of filing a lawsuit will become too low.[265] Litigants will not have to expend time and resources conducting a pre-suit investigation. Instead, they can simply look for a complaint filed in another lawsuit, copy and paste the allegations, and be on their way. As a result of it being so easy to file a lawsuit that survives a motion to dismiss, there will be an influx of lawsuits into the system. Correspondingly, we might worry, as the Court did in *Twombly*,[266] that plaintiffs could spend little time and energy preparing a complaint, and then use the high cost of discovery to extract a settlement. Seen in this light, focusing on the sources from which a plaintiff draws from is a way of balancing incentives and ensuring that plaintiffs pay a high enough cost to initiate a lawsuit so that none will bring baseless claims.

If the concern is judicial economy, then scrutinizing the complaint's sources is unlikely to help. Courts and commentators have recognized that both motions to strike and motions for Rule 11 sanctions can lead to lengthy satellite litigation. Wright and Miller, for example, explained that a motion to strike "often is sought by the movant simply as a dilatory or harassing tactic."[267] It is possible that any benefit from eliminating a certain number of cases will be canceled out or minimized by a substantial expenditure of time in briefings, hearings, and appeals on motions to strike and motions for Rule 11 sanctions.

As far as incentives go, motions to strike and motions for Rule 11 sanctions threaten to skew them too far in favor of defendants. When faced with a meritorious complaint, defendants can file motions asserting that the complaint impermissibly borrows plausibility and hope the resulting delay and costs cause plaintiffs to give up on the case or accept an unfavorable settlement. While the judicial system should be on guard against unscrupulous plaintiffs using expensive discovery to extract settlements in unmeritorious cases, it should equally be on guard

264. *See* Benjamin P. Cooper, Iqbal*'s Retro Revolution*, 46 WAKE FOREST L. REV. 937, 953 (2011).

265. *See* Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. Walgreen Co., 631 F.3d 436, 444 (7th Cir. 2011).

266. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (worrying that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings").

267. 5C WRIGHT & MILLER, *supra* note 233; *see* Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 347 (4th Cir. 2001).

against unscrupulous defendants using the threat of delay to extract voluntary dismissals or unfair settlements in meritorious cases.

If one were inclined to be uncharitable toward heightened pleading standards, perhaps these standards are not best understood as sieves through which courts filter out unmeritorious cases. Perhaps, instead, they mean simply to filter out cases. One way to decrease case dockets and reduce costs for defendants is simply to decrease the number of cases plaintiffs file. Requiring more detail in complaints before discovery will require plaintiffs to invest significant time and money into investigating a claim before filing a complaint. Many—especially plaintiffs of modest means—will not have those resources and will be unable to file suit. In this light, the trend toward heightened pleading standards is simply an attempt to raise the transaction costs of filing a lawsuit high enough to deter a substantial number of would-be plaintiffs.

Figuring out the optimal balance between discouraging unmeritorious litigation and encouraging meritorious litigation is difficult. But we should not lightly assume that heightened pleading standards are simply a crass attempt to decrease lawsuits. In passing antitrust, securities, and civil rights legislation, Congress recognized that there were serious problems that litigation from private plaintiffs could address. For example, the Clayton Act not only provides anyone injured by antitrust laws with a cause of action but it also authorizes treble damages.[268] Scholars have recognized that "our society places extensive reliance upon such private attorneys general to enforce the federal antitrust and securities laws, to challenge corporate self-dealing in derivative actions, and to protect a host of other statutory policies."[269]Actively turning away meritorious claims could prevent such legislation from achieving its aims.

Second, we might hesitate to allow plaintiffs to borrow plausibility because we think it is unfair to let them profit from the efforts of others. That is, if one litigant put in the hard work of investigating and drafting a plausible complaint, we might think it unfair that another party that has not put in the effort can now simply use that person's work.[270] To draw an analogy to school, we would not let one student copy someone else's spelling test and receive credit for the right answer. I suspect at least some of the courts that have bought into the doctrine of stolen plausibility

268. 15 U.S.C. § 15(a) ("Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.").

269. Coffee, Jr., *supra* note 12, at 216; *see, e.g.*, Adam Babich, *The Wages of Sin*: *The Violator-Pays Rule for Environmental Citizen Suits*, 10 WIDENER L. REV. 219, 243 (2003) (noting that "[t]he courts have long recognized that Congress enacted environmental citizen-suit provisions to abate threats to the environment, supplement government enforcement, encourage government agencies to enforce the laws more effectively, and expand opportunities for public participation").

270. This is reminiscent of Justice Jackson's observation in *Hickman v. Taylor* that "[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." 329 U.S. 495, 516 (1947) (Jackson, J., concurring).

approach cases with this mindset.[271] There are at least two problems with the doctrine. First, it misunderstands the purpose of government litigation. The government is not like a private party that exists primarily to advance its own personal interests. Unlike the student who studies hard for her spelling test so she can receive a high grade and not to help her classmates, the government litigates to benefit the public. Allowing a plaintiff to borrow a government complaint's plausibility allows a member of the public to benefit from the same laws the government is charged with protecting. Second, even in the context of borrowing from private litigants, it misunderstands the legal system's fundamental purpose. Unlike a school, where the teachers grade individual students based on the quality of their work and effort, the legal system is concerned with accurately applying the law. It should not matter how hard a judge thinks a litigant tried or what she thinks of their lawyer's quality. The judge's task is to apply the law to the facts to reach the correct result, whether she thinks the individual litigant deserves that result or not.[272]

A final worry is that defendants might become less likely to settle cases or investigations if they know that those investigations and settlements could be used against them in future complaints. Government agencies have an interest in convincing defendants to settle.[273] The SEC, for example, has described settlement as "put[ting] money back in the pockets of harmed investors without years of courtroom delay and without the twin risks of losing at trial or winning but recovering less than the settlement amount - risks that always exist no matter how strong the evidence is in a particular case."[274] Moreover, "other frauds might never be investigated or be investigated more slowly because limited agency resources are tied up in litigating a case that could have been resolved."[275]

Similarly, the government has an interest in ensuring that defendants fully and completely cooperate with investigations. The easier it is for the government to

---

271. *See* Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. Walgreen Co., 631 F.3d 436, 444 (7th Cir. 2011).

272. This might still leave us feeling that it is unfair that a private party bore all of the costs of investigating a defendant to uncover facts that support a plausible complaint and that plaintiffs are able to profit from that person's efforts and "free ride." However unappealing this prospect is, I maintain it is even worse if the only thing that lets a plaintiff write a plausible complaint as a practical matter—third party litigation materials—is deemed off limits and the plaintiff's complaint is dismissed when, ultimately, they have a meritorious claim. Perhaps we might then worry that there will be negative systemic implications because parties will be less likely to pour resources into investigating a defendant if they think others can swoop in and use their work product. But that fear seems unfounded. If, say, a corporation believed it could recover $50 million from a defendant for some wrongdoing, is what would stop them from investigating the defendant and producing a complaint really be the prospect that another plaintiff might eventually use the materials for another lawsuit? To ask the question is to answer it.

273. Danné L. Johnson, *SEC Settlement: Agency Self-Interest or Public Interest*, 12 FORDHAM J. CORP. & FIN. L. 627, 647 (2007) ("The SEC settles most enforcement actions by consent . . . ." (footnote omitted)).

274. Press Release, SEC, SEC Enforcement Director's Statement on Citigroup Case (Dec. 15, 2011), https://www.sec.gov/news/press/2011/2011-265.htm [https://perma.cc/B9EN-JHKB] (No. 2011-265).

275. *Id.*

investigate, the sooner it can bring potential cases to resolution and redeploy scarce resources to ferreting out other unlawful conduct. The investigations it does conduct will likely be more efficient and less costly if defendants cooperate. However, one might worry that allowing third parties to use information uncovered from investigations will change a defendant's calculus. Yes, working to undermine a government investigation by withholding documents or dragging things out might upset the government. But a defendant might conclude that the bigger risk is furnishing plaintiffs with information that will allow them to survive a motion to dismiss and drag it into expensive proceedings. As we assess this potential downside, we should remember that defendants need not worry that settling with government agencies will hurt them on the merits. This is because the Rules of Evidence already prevent litigants from using settlements and related materials at trial.[276] So defendants need not worry that settlements will convince a jury or judge to find them liable. Still, perhaps settlements mean more plaintiffs suing and eventually presenting their cases at trial, which means more chances for defendants to lose.

This final fear has theoretical merit. But to fully establish whether it has actual merit will require empirical work of the sort that does not yet exist and might not be possible. At first glance, there is reason for skepticism. Currently, defendants cannot be sure that a motion to strike pleadings or for Rule 11 sanctions for borrowing plausibility will succeed. As noted above, courts have not provided consistent answers about whether and when a plaintiff may borrow plausibility. Is it because some courts may allow such behavior that is causing defendants to settle less than they otherwise might? Again, there is no definitive answer, but the many enforcement actions that settle every year[277] suggest caution before assuming the answer is "yes."

Overall, permitting plaintiffs to borrow plausibility balances competing impulses. We can all recognize that discovery imposes enormous costs on courts. If complaints (even when borrowing from other complaints or government investigations) are implausible—whatever that means—courts will dismiss them, and they will not consume judicial resources. On the other hand, if borrowing plausibility pushes an allegation from "conceivable" to "plausible," it is the sort of presumptively meritorious claim that should be decided on the merits. We must consider judicial economy alongside an equally important (if not more important)

276. FED. R. EVID. 408(a)–(a)(2) ("Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: (1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim . . . .").

277. *See* Mike Koehler, *Has the FCPA Been Successful in Achieving Its Objectives?*, 2019 U. ILL. L. REV. 1267, 1285 (observing that "because the vast majority of enforcement actions are resolved through DPAs and NPAs, and other settlement devices, these cases never make it to trial").

value: access to justice.[278] We have a legal system to ensure that every citizen has an opportunity to redress wrongs. This remains the aspiration regardless of how well-resourced a particular plaintiff is. To the extent this ideal has application after the prolonged march toward heightened pleading standards, it surely applies to plaintiffs with meritorious complaints.

CONCLUSION

Without reflection, the legal system has applied case law that prohibits plaintiffs from borrowing in their complaints from one pleading regime in the context of a vastly different one today. In the past, many courts striking complaints provided relatively little discussion of their decisions because the stakes were low. Complaints did not need to allege "facts sufficient to constitute a cause of action."[279] Courts could strike portions of complaints containing borrowed material without preventing plaintiffs from pursuing their claims.[280] The justifications for doing so may have been flimsy, but the decisions did little lasting harm.

That has changed. Fairness now requires us to take another look at how courts treat borrowed plausibility. In many of the cases where plaintiffs must provide factual detail that would only come from discovery prior to taking any discovery, litigation materials from other cases are the only realistic source of information. This is particularly true for plaintiffs with limited resources. Allowing them to borrow plausibility ensures that they are not the only parties in the legal system prevented from using other litigants' materials, that they are not singled out for higher evidentiary burdens, and that they benefit from government resources intended to help them.

The legal system does not seem inclined to retreat from heightened pleading standards any time soon. Instead, it has reinforced and added to them steadily. Permitting plaintiffs to borrow plausibility is a way of respecting those heightened pleading standards' objectives while mitigating their harshness. Lower courts have divided over how to treat borrowed material in complaints for almost a century. The way to resolve the conflict is to step back from a narrow focus on Rules 11 and 12(f) and invoke broader considerations of fairness.

278. *See* Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 LOY. L.A. L. REV. 691, 691 (2006) ("A society based on the rule of law fails in one of its central premises if substantial parts of the population lack access to law enforcement institutions.").

279. Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944).

280. *See* Lipsky v. Commonwealth United Corp., 551 F.2d 887, 894 (2d Cir. 1976).