Chapter 6

Pleading

1. Notice Pleading under the FRCP

Federal Rules of Civil Procedure

Rule 3. Commencing an Action

A civil action is commenced by filing a complaint with the court.

Rule 7. Pleadings Allowed; Form of Motions and Other Papers

(a) Pleadings. Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a counterclaim;

(4) an answer to a crossclaim;

(5) a third-party complaint;

(6) an answer to a third-party complaint; and

(7) if the court orders one, a reply to an answer.

(b) Motions and Other Papers.

(1) In General. A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for seeking the order; and

(C) state the relief sought.

(2) Form. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

Rule 8. General Rules of Pleading

(a) Claim for Relief. 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.

(b) Defenses; Admissions and Denials.

(1) *In General.* In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

[ ]

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) *In General.* Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense.* A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses.* A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

Rule 9. Pleading Special Matters

(a) Capacity or Authority to Sue; Legal Existence.

(1) *In General.* Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) *Raising Those Issues.* To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) Conditions Precedent. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

[ ]

(f) Time and Place. An allegation of time or place is material when testing the sufficiency of a pleading.

(g) Special Damages. If an item of special damage is claimed, it must be specifically stated.

[ ]

Rule 10. Form of Pleadings

(a) Caption; Names of Parties. Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.

(b) Paragraphs; Separate Statements. A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense.

(c) Adoption by Reference; Exhibits. A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.

2. Claims for Relief

2.1 Short and Plain Statement

Weiland v. Palm Beach County Sheriff's Office, 792 F.3d 1313 (11th Cir. 2013)

ED CARNES, Chief Judge

Nearly one hundred and thirty years ago, one of Georgia's greatest judges described the ideal in pleading:

> Pleading is pure statement; just as much as a letter addressed to your sweetheart or your wife or your friend. The plaintiff complains that he has such a case, and he tells you what it is. The defendant says either that that is not so, or something else is so, and he makes his statement. The true rule ought to be this: the statement ought to consist precisely of what has to be proven. It ought not to fall short, or go beyond. If it goes beyond, it has surplusage matter that is unnecessary. Whatever is irrelevant, whatever is non-essential in statement, ought not to be in. Let the law declare that every man's pleadings shall embrace a full and clear statement of all matters of fact, which he is required to prove, and no other.

Logan Bleckley, "Pleading," 3 Ga. Bar Assoc. Report 40, 41-42 (1886). The complaint that gave rise to this appeal does not approach that ideal, but it claims that the plaintiff has a case, and parts of it do a good enough job in telling what that case is to require the defendants to say "either that that is not so, or something else is so."

The story that Christopher Weiland's complaint tells is about two Palm Beach County Sheriff's Office deputies shooting, tasering, and beating him in his own bedroom without warning or provocation during their response to a "Baker Act call."[1] Finding that the latest version of Weiland's complaint failed to comply with Federal Rules of Civil Procedure 8(a)(2) and 10(b), the district court dismissed with prejudice his § 1983 claims against the deputies and the Sheriff's Office. As an alternative ground for the dismissal of the § 1983 claims against the Sheriff's Office, the court found that Weiland had failed to plausibly allege a custom or policy of deliberate indifference sufficient to impose municipal liability. The district court also dismissed on sovereign immunity grounds two of his three state law claims; the third one it remanded to state court. This is Weiland's appeal.

1 (n.1 in opinion) The Baker Act is a Florida law that permits a person to be "involuntarily examined" by a mental health facility "if there is reason to believe that the person has a mental illness and because of his or her mental illness ... there is a substantial likelihood that without care or treatment the person will cause serious bodily harm to himself or herself or others...."

I.

The allegations in Weiland's third amended complaint, which we accept as true for present purposes, are as follows.

On April 6, 2007, Weiland's father called 911 and stated that his son—who at the time suffered from bipolar disorder—was "acting up," was "on drugs" (prescription painkillers), and "probably had a gun." This was not the first time the Sheriff's Office had dealt with the younger Weiland; in fact, he had been "Baker Acted" on at least two earlier occasions after threatening to harm himself.

Deputies Christopher Fleming and Michael Johnson were dispatched to the Weiland residence. Weiland's father met them outside of the house and explained that his son had threatened to harm himself and that he might have a gun. As he escorted the deputies into the house, he told them that Weiland was in a bedroom at the end of a hallway.

Fleming and Johnson, guns drawn, approached the bedroom without calling out or identifying themselves. The deputies "came upon Weiland sitting on the edge of a bed looking down at a shotgun that lay loosely in his lap." Suddenly and without warning, Johnson fired two rounds at Weiland, knocking him off the bed. As Weiland lay on the floor bleeding and critically injured, Fleming tasered him. Then both Johnson and Fleming "physically beat and assaulted Weiland before finally handcuffing one of his hands to a dresser." At no point did Weiland raise the shotgun from his lap or point it at the deputies.

In an effort to cover up their assault on Weiland, Johnson and Fleming "fabricated an elaborate story about Weiland running from them into another room, grabbing a shotgun, sitting in a chair and then pointing the gun at the Deputies as they entered the doorway." They also said that Weiland's gun had discharged during the scuffle.

Weiland was charged with two counts of aggravated assault on a law enforcement officer and incarcerated for nearly two years awaiting trial. And then at his trial:

> Fleming and Johnson's story fell apart.... No blood was found in the office/bedroom they claimed Weiland ran into before he armed himself and was subsequently shot. No buckshot or other projectiles were recovered from a hole in the office wall Fleming and Johnson claimed was from Weiland's alleged shotgun blast. In fact, during trial, it was revealed that Johnson had removed Weiland's shotgun from the so-called crime scene to another unknown location, finally returning and placing it in the custody of crime scene investigators nearly 7-8 hours after the incident.

The jury acquitted Weiland of the charges against him.

II.

Weiland filed this lawsuit in state court on January 12, 2011. His original complaint and first amended complaint asserted only state law claims. On December 17, 2012, Weiland filed a second amended complaint that added multiple claims under 42 U.S.C. § 1983. The defendants removed the case to the Southern District of Florida and filed a motion to dismiss.

In May 2013 the district court dismissed without prejudice all of Weiland's § 1983 claims. It concluded that the four counts asserting those claims violated Rule 8(a)(2) and Rule 10(b) of the Federal Rules of Civil Procedure because they "incorporated all of the factual allegations contained in paragraphs 1 through 30 inclusive, failed to identify which legal theories or constitutional amendments govern which counts, and failed to identify which allegations are relevant to the elements of which legal theories." Even though it dismissed all of Weiland's federal claims, the district court observed that "viewing the alleged facts in the light most favorable to Weiland … Defendants violated Weiland's fourth amendment constitutional rights when they shot him." The court gave Weiland until May 29, 2013 to amend his complaint.

On that deadline, Weiland filed a third amended complaint, which is the operative one in this case. The first 49 paragraphs of the third amended complaint consist of an introductory statement, a jurisdiction section, a parties section, and a facts section. The facts section has three subsections: (1) "Facts Surrounding the Shooting of [Christopher Weiland]"; (2) "[The Sheriff's Office's] Deliberate Indifference"; and (3) "[The Sheriff's Office's] Coverup". The remainder of the complaint is organized into seven counts, each of which begins, "Plaintiff realleges and reavers the allegations of paragraphs 1-49 inclusive, and alleges further...."

The first four counts are § 1983 claims. Count one claims that Fleming, Johnson, and John Doe Deputies, acting under color of state law, violated Weiland's constitutional rights by "using excessive and unreasonable force." Count two claims that the Sheriff's Office "did not adequately train or supervise its Sheriff Deputies in … [the use of] appropriate and proportioned force" in detaining mentally ill citizens. Count three claims that Fleming, Johnson, and the Sheriff's Office conspired to cover up their violations of Weiland's constitutional rights. And count four claims that the Sheriff's Office had a custom or policy of using its internal affairs investigations to "perpetrate a coverup of any misconduct by Deputies."

The final three counts of the complaint are brought under Florida tort law and allege excessive use of force (count five), intentional infliction of emotional distress (count six), and malicious prosecution (count seven). All three of those claims are brought only against the Sheriff's Office.

Defendants moved to dismiss the third amended complaint. On August 28, 2013, the district court issued an order granting in part and denying in part defendants' motion to dismiss and remanding the remainder of the action to state court. The court dismissed all four of the § 1983 claims (counts one through four)—this time with prejudice—because the pleading of them "duplicated the violations of Rule 8(a)(2) and 10(b) which formed the basis of the court's earlier dismissal of those counts." The court also concluded, with respect to three of the § 1983 claims asserted against the Sheriff's Office, that the "allegations ... failed to provide any factual support ... beyond merely referring to alleged practices and policies promulgated by [the Sheriff's Office]."

As an alternative ground for dismissal of counts two and four, which alleged that the Sheriff's Office failed to adequately train its deputies and maintained a custom or policy of covering up constitutional violations, the court determined that Weiland did not state a claim upon which relief could be granted because he failed to plausibly allege an official policy or custom, as is required for municipal liability under § 1983.

As an alternative ground for the dismissal of the part of count three that involves the Sheriff's Office itself, the court ruled that Weiland's allegations of conspiracy among Fleming, Johnson, and the Sheriff's Office were "conclusory" as to the Sheriff's Office. But not as to Fleming and Johnson, as the court added in a footnote: "However, the court finds that with respect to Defendants Fleming and Johnson, the Plaintiff has pled sufficient facts to meet the pleading requirements for a conspiracy." Just as the court had earlier observed that Weiland's second amended complaint stated a Fourth Amendment claim, it found that his third amended complaint stated a conspiracy claim even though it had dismissed that claim based on Rules 8(a)(2) and 10(b).

Finally, the court concluded that sovereign immunity barred Weiland's state law claims for intentional infliction of emotional distress and malicious prosecution and dismissed them for that reason. The court, however, took "no position" on whether Weiland had stated a claim under Florida law for excessive force; instead, it declined to exercise supplemental jurisdiction and remanded that claim to state court.

III.

A.

We first address whether the district court abused its discretion when it dismissed Weiland's constitutional claims against Johnson and Fleming in counts one and three of the complaint for failure to comply with Federal Rules of Civil Procedure 8(a)(2) and 10(b).

1.

It is unclear from the district court's order what authority it relied on in dismissing the claims against Johnson and Fleming. The order does not cite Rule 41(b)—which authorizes the dismissal with prejudice of an action for failure to obey a court order or a federal rule—nor does it make the findings necessary to justify a dismissal under that provision. For that reason, we will not assume that the court was acting under Rule 41(b). And given the court's observations that Weiland's allegations against Johnson and Fleming could state a claim for relief, we infer that the dismissal of those particular claims was not based on the failure to state a claim under Rule 12(b)(6).

With Rule 41(b) and Rule 12(b)(6) off the table, we are left to conclude that the dismissal of Weiland's claims against the two deputies was based on the district court's inherent authority to control its docket and ensure the prompt resolution of lawsuits, which in some circumstances includes the power to dismiss a complaint for failure to comply with Rule 8(a)(2) and Rule 10(b). Our standard of review of such dismissals is abuse of discretion.

Rule 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 10(b) further provides:

> A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense.

2.

Complaints that violate either Rule 8(a)(2) or Rule 10(b), or both, are often disparagingly referred to as "shotgun pleadings." The first published opinion to discuss shotgun pleadings in any meaningful way (albeit in a dissenting footnote) described the problem with shotgun pleadings under the federal rules. *See T.D.S. Inc. v. Shelby Mut. Ins. Co.,* 760 F.2d 1520 (11th Cir.1985). The footnote, which began by quoting Rules 8(a)(2) and 10(b), commented:

> The purpose of these rules is self-evident, to require the pleader to present his claims discretely and succinctly, so that, his adversary can discern what he is claiming and frame a responsive pleading, the court can determine which facts support which claims and whether the plaintiff has stated any claims upon which relief can be granted, and, at trial, the court can determine that evidence which is relevant and that which is not. "Shotgun" pleadings, calculated to confuse the "enemy," and the court, so that theories for relief not provided by law and which can prejudice an opponent's case, especially before the jury, can be masked, are flatly forbidden by the spirit, if not the letter, of these rules.

That footnote described the complaint at issue in *T.D.S.* as "a paradigmatic shotgun pleading, containing a variety of contract and tort claims interwoven in a haphazard fashion."

T.D.S. was this Court's first shot in what was to become a thirty-year salvo of criticism aimed at shotgun pleadings, and there is no ceasefire in sight. Some of our shooting, which has mostly been done with nonlethal dicta, has at times been nearly as lacking in precision as the target itself. At times we have used the term "shotgun pleading" to mean little more than "poorly drafted complaint." In the hope that we could impose some clarity on what we have said and done about unclear complaints, we have examined more than sixty published decisions issued since the *T.D.S.* decision in 1985. One thing we looked for is how many types of shotgun pleadings have been used, wittingly or unwittingly, by attorneys and litigants.

Though the groupings cannot be too finely drawn, we have identified four rough types or categories of shotgun pleadings. The most common type—by a long shot—is a complaint containing multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint. The next most common type, at least as far as our published opinions on the subject reflect, is a complaint that does not commit the mortal sin of re-alleging all preceding counts but is guilty of the venial sin of being replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action. The third type of shotgun pleading is one that commits the sin of not separating into a different count each cause of action or claim for relief. Fourth, and finally, there is the relatively rare sin of asserting multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against. The unifying characteristic of all types of shotgun pleadings is that they fail to one degree or another, and in one way or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests.

3.

The district court dismissed Weiland's § 1983 claims against Johnson and Fleming, which were contained in counts one and three of the complaint, because those counts: (1) incorporated "all of the factual allegations contained in paragraphs 1 through 49 inclusive"; and (2) failed "to identify which allegations are relevant to the elements of which legal theories" and "which constitutional amendments govern which counts." The court dismissed those claims even though it was able to determine from the complaint that Weiland had stated a claim for relief against the two deputies under the Fourth Amendment and for conspiracy to violate his constitutional rights. Its reasoning for dismissing with prejudice claims that it

could discern from the complaint was that it had given Weiland an opportunity to replead his complaint, and his amended pleadings "duplicated the violations of Rule 8(a)(2) and 10(b) which formed the basis of the court's earlier dismissal of those counts."

Weiland's re-alleging of paragraphs 1 through 49 at the beginning of each count looks, at first glance, like the most common type of shotgun pleading. But it is not. As we have already discussed, this Court has condemned the incorporation of preceding paragraphs where a complaint "contains several counts, each one incorporating by reference the allegations of its predecessors [i.e., predecessor *counts*], leading to a situation where most of the counts (i.e., all but the first) contain irrelevant factual allegations and legal conclusions." What we have here is different. The allegations of each count are not rolled into every successive count on down the line.

More importantly, this is not a situation where a failure to more precisely parcel out and identify the facts relevant to each claim materially increased the burden of understanding the factual allegations underlying each count. This may explain why the defendants did not move for a more definite statement under Federal Rule of Civil Procedure 12(e) or otherwise assert that they were having difficulty knowing what they were alleged to have done and why they were liable for doing it. And it may also explain why the district court could and did understand the claims that were stated in these two counts.

Count one claims that Fleming and Johnson, "while acting under color of law," violated Weiland's constitutional rights by "using excessive and unreasonable force." The task of figuring out which of the 49 paragraphs that are incorporated into count one are relevant to a claim of "excessive and unreasonable force" is hardly a task at all. It is greatly simplified by the organization of the 49 paragraphs of factual allegations into three subsections, the first of which is titled "Facts Surrounding the Shooting of [Christopher Weiland]" and consists of 23 paragraphs spanning just over six pages. This subsection is over-inclusive for purposes of an excessive force claim (the final 10 paragraphs are about the role the deputies played in the alleged coverup, which is not an element of excessive force). But the first 13 paragraphs clearly and concisely describe the events of April 6, 2007, from the 911 call to the shooting, tasering, beating, and arrest of Weiland. Count one is not a model of efficiency or specificity, but it does adequately put Fleming and Johnson on notice of the specific claims against them and the factual allegations that support those claims.

Count three—the conspiracy count—restates in paragraphs 69 through 74 the facts relevant to a conspiracy claim against Fleming and Johnson, including the allegations that Fleming and Johnson agreed to "fabricate an elaborate story" that would justify their use of deadly force and, in furtherance of that agreement, falsified police reports and tampered with evidence. According to count three, the

deputies' conspiracy resulted in the deprivation of multiple constitutional rights. As we will explain, only one of those alleged deprivations yields a cognizable claim, but for present purposes, it is enough to say that count three, like count one, gives Fleming and Johnson adequate notice of the claims against them and the factual allegations that support those claims.

4.

Finally, we disagree with the district court's characterization of Weiland's complaint as "failing to identify ... which constitutional amendments govern which counts." The complaint does identify the constitutional amendment or amendments that govern each count. The fact that it includes constitutional amendments under which he is not entitled to relief would be dispositive in a Rule 12(b)(6) analysis, but it is not dispositive of the separate question of whether the claims in this complaint are so poorly pleaded that they warrant a dismissal under Rules 8(a)(2) and 10(b) regardless of whether they state viable claims. A dismissal under Rules 8(a)(2) and 10(b) is appropriate where "it is *virtually impossible* to know which allegations of fact are intended to support which claim(s) for relief." No such virtual impossibility exists in this case.

5.

For these reasons, we conclude that the district court abused its discretion when it dismissed Weiland's count one and count three claims against Fleming and Johnson on the ground that those counts did not comply with Rules 8(a)(2) and 10(b). In concluding that the court should not have dismissed those two counts, we are not retreating from this circuit's criticism of shotgun pleadings, but instead are deciding that, whatever their faults, these two counts are informative enough to permit a court to readily determine if they state a claim upon which relief can be granted. The district court implicitly recognized as much when it observed in the orders dismissing counts one and three that they actually do state claims upon which relief can be granted.

2.2 Showing an Entitlement to Relief

A defending party may challenge the sufficiency of a claim under Rule 8(a)(2) with a motion to dismiss for "failure to state a claim upon which relief can be granted". Fed. R. Civ. P. Rule 12(b)(6). A claim may be dismissed on this basis for either factual or legal insufficiency:

- A claim is *factually insufficient* if the facts alleged, even assuming they are true, would not satisfy the elements of a claim. For example, if a plaintiff asserts a claim for negligence, but fails to allege any injury resulting from the defendant's conduct, the claim would be factually insufficient, because injury is a necessary element of the claim.

- A claim is *legally insufficient* if the law does not recognize the purported claim at all. For example, if a plaintiff sues for "tortious bad taste in music", alleging that the defendant incessantly played "We Built this City" by The Starship and "Rockstar" by Nickleback, the claim would be legally insufficient, because the law (regrettably) doesn't recognize any such claim.

In *Conley v. Gibson*, 355 U.S. 41 (1957), the Supreme Court interpreted Rule 8(a)(2) to establish a "notice pleading" pleading standard, requiring only that the plaintiff "give the defendant fair notice of what the ... claim is and the grounds upon which it rests," without the necessity for detailed factual allegations. This standard rested on the structure of the Federal Rules of Civil Procedure, under which the assertion of claims and the disclosure of facts are allocated to separate phases of a suit. At the pleading stage, "a complaint should not be dismissed for failure to state a claim 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." The discovery rules then give the parties an opportunity to establish the facts in full.

A half-century later, a pair of Supreme Court decisions jettisoned the *Conley* "no set of facts" standard and adopted a more demanding approach.

1. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)

In *Twombly*, the plaintiffs alleged that four telecommunications companies had "engaged in a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1" In support of that claim, the complaint alleged that the defendants "engaged in parallel conduct" to restrict competition, including "making unfair agreements with [competing providers] for access to [the defendants'] networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the [competing providers'] relations with their own customers." The complaint also alleged that the defendants agreed to refrain from competing with one another, by not pursuing business opportunities in markets already serviced by other defendants.

> In the absence of any meaningful competition between [the defendants] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from [other providers] 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 Defendants 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.

The Court held that the allegations in the complaint were insufficient to state a claim under § 1 of the Sherman Act, which requires proof of a "contract, combination ..., or conspiracy, in restraint of trade or commerce".

> [A] plaintiffs obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).
>
> [A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without 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. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."

To asses whether the inference of an agreement was plausible, the majority considered "an obvious alternative explanation": While the alleged parallel conduct was "consistent with conspiracy," it was, in the majority's view, "as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." Finding that "the plaintiffs here have not nudged their claims across the line from conceivable to plausible," the majority concluded that "their complaint must be dismissed."

2. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)

Javaid Iqbal sued various federal government officials, including former Attorney General John Ashcroft and FBI Director Robert Mueller, over his arrest and detention as a "a person 'of high interest' to the September 11 investigation". Iqbal, a citizen of Pakistan and a Muslim, alleged that Ashcroft and Mueller "adopted an unconstitutional policy that subjected him to harsh conditions of confinement on account of his race, religion, or national origin."

> The complaint contends that petitioners designated respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution. The complaint alleges that "the FBI, under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men ... as part of its investigation of the events of September 11." It further alleges that "the policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." Lastly, the complaint posits that petitioners "each knew of, condoned, and willfully and maliciously agreed to subject" respondent to harsh conditions of confinement "as a matter of policy, solely on account of his religion, race, and/or national origin and for no legitimate penological interest." The pleading names Ashcroft as the "principal architect" of the policy, and identifies Mueller as "instrumental in its adoption, promulgation, and implementation,"

Iqbal's claims were based on *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971):

> In *Bivens*—proceeding on the theory that a right suggests a remedy—this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights."
>
> In the limited settings where *Bivens* does apply, the implied cause of action is the "federal analog to suits brought against state officials under 42 U.S.C. § 1983." Based on the rules our precedents establish, respondent correctly concedes that Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior. Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government official defendant, through the official's own individual actions, has violated the Constitution.
>
> The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose. To state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

The Court reiterated the standard adopted in *Twombly*:

> Rule 8 ... does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertions" devoid of "further factual enhancement."

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"
>
> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "shown"—"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).
>
> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Applying that standard to Iqbal's complaint, the majority concluded that the allegations were insufficient to state *Bivins* claims against Ashcroft and Mueller.

> We begin our analysis by identifying "the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners"knew of, condoned, and willfully and maliciously agreed to subject him" to harsh conditions of confinement "as a matter of policy, solely on account of his religion, race, and/or national origin and for no legitimate penological interest." The complaint alleges that Ashcroft was the "principal architect" of this invidious policy, and that Mueller was "instrumental" in adopting and executing it. These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim, namely, that petitioners adopted a policy "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," As such, the allegations are conclusory and not entitled to be assumed true. To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in *Twombly* rejected the plaintiffs' express allegation of a "'contract, combination or conspiracy to prevent competitive entry,'" because it thought that claim too chimerical to be maintained. It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.
>
> We next consider the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief. The complaint alleges that "the FBI, under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men ... as part of its investigation of the events of September 11." It further claims that "the policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." 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.
>
> The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely law-

ful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that "obvious alternative explanation" for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.

But even if the complaint's well-pleaded facts give rise to a plausible inference that respondent's arrest was the result of unconstitutional discrimination, that inference alone would not entitle respondent to relief. It is important to recall that respondent's complaint challenges neither the constitutionality of his arrest nor his initial detention [...]. Respondent's constitutional claims against petitioners rest solely on their ostensible "policy of holding post-September-11th detainees" in the [maximum security special housing unit] once they were categorized as "of high interest." To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as "of high interest" because of their race, religion, or national origin.

This the complaint fails to do. Though respondent alleges that various other defendants, who are not before us, may have labeled him a person "of high interest" for impermissible reasons, his only factual allegation against petitioners accuses them of adopting a policy approving "restrictive conditions of confinement" for post-September-11 detainees until they were "'cleared' by the FBI." Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners' constitutional obligations. He would need to allege more by way of factual content to "nudge" his claim of purposeful discrimination "across the line from conceivable to plausible."

Woods v. City of Greensboro, 855 F.3d 639 (4th Cir. 2017)

DAVIS, Senior Circuit Judge:

Racial stigmas and stereotypes are not impairing unless we internalize them. And there is no reason for us to do that when we know that the history of black culture in America is rich and reaffirming. We may live in a society that will only grudgingly and inconsistently acknowledge our equality, but that does not mean that we must live as if we are victims. I understand that avoiding the effects of racial stigmas and stereotyping is not always easy because many studies have shown that most people harbor implicit biases and even well-intentioned people unknowingly act on racist attitudes. However, this merely confirms that we alone cannot carry the burden of ameliorating racism in our country. This responsibility must be assumed by all good people without regard to race, sex, and ethnicity.

This appeal requires us to consider whether it is plausible to believe that, in twenty-first century America, a municipal government may seek to contract with a minority-owned enterprise under some conditions, yet, on account of race, avoid contracting with a minority-owned company under other conditions.

In April 2013, Black Network Television Ad Agency, LLC ("BNT"), a minority-owned television network, was granted and then subsequently denied a $300,000 economic development loan from the City of Greensboro, North Carolina ("the City"), prompting BNT to file this action asserting a claim, among others, for racial dis-

crimination pursuant to 42 U.S.C. § 1981. The City argued, in support of its motion to dismiss the complaint for failure to state a claim upon which relief could be granted, that its willingness to grant BNT a loan *fully secured* by *a second-position lien* on the personal residence of BNT's principals, notwithstanding its unwillingness to grant BNT a loan *fully secured* by *a third-position lien* on that residence, foreclosed a claim of race discrimination as a matter of law. BNT responded that, to the contrary, the City's refusal to make the loan was based upon stereotypes about the risk of lending to a minority business and that, at the pleading stage, its allegations suggesting the pretextual character of the City's explanation for the denial of the loan are sufficient to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The district court agreed with the City's arguments, concluded that BNT's factual allegations were so insubstantial as to render its claim implausible, and therefore dismissed the complaint with prejudice.

We hold that the district court's crabbed plausibility analysis misinterpreted and misapplied the controlling pleading standard. The key issue in this case is not whether the City would contract with a minority-owned business, but whether the City would contract with BNT on the same conditions and under substantially the same circumstances as it would with a nonminority-owned business. Because BNT has plausibly pled that the conditions under which the City was willing to grant it a loan were more stringent than those the City applied to similarly situated white-owned applicants, we conclude that the district court erred in dismissing BNT's claim of discrimination at the pleading stage. Accordingly, for the reasons explained within, we reverse the district court's order dismissing this action and remand for further proceedings.

I.

A.

We begin by summarizing the cardinal facts surrounding BNT's application for, and the City's ultimate denial of, the economic development loan. [...] Throughout, we consider as true all well-pleaded allegations in the complaint, matters of public record, and documents attached to the motion to dismiss that are integral to the complaint and of unquestioned authenticity.

In April 2013, members of the City's Economic and Business Development Office recommended that Michael and Ramona Woods (referred to by the parties, and hence herein, as "the Woods") submit an application for a $300,000 ten-year economic development loan for their company, BNT, as part of the City's economic development efforts. The Woods offered to secure the loan by way of a note and deed of trust to their home. On May 28, 2013, L.R. Appraisals, Inc., appraised the home at a value of $975,000.00 "resulting in equity well over the $300,000.00 loan, after consideration of all existing loans on the residence."

Pursuant to Greensboro Code of Ordinances Section 4.55, the City may make economic development loans only after receiving authorization from its nine-member elected City Council. On June 18, 2013, at a regularly scheduled meeting, the City Council considered a Resolution authorizing the City to enter into a loan agreement with BNT. The Resolution, which was drafted by the Greensboro City Attorney's office, stated that the City's interest would be secured by "no more than a second lien" on the real property and improvements. Assistant City Manager of Economic Development, Andy Scott, discussed with the City Council in open session the financial statements of the Woods and the collateral requirements of the proposed loan agreement and "stated [to the Council] that the City would be placed in the second loan position on the residence being used as collateral." The City Council voted seven to two in favor of adopting Resolution 172-13, which authorized the City to enter into an agreement with BNT for the $300,000 loan. The Resolution provided the following conditions:

> WHEREAS, the borrower is required to confirm compliance with the following conditions prior to the City's loan closing to protect the public funds invested in the project;
>
> 2. City will complete a title search confirming no additional liens are out-standing on the 5018 Carlson Dairy Road property that will secure the City's loan beyond the first mortgage that is currently outstanding.
>
> 3. City will confirm that the first mortgage balance does not exceed $509,000.
>
> 4. City loan will be secured by a note and deed of trust with the City's interest secured by no more than a 2nd lien on the real property and improvements located at 5018 Carlson Dairy Road.
>
> NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF GREENSBORO:
>
> The City of Greensboro is hereby authorized to execute the necessary note and agreements with BNT Ad Agency LLC in accordance with the above terms and conditions.

As it turned out, in addition to a first mortgage, the Woods had a home equity line of credit on the property. The City informed the Woods that the Resolution would have to be amended to reflect that the City's security interest would be a third lien, rather than a second lien. On July 16, 2013, at a second meeting, the City Council considered modifying the Resolution. According to the minutes, the following occurred:

> Assistant City Manager of Economic Development Andy Scott summarized the difference between the approved loan at the June 18 council meeting and the modifications made in the presented resolution; and spoke to the financial assessment of the Woods' collateral in terms of loan repayment.
>
> Council discussed the capped equity limits by Carolina Bank; referenced three previous loans where the City had been in the third position; the desire to support minority owned small businesses; and concerns expressed about the City going from second to the third position in loan repayment.

> City Attorney Shah-Khan advised that if Council chose to move forward with the transaction, it would be necessary to comply with the changes with what Council was now aware of; and stated the decision was a policy matter for Council.
>
> Mayor Perkins stated there were speakers to the item.
>
> George Hartzman ..., stated there was not enough equity in the property to fund the city's portion of a potentially defaulted loan; and encouraged Council to respect their fiduciary responsibility to the taxpayers.
>
> Mr. Scott stated there was sufficient collateral in the house based on the appraisal to support the loan.
>
> Ramona Woods ... stated she had not intended to not disclose her loan positions; commented on Ashtae Products sic role in the Black Network Television; and provided a status report on marketing the television show.
>
> Mayor Perkins clarified that the former resolution stated that the City would not take worse than a second mortgage.

The City Council then voted not to modify the Resolution to make a loan secured by a third-position lien, but left in effect the original Resolution and its terms. Subsequently, on February 18, 2014, the City Council officially revoked the Resolution authorizing the City to enter into a loan agreement with BNT.

B.

The Woods and BNT filed suit in federal district court alleging violations of 42 U.S.C. §§ 1981, 1983, and 1986, the Equal Protection and Due Process clauses of the Fourteenth Amendment and the North Carolina Constitution, as well as state law claims for breach of contract, civil conspiracy, and unfair and deceptive trade practices. The district court dismissed all of the Woods' and BNT's claims. The court dismissed all claims asserted against the City and the Councilmembers in their individual capacities on the basis of legislative immunity. The court dismissed the breach of contract, due process, conspiracy, and § 1986 claim for failure to state a cause of action.

The court considered together the plaintiffs' claims that the City discriminated against them on the basis of race by failing to modify the terms of the Resolution to provide BNT a loan. The court first concluded that the Woods and BNT did not have standing to assert discrimination claims on the alleged facts. The court also concluded that the plaintiffs failed to plausibly allege discrimination based upon race. Specifically, the court reasoned that the plaintiffs failed to allege the existence of valid comparators, which in its view was essential to allegations of intentional disparate treatment. The court also reasoned that it could not infer an intent to discriminate where "the initial Resolution was approved in part *because* Plaintiffs are minorities."

BNT, alone, timely appealed the court's dismissal of its claim that the City discriminated against it in violation of § 1981.

II.

B.

We next review the district court's dismissal for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). We review dismissals under Federal Rule of Civil Procedure 12(b)(6) de novo.

1.

As a preliminary matter, the parties dispute the correct pleading standard. BNT argues that it has sufficiently pleaded a race discrimination claim and that it was not required to plead a prima facie case. BNT relies on *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 510 (2002), which explained that the prima facie case is an "evidentiary standard, not a pleading requirement." The City does not dispute that BNT need not establish a prima facie case, but argues that BNT relies on a superseded pleading standard articulated in _Conley v. Gibson.

In *Swierkiewicz,* the plaintiff alleged discrimination based on his age and national origin in violation of the Age Discrimination in Employment Act of 1967 and Title VII of the Civil Rights Act of 1964. Swierkiewicz was a fifty-three-year-old Hungarian native employed by Sorema N.A. as a senior vice president and chief underwriting officer. According to Swierkiewicz, the CEO demoted him and gave many of his duties to a thirty-two-year-old French national. The district and appellate courts found that Swierkiewicz had not adequately alleged circumstances that support an inference of discrimination, but the Supreme Court held that "an employment discrimination plaintiff need not plead a prima facie case of discrimination … to survive a motion to dismiss," because "the prima facie case … is an evidentiary standard, not a pleading requirement," The Court explained that applying *McDonnell Douglas* to Rule 12(b)(6) motions would establish a "heightened pleading standard" in contravention of Rule 8(a)(2). As further support, the *Swierkiewicz* Court cited the pleading standard as articulated in *Conley v. Gibson*, which required the plaintiff need only provide fair notice of what the claim is and the grounds upon which it rests.

In *Bell Atlantic Corp. v. Twombly*, the Supreme Court announced a new pleading standard. *Twombly* required that allegations must be more than conclusory. In addition, under *Twombly,* allegations must be sufficient "to raise a right to relief above the speculative level," including sufficient facts to state a claim that is "plausible on its face," This requires that the plaintiff do more than "plead[] facts that are 'merely consistent with' a defendant's liability;" the facts alleged must "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."

In *Iqbal,* the Court made clear that this heightened standard applied to all civil actions, including claims of discrimination. The *Iqbal* Court considered allegations that the government discriminated against a Pakistani man detained by federal officials in New York City following the September 11 attacks. Iqbal brought claims against Attorney General John Ashcroft and FBI Director Robert Mueller, arguing that they had "adopted an unconstitutional policy that subjected Iqbal to harsh conditions of confinement on account of his race, religion, or national origin." A majority of the Supreme Court deemed Iqbal's claims of discrimination implausible in light of the fact that the September 11 attacks "were perpetrated by 19 Arab Muslim hijackers." "As between that 'obvious alternative explanation' for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion." Iqbal's allegations had "not 'nudged his claims' of invidious discrimination 'across the line from conceivable to plausible,'"

Following the Supreme Court's decisions in *Iqbal* and *Twombly,* we of course have had several occasions to explicate the new pleading standards. We did so, for example, in an employment discrimination case, *McCleary-Evans v. Maryland Department of Transportation*, in which the plaintiff, an African-American woman, alleged that a state agency discriminated against her when it refused to hire her. In support, she stated that she was a qualified applicant and that she was denied a position in favor of someone who was white. She did not offer any comparison between herself and the individual who was hired. A majority of the panel found that McCleary-Evans' allegations were fatally conclusory without additional facts to support a reasonable inference that the decisionmakers were motivated by race. To be sure, the Court explained, *Swierkiewicz* remained binding precedent and the plaintiff was not required to "plead facts establishing a prima facie case of discrimination to survive a motion to dismiss." The Court further reasoned, however, that a plaintiff is nonetheless "required to allege facts to satisfy the elements of a cause of action created by [the relevant] statute" in compliance with *Iqbal*. Applying this standard, the *McCleary-Evans* Court wrote: "The defendant's decision to select someone other than her, and the cause that she asks us to infer (*i.e.,* invidious discrimination) is not plausible in light of the 'obvious alternative explanation' that the decisionmakers simply judged those hired to be more qualified and better suited for the positions."

The correct application of the above principles is straightforward. BNT need not plead facts sufficient to establish a prima facie case of race-based discrimination to survive a motion to dismiss, but as the City argues, the more stringent pleading standard established in *Iqbal* and *Twombly* applies, not the superseded standard that BNT cited in its brief.

2.

Finally, we consider whether BNT has offered sufficient factual allegations to support a plausible claim that the City acted, *pretextually,* on the basis of insufficient security (or, perhaps put differently, on the basis of an arguably irrational insistence on taking a "second lien" position without regard for the level of security supporting the requested loan) or, instead, *actually* on the basis of race. At this stage, BNT need only allege sufficient "factual matter (taken as true) to suggest" a cognizable cause of action.

BNT argues that the City Council refused to modify the terms of the Resolution "to allow Defendant Greensboro to take a third, but fully secured, position" for discriminatory reasons. Unlike the allegations before the court in *McCleary-Evans,* BNT pleaded allegations beyond "a sheer possibility that a defendant has acted unlawfully," BNT's allegations include (1) the results of a disparity study demonstrating a pattern of the City almost exclusively lending to nonminority-owned businesses; (2) facts which suggest that the Woods' residence had sufficient equity to fully secure a third-position lien; and (3) examples of how the City has treated nonminority businesses differently, *including taking a third-position lien in approving a loan to a nonminority corporation.* Taken together, we hold that these allegations are more than sufficient to "nudge[ ] [BNT's] claims across the line from conceivable to plausible."

First, BNT alleges that a June 2012 "Disparity Study for the Minority/Women Business Enterprise Program" demonstrates that of $92.4 million in economic development expenditures, less than $200,000—or .2%—was disbursed to minority businesses, despite the fact that the City is over 40% African-American. This Court may infer discriminatory intent from evidence of a general pattern of racial discrimination in the practices of a defendant. In this case, the June 2012 study of racial disparities in contracting by the City necessarily informs this Court's "common sense" analysis of whether BNT's allegations are plausible.

Second, BNT alleges that, as a practical matter, there was no difference in risk between a third-position lien and second-position lien because there was sufficient equity in the property to fully secure the City's loan under either condition. This does not seem to be in dispute and, in fact, was stated in the open session during the July City Council meeting. But even if it could be disputed at some appropriate stage of these proceedings, this case had not arrived at that stage when the district court dismissed the case. We do not doubt that there may yet be sound, rational reasons why the City has insisted that it must take no worse than a second lien position in these circumstances, but again, that kind of factual exploration must await discovery and, if appropriate, summary judgment proceedings. However sound the City's position may be, there is nothing *self-evident* on the face of the City's position that is material to BNT's claim of pretext.

Whether the City's nondiscriminatory explanation for rejecting the third-lien position is in fact pretext is a question to be analyzed under the long-familiar shifting burdens regime of *McDonnell Douglas v. Green*, and not under Rule 12(b)(6). Still, under *Iqbal* and *Twombly,* the Court must consider the plausibility of inferring discrimination based on BNT's allegations in light of an "obvious alternative explanation" for the conduct. In other words, while BNT need not establish a prima facie case at this stage, as discussed *supra* in Part II.B, we must be satisfied that the City's explanation for rejecting the loan does not render BNT's allegations implausible.

Viewed in the light most favorable to BNT, the operative complaint contains allegations of fact which undermine the City's explanation for rejecting the loan, in particular the allegation that there was sufficient equity to secure the loan whether the second or third lien condition applied. *The City has not yet disputed this allegation for it has yet to file its answer to the complaint.* There may well be, of course, other reasons that the City decided to deny the loan, such as a general unwillingness to change the terms of a resolution once it has been adopted, or perhaps a concern that BNT had failed to disclose important information, e.g., the existence of the second lien. The question is not whether there are more likely explanations for the City's action, however, but whether the City's impliedly proffered reason—that a third-positon lien presented too great a risk—is so obviously an irrefutably sound and unambiguously nondiscriminatory and non-pretextual explanation that it renders BNT's claim of pretext implausible. We discern no such weakness in the inferences to be drawn based on the factual allegations here.

Third, and even if the above considerations were deemed insufficient to nudge the claim over the plausibility threshold, BNT actually alleges particular examples of how the City has treated similarly situated white businesses differently. BNT alleges that the City accepted third-position liens as collateral in other contemporary deals with nonminority firms. Specifically, in January 2013, the City Council voted to give an $850,000 loan to Kotis Holdings, a nonminority developer, which was secured by a third-place lien on a private residence.

BNT also alleges that the City was generally more willing to afford accommodating treatment to non-African-American/Hispanic companies. According to BNT's allegations (taken as true), the City provided nonminority company Gerbing a $125,000 grant without amending its policy to create a new incentive program. In another example, Mel's Pressure Washing, a nonminority company, received $450,000 in business over a six-year period without any contract on record or a bid approval for the work that was done. In addition, BNT alleges that the City entered into other deals with nonminority businesses that had a history of default, and therefore carried greater default risks. For example, the City allegedly provided a $2,000,000 forgivable loan to a nonminority borrower, Self Help, as well as a second installment of $100,000 to Greensboro Parking Group, LLC, a nonminority company that had defaulted in the past. BNT also alleges that the City convert-

ed the nonminority-owned Nussbaum Center for Entrepreneurship's twenty-year $1,275,000 loan into a grant, despite the fact that it had defaulted on two initial loans. BNT asserts it had no such history or suggested risk of default, and that the City's refusal to modify its resolution, despite its continued willingness to work with defaulted nonminority entities, evidences disparate treatment based on race. These allegations support an inference of disparate treatment at this stage.

There's yet more. BNT alleges that the City has backed out of commitments to other minority companies, but does not treat white companies this way. In support of this assertion, BNT alleges that in 2014, the City Council attempted to renege on a $1.5 million dollar loan given to the International Civil Rights Museum, relying on a technicality that the documents on the loan were never signed, despite the fact that the City had already paid out $750,000 of the loan. The Civil Rights Museum's interim Chairwoman, Deena Hayes, stated that "there seems to be a higher standard" when it comes to the City lending to African-American companies.

The district court reasoned that "many of the allegedly similarly situated businesses proffered by BNT are not valid comparators." The court further reasoned that the "specific security position of the City is a financial decision that is not immediately subject to drawing inferences of racial discrimination within the context of minority small-business promotion." This amounts to *fact finding,* not the conduct of a common sense plausibility analysis.

So viewed, we decline to credit this reasoning. While differences exist between the facts alleged in the case at bar and each of the comparative exemplars that BNT offers, as would be expected, evidentiary determinations regarding whether the comparators' features are sufficiently similar to constitute appropriate comparisons generally should not be made at this point. The similarly situated analysis typically occurs in the context of establishing a *prima facie* case of discrimination, not at the 12(b)(6) stage. At this point, BNT has pleaded sufficient facts to justify an inference, plausibly and reasonably indulged, that the City treated it differently from the way it has treated non-minority businesses under arguably similar circumstances, and that it did so on account of race.

3.

Central to the district court's analysis was its conclusion that since "the initial Resolution was approved in part *because* [BNT's principals] are minorities, it is implausible that they were later *denied* a loan because of the same consideration." We disagree. We break no new ground in observing that it is not implausible that the City was willing to contract with BNT on one set of terms, but, on account of race, it was unwilling to contract with BNT on another set of terms, although nonminority firms might meet with approval under both regimes.

A claim similar to BNT's was recognized in *Williams v. Staples, Inc.* The plaintiff, Williams, brought a § 1981 claim of discrimination after he was prevented from purchasing a printer cartridge at a Staples office supply and photocopying store. When Williams presented a check, the clerk informed him that Staples did not accept out-of-state checks. Later that day, a white customer was permitted to make a purchase using an out-of-state check. The disparate treatment was replicated by a black and white tester. We concluded that Williams had presented sufficient evidence to establish that Staples's refusal to take his check was a pretext for unlawful discrimination in violation of § 1981, even though Staples would sell to black customers if they did not use checks. Invidious discrimination steeped in racial stereotyping is no less corrosive of the achievement of equality than invidious discrimination rooted in other mental states.

We have previously admonished district courts, albeit in unpublished, non-precedential decisions, that imposing unique burdens or stereotypical expectations on an individual based on her membership in a protected group is illicit discrimination, even though the defendant may not discriminate consistently against *every* woman or minority under *all* conditions. It is past the time when that admonishment should be given precedential force.

It is well established that an actor may consider another individual's race or gender to be an asset in some circumstances but a motivation for unlawful discrimination in other circumstances. Indeed, it is unlikely today that an actor would explicitly discriminate under all conditions; it is much more likely that, where discrimination occurs, it does so in the context of more nuanced decisions that can be explained based upon reasons other than illicit bias, which, though perhaps implicit, is no less intentional. While a company may generally seek to hire women, it may also unfairly deny women positions once they become pregnant. While a school may affirmatively recruit minority students, the race of a student may simultaneously lead to harsher scrutiny when the individual has a disciplinary record. And while a lender may generally grant loans to African-American applicants, it may also view African-American borrowers as less creditworthy and more challenging risks than similarly situated white borrowers under some conditions.

In reaching our conclusion, we note that discrimination claims are particularly vulnerable to premature dismissal because civil rights plaintiffs often plead facts that are consistent with both legal and illegal behavior, and civil rights cases are more likely to suffer from information-asymmetry, pre-discovery. There is thus a real risk that legitimate discrimination claims, particularly claims based on more subtle theories of stereotyping or implicit bias, will be dismissed should a judge substitute his or her view of the likely reason for a particular action in place of the controlling plausibility standard. Such an approach especially treads through doctrinal quicksand when it is undertaken without the benefit of a developed record, one essential to the substantiation or refutation of common sense allega-

tions of invidious discrimination. Affirmance of the dismissal of the complaint in this case, which catalogs numerous factual allegations beyond conclusory recitals of law, would establish a precedent that would inevitably lead to the premature dismissal of a host of other potentially meritorious discrimination claims where plaintiffs offer fulsome allegations similar to those invoked by BNT here.

"A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" Manifestly, the rule of *Iqbal/Twombly* was not intended to serve as a federal court door-closing mechanism for arguably weak cases, even assuming this case fits the description of "arguably weak." Whether BNT will have a difficult time establishing the merits of its claim is of little import now. The question before us is "'not whether [the defendant] will ultimately prevail' ... but whether the complaint was sufficient to cross the federal court's threshold." We conclude simply that BNT has alleged sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." No more was required of BNT to state a claim, and no more is required of us to so hold.

WILKINSON, Circuit Judge, dissenting:

If ever there were a case that failed to satisfy the plausibility standard on a Rule 12(b)(6) motion to dismiss, it is this one. BNT presents nothing more than bare speculation that racial discrimination influenced the City's treatment of its loan application. To the contrary, the minority-owned status of the business motivated the City to extend the loan in the first place. The complaint manifests that nothing but prudent, neutral, non-racial lending practices were at issue here. The dismissal was absolutely justified and I would affirm the district court.

I.

The majority ignores the whole point of *Bell Atlantic Corp. v. Twombly,* and *Ashcroft v. Iqbal*. Those two decisions make clear that a well-pleaded complaint must allege "enough facts to state a claim to relief that is plausible on its face." In other words, "factual allegations must be enough to raise a right to relief above the speculative level." This "requires more than labels and conclusions," because the court must be able to "draw the reasonable inference that the defendant is liable of the misconduct alleged," And as relevant here, a claim may fail to reach this threshold if some "obvious alternative explanation" exists.

The distinction that *Twombly* and *Iqbal* draw between plausibility and mere possibility means this: in cases where there is no more than bald conjecture of impermissible animus, the claim should be dismissed at the pleading stage. Discovery is an expensive and cumbersome process that parties should not frivolously be

forced to undertake. "So, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court."

BNT has not met even the most permissive reading of these pleading requirements.

II.

There can be no mistake that the City in fact approved BNT's request for a loan. Michael and Ramona Woods, the owners of BNT, "discussed with various City of Greensboro officials what a successful minority owned Greensboro-based television network would mean to the Greensboro community." It is undisputed that City officials actually "suggested and recommended" that BNT apply for funding to facilitate production of its situational comedy, "Whatcha Cookin." City officials then assisted BNT in framing the loan application, and the City Council later discussed "the desire to support minority owned small businesses." In both word and deed, the City encouraged BNT's endeavor.

The City, however, conditioned its approval of the loan on a number of factors. These included a title search confirming that there were no liens beyond the first mortgage on the property that secured the loan, that the current mortgage debt out-standing on that collateral did not exceed $509,000, and that the City's interest in the collateral would be prioritized at no worse than a second lien. BNT failed to meet these conditions and petitioned the City to amend the specified terms, which the City refused to do. Although BNT alleges that it was unable to obtain a loan due to racial discrimination, an "obvious alternative explanation" for the City's action is immediately clear from the face of the complaint. BNT simply did not satisfy prudent, neutral, non-racial loan conditions for eight months while the loan resolution was in place.

BNT alleges no direct evidence of racial bias, nor does it assert that any such evidence exists. Instead, BNT searches under bushes to propose additional facts from which animus might be inferred. BNT argues that there was sufficient equity in the collateral to secure the loan regardless of whether the City assumed a second or third lien. BNT also claims that the City has provided larger loans under equally or less favorable conditions to non-minority borrowers. BNT reasons, therefore, that the only remaining explanation for why it was unable to obtain a loan is presumptively discrimination. I disagree. This is the very type of baseless pleading that *Twombly* and *Iqbal* were meant to foreclose.

Home values, like any investment, can be volatile. Any lender knows the difference between a second and third lien: being second in line is better than being third. The City simply did not wish to wait behind two other outstretched hands in the event of a default. Recovery on any loan is never entirely certain. And BNT further overlooks that the Woods, who provided the collateral, failed even to convey to the City the true nature and amount of their debt obligation in the first place. Both parties encouraged the district court to consider the City Council minutes concerning the loan. These minutes show that the City was unaware of the pre-existing second lien on the property that was offered as security. Ramona Woods responded to the City Council that "she had not intended to not disclose her loan positions." But the City cannot be blamed for refusing to amend the terms of a loan upon finding that the collateral was more encumbered, both in the number and total debt obligation of out-standing liens, than the City had originally been led to believe.

The district court correctly observed that "the specific security position of the City is a financial decision that is not immediately subject to drawing inferences of racial discrimination." Assuming that BNT could establish every fact alleged in the complaint, it would still be insufficient to plausibly support a finding of unlawful animus.

Although BNT references numerous other loans approved by the City, these loans provide no plausible route by which BNT can establish discriminatory intent. Whether a loan is a valid comparator is a legal conclusion for which the parties are not entitled to deference at the pleading stage. The district court was quite correct to note that the provided examples primarily "involve either grant money, rather than loan money, City Council decisions that were made after a loan had already been disbursed, or a differently constituted City Council." The supposed comparators are so far afield that almost any approval of a loan to a non-minority business could subject the City to a lawsuit.

BNT makes mention of an $850,000 loan made by the City to Kotis Holdings in January 2013. It argues that this loan, secured by a third lien and nearly three times the size of the loan BNT requested, is evidence that BNT was denied its loan due to racial bias.

But BNT forgets that the Kotis loan was part of a new incentive program offered to a local developer, not an economic development loan to a private business for goods and services. In other words, these loans differed in kind. BNT also failed to provide any indication as to the amount of available equity in the asset that secured the Kotis loan, which would be essential to establish a comparison. Moreover, the Kotis loan was initially approved with a third lien, whereas the City likely felt misled when BNT asked to renegotiate the basic terms of its loan after the loan was approved.

The majority surmises that BNT just might somehow conceivably manage to prevail. Yet the complaint itself makes clear that basic, elemental lending prudence was at work here. "As between that 'obvious alternative explanation' ... and the purposeful, invidious discrimination [the plaintiff] asks us to infer, discrimination is not a plausible conclusion." *Iqbal,* 556 U.S. at 682. BNT has therefore "not nudged its claims across the line from conceivable to plausible." Even assuming all the facts alleged, BNT "stops short of the line between possibility and plausibility," and fails to present "more than a sheer possibility that a defendant has acted unlawfully".

III.

The majority is certainly right that racial prejudice in this society is persistent and that its modern incarnation may take more subtle forms. There is another side to this story, however, which *Twombly* and *Iqbal* serve to underscore. Promiscuous accusations of racial prejudice, as exemplified by this complaint, are diminishing the perceived gravity of those unfortunate situations where racial discrimination must be confronted and still does occur. Careless racial accusations carry a distinctive sting and visit an especial hurt that serves only to estrange and separate: Americans will eschew racial interactions that carry a risk of accusation when no unlawful animus is afoot. Allowing complaints such as this to go forward trivializes, sadly, the imperishable values our civil rights laws embody. A separatism born of unfounded accusations and pervasive racial attributions cannot be the society to which I or my fine colleagues in the majority aspire.

Courts should respect responsible decisionmaking rather than strip cities of sound lending practices just because a party injects race into the equation. It is no secret that municipal budgets are severely strained: the City should be respected both for seeking to extend a loan to BNT and for refusing to amend the associated conditions when, unexpectedly, its lien position turned more precarious.

The City Council minutes reveal that being a minority business was a plus here. The City openly wished to grant this loan to BNT and went to great lengths to help BNT prepare the loan application. The fact that the loan was actually approved shows that it was something the City wanted to do. BNT now faults the City for following sound and accepted lending practices. It would appear that no good deed goes unpunished: clichés, as the saying goes, sometimes become clichés because they are true.

3. Answers and Defenses

Federal Rules of Civil Procedure

Rule 8. General Rules of Pleading

(b) Defenses; Admissions and Denials.

(1) In General. In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) Denials—Responding to the Substance. A denial must fairly respond to the substance of the allegation.

(3) General and Specific Denials. A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) Denying Part of an Allegation. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) Lacking Knowledge or Information. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) Effect of Failing to Deny. An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses.

(1) In General. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;

- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) Mistaken Designation. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) In General. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

[...]

(4) Effect of a Motion. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. 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.

(g) Joining Motions.

(1) Right to Join. A motion under this rule may be joined with any other motion allowed by this rule.

(2) Limitation on Further Motions. Except as provided in Rule 12(h)(2) or

(3) a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) When Some Are Waived. A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) When to Raise Others. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) Lack of Subject-Matter Jurisdiction. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Reis Robotics, USA, Inc. v. Concept Industries, Inc., 462 F.Supp.2d 897 (N.D. Ill. 2006)

CASTILLO, District Court.

This is a diversity action governed by Illinois law in which Plaintiff Reis Robotics USA, Inc. ("Reis") filed a complaint against Defendant Concept Industries, Inc. ("Concept"), seeking redress for breach of contract. Concept has answered the complaint, asserted six affirmative defenses, and brought seven counterclaims against Reis. Reis now moves to strike and dismiss Concept's affirmative defenses; strike portions of Concept's answer; and dismiss Concept's counterclaims. For the reasons set forth below, Reis's motions are granted in part and denied in part.

BACKGROUND

1. Reis's Allegations

The following facts are taken from Reis's complaint. Reis, an Illinois corporation, manufactures and supplies industrial robotics equipment. Concept, a Michigan corporation, manufactures and supplies automotive parts. On or about February 24, 2005, the parties entered into a contractual arrangement for Concept to purchase from Reis a robotic laser cutting machine (the "Laser") and associated fixtures for trimming three separate automotive parts: the Hush Panel, JS Dash Silencer, and JS Dash Close Out Panel. The pertinent contract documents are an "Order Acknowledgment" executed by Reis and an "Amended Purchase Order" executed by Concept. For ease of reference, we refer to these documents collectively as "the Agreement."

While Reis was in the process of manufacturing the Laser and fixtures pursuant to the Agreement, Concept informed Reis that Concept had terminated the Hush Panel program and that the associated fixtures were no longer needed. The parties agreed to amend the purchase price of the Agreement to reflect the cancellation of the Hush Panel fixtures but to include payment for work performed. Following the cancellation of the Hush Panel fixtures, the amended purchase price of the Agreement was $911,000.

In July 2005, Reis presented and demonstrated the Laser to Concept. In August 2005, Concept informed Reis of changes to the JS Dash Silencer part. Concept's changes to the JS Dash Silencer part required Reis to redesign the associated fixtures. Reis alleges that Concept ordered these modifications under the Agreement, but Concept denies this allegation. Reis asserts that it is entitled to the original purchase price of the JS Dash Silencer fixtures and for work performed on their redesign and remanufacture.

In October 2005, Reis again presented and demonstrated the Laser to Concept. On October 3, 2005, Concept acknowledged receipt of the Laser at its Michigan facility by executing an Acceptance Test Certificate.

In November 2005, Concept informed Reis that Concept had terminated the JS Dash Close Out Panel program and that the associated fixtures, which Reis was still working on, were no longer needed. Reis alleges that it was entitled to payment for work already performed on the JS Dash Close Out Panel fixtures prior to cancellation, a total of $6,900. Concept denies that Reis is entitled to payment of this amount.

The parties agree that Concept has paid' Reis $588,600 to date. Reis asserts that Concept has breached the Agreement by failing to pay a remaining balance of $264,300 plus interest. Concept denies that it owes Reis any additional money under the Agreement.

2. Concept's Allegations

The following additional facts are gleaned from Concept's "Answer, Affirmative Defenses and Counterclaim." Concept alleges that prior to entering the Agreement, the parties engaged in extensive negotiations regarding the specifications of the Laser, particularly the Laser's cutting speed, also called "cycle time," meaning the time required to complete one part. Throughout the negotiations, Reis, through its sales manager Dino Chece, allegedly made various oral and written promises to Concept indicating that the Laser would trim the JS Dash Silencer parts at a cycle time of 60-70 seconds per part or faster. Relying on these promises by Reis, Concept entered into the Agreement.

The Agreement stated that the "Application" of the Laser was for the cutting of parts "described as Hush Panel/Panels Close/Silencer." The Agreement did not mention the 60-70 seconds cycle time, but did provide as follows:

> Necessary cycle time per component is indicated from Concept Industries with 23.7 sec per part including loading/ unloading and inspection. During our test in Chicago we were able to cut the parts in 17-20 sec. The table rotating time is 3 sec. The loading/ unloading as well as inspection is done during [sic] the robot is cutting the part, therefore this time does not need to be added to the overall cycle. Reis Robotics is NOT responsible for the Operator related cycle times.

The Agreement also contained an express warranty that the Laser would be free from defects in material and workmanship.

According to Concept, at a demonstration of the Laser conducted by Reis on May 26, 2005, Concept personnel questioned Mr. Chece and Dr. Wenzel, Reis's general manager, about the Laser's apparent slow cutting speed of JS Dash Silencer parts during the demonstration. In response to Concept's concerns, Mr. Chece and Dr. Wenzel responded that the Laser was not yet optimized and that Concept had "nothing to worry about." When Concept accepted possession of the Laser at its facility, the certificate of acceptance indicated that cycle times "cannot be checked without the production fixture." Following the installation of the Laser at Concept's facility, Concept repeatedly expressed to Reis concerns regarding the cutting speed of the Laser. Concept repeatedly requested assurances from Reis that the cycle time for the JS Dash Silencer would be 60-70 seconds per part, as promised earlier by Mr. Chece. After it became clear to Concept that the Laser would be unable to achieve the promised cycle time, on December 21, 2005, a representative of. Concept sent Reis an email informing Reis that "Concept is pursuing the implementation of an alternate production process" and requesting that Reis "place all production fixtures design work that is currently in-process on the LHD and RHD JS Dash Silencers on hold."

On January 6, 2006, Reis informed Concept in writing that the Laser's cycle time for the JS Dash Silencer would be between 150-195 seconds per part, far longer than what was originally promised. According to Concept, to date the Laser has failed to come close to achieving the initially promised cycle time of 60-70 seconds per part, a defect that was. "fatal" to Concept's ability to manufacture parts in the volumes required by its customers.

As for the JS Dash Silencer fixtures, Concept alleges that it only authorized Reis to design the JS Dash Silencer fixtures and never authorized Reis to begin manufacturing the fixtures. According to Concept, between April and October 2005, the parties exchanged numerous communications through which both parties indicated that Reis would wait for Concept's final design approval prior to initiating any production of the JS Dash Silencer fixtures. Concept alleges that it never gave Reis final design approval and therefore is not responsible for any charges related to the production of the JS Dash Silencer fixtures.

Concept also raises counterclaims against Reis for: (1) fraudulent inducement; (2) misrepresentation; (3) unjust enrichment; (4) promissory estoppel; (5) breach of contract; (6) breach of express warranty; and (7) overpayment. All of the claims are premised on the Laser's inability to achieve the cycle time allegedly discussed by the parties.

MOTION TO STRIKE AND DISMISS AFFIRMATIVE DEFENSES

We turn first to Reis's motion to strike and dismiss various portions of Concept's affirmative defenses.

I. Legal Standard

Federal Rule of Civil Procedure 12(f) permits the Court to strike "any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Fed.R.Civ.P. 12(f). Motions to strike are generally disfavored because of their potential to delay proceedings. Nonetheless, a motion to strike can be a useful means of removing "unnecessary clutter" from a case, which will in effect expedite the proceedings.

Affirmative defenses are pleadings and, as such, are subject to all the same pleading requirements applicable to complaints. Thus, affirmative defenses must set forth a "short and plain statement" of the basis for the defense. Fed. R.Civ.P. 8(a). Even under the liberal notice pleading standards of the Federal Rules, an affirmative defense must include either direct or inferential allegations as to all elements of the defense asserted. "[B]are bones conclusory allegations" are not sufficient.

This Court applies a three-part test for examining the sufficiency of an affirmative defense. First, we determine whether the matter is appropriately pled as an affirmative defense Second, we determine whether the defense is adequately pled under Federal Rules of Civil Procedure 8 and 9. *Id.* Third, we evaluate the sufficiency of the defense pursuant to a standard identical to Federal Rule of Civil Procedure 12(b)(6). Before granting a motion to strike an affirmative defense, the Court must be convinced that there are no unresolved questions of fact, that any questions of law are clear, and that under no set of circumstances could the defense succeed. Additionally, in a case premised on diversity jurisdiction, "the legal and factual sufficiency of an affirmative defense is examined with reference to state law." With these principles in mind, we turn to the specific arguments raised in the motion.

II. Analysis

For its first affirmative defense Concept asserts: "The complaint fails to state a claim upon which relief can be granted." Reis argues that this is not a proper affirmative defense. There is some debate in this District regarding whether "failure to state a claim" may be raised as an affirmative defense or instead must be raised by separate motion. Notably, as one court in this District has observed, although failure to state a claim, may not meet the technical definition of an affirmative defense, Form 20 of the Federal Rules of Civil Procedure's Appendix of Forms lists "failure to state a claim" as a model defense. Rule 84 specifically authorizes the use of the model defenses contained in the Forms. Fed.R.Civ.P. 84. In light of Rule 84 and Form 20, we find authority under the Federal Rules to permit an affirmative defense based on failure to state a claim.

Nonetheless, Concept has failed to adequately plead the defense in accordance with Rule 8. Concept's first affirmative defense is nothing more than a recitation of the standard for a motion to dismiss under Rule 12(b)(6). As alleged, the defense provides no explanation as to how and in what portion of the complaint Reis has failed to state a claim. Although Concept's counterclaim contains detailed factual allegations, these allegations are not mentioned or incorporated by reference in the affirmative defenses. Additionally, it is not clear what portion of the lengthy counterclaim allegations are intended to support Concept's failure to state a claim defense. The Court agrees that clarity is needed as to the basis of this defense, and accordingly, the first affirmative defense is stricken without prejudice.

As its second affirmative defense Concept states: "Reis breached the contract on which it purports to rely, and that contract may be void for fraud and/or failure of consideration." Breach of contract, fraud, and failure of consideration are all matters that may be pled as affirmative defenses. *See* Fed.R.Civ.P. 8(c). However, the Court agrees with Reis that Concept's defenses, as pled, do not satisfy the pleading requirements of Rule 8(a). The breach of contract defense fails to make reference to any of the elements of a breach of contract claim, and additionally, Concept fails to plead with heightened particularity the alleged circumstances constituting fraud as required by Rule 9(b). Again, although Concept has included detailed allegations in its counterclaim, it does not link these allegations in any way to the affirmative defenses, nor is it clear what particular paragraphs of the counterclaim allegations would apply to this affirmative defense. Accordingly, the Court strikes Concept's second affirmative defense without prejudice.

As its third affirmative defense, Concept alleges: "Reis's payment claims for the silencer fixture are barred because Concept never authorized Reis to begin manufacturing the fixture, as Reis itself has acknowledged." Reis argues that this affirmative defense is legally inadequate. The concept of an affirmative defense under Rule 8(c) "requires a responding party to *admit* a complaint's allegations but then permits the responding party to assert that for some legal reason it is nonetheless

excused from liability (or perhaps from full liability)." Concept's third affirmative defense does not meet this criteria, but instead is merely a restatement of the denials contained in its answer. As such, the affirmative defense is not only unnecessary but also improper. However, to the extent Concept intended to raise some affirmative matter here, the Court will give Concept an opportunity to replead. Accordingly, the third affirmative defense is stricken without prejudice.

As its fourth affirmative defense, Concept alleges: "Reis's claims are subsumed by Concept's right of set-off and/or recoupment. Alternatively, the amount of Concept's claims against Reis exceeds the amount of Reis's claim against Concept." Reis argues that the affirmative defense is nothing more than a recapitulation of Concept's denial of the amount of damages claimed to be owed in the complaint. In its response brief, Concept fails to offer any analysis refuting Reis's argument. The Court agrees that this affirmative defense appears to be simply a restatement of the denials contained in Concept's answer, which is improper. However, to the extent Concept intended to raise some affirmative matter here, the Court will give Concept an opportunity to replead. The fourth affirmative defense is therefore stricken without prejudice.

Concept's fifth affirmative defense states: "Reis's claims are barred or limited by laches, waiver, estoppel, unclean hands, or similar legal or equitable doctrines." Laches, waiver, estoppel, and unclean hands are equitable defenses that must be pled with the specific elements required to establish the defense. Merely stringing together a long list of legal defenses is insufficient to satisfy Rule 8(a). "It is unacceptable for a party's attorney simply to mouth [affirmative defenses] in formula-like fashion ('laches,' 'estoppel,' 'statute of limitations' or what have you), for that does not do the job of apprising opposing counsel and this Court of the predicate for the claimed defense — which after all is the goal of notice pleading." This is precisely what Concept has done here. Indeed, in asserting "similar legal or equitable doctrines," Concept fails to put Reis on notice as to even the legal bases for its defenses. Thus, the Court strikes Concept's fifth affirmative defense without prejudice.

Concept's sixth affirmative defense states: "Concept reserves the right to add additional affirmative defenses as they become known through discovery." This is not a proper affirmative defense. If at some later point in the litigation Concept believes that the addition of another affirmative defense is warranted, it may seek leave to amend its pleadings pursuant to Rule 15(a); such a request will be judged by the appropriate standards, including the limitations set forth in Rule 12(b) and (h). Accordingly, Concept's sixth affirmative defense is stricken with prejudice.

MOTION TO STRIKE PORTIONS OF DEFENDANT'S ANSWER

Reis next moves to strike various portions of Concept's answer for failing to comply with Rule 8. Rule 8 provides in relevant part:

> A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder.

Fed.R.Civ.P. 8(b). Reis argues that Concept has violated Rule 8 by including improper qualifying language in Paragraphs 5, 6, and 7. Specifically, Reis objects to the following language, which is contained in each of the aforementioned Paragraphs: "To the extent the alleged 'contract' created by issuance of this purchase order failed to warrant the trim speed and cycle time that Concept required, it *was* procured by fraud and was of no validity; accordingly, the remaining allegations in this paragraph are denied as true." Upon review, the Court concludes that the above language does not constitute an admission or denial of Reis's allegations as required by Rule 8; instead the language is equivocal and serves to confuse the issues that are in dispute.

Similarly, Reis argues that Paragraphs 15, 16, 20 each contain language that does not comport with Rule 8. Upon review, the Court finds that the last sentence of Paragraph 15, the last two sentences of Paragraph 16, and in Paragraph 20, all of the language following the statement, "Concept denies these allegations as untrue," renders the answers equivocal and improper under Rule 8. Accordingly, Paragraphs 5, 6, 7, 15, 16, and 20 are stricken with leave to amend. In repleading, Concept shall follow Rule 8(b)'s directive that it admit, deny, or state that it is without sufficient knowledge to admit or deny. To the extent Concept must give a qualified answer, Concept must "specify so much of it as is true and material and shall deny only the remainder." *See* Fed. R.Civ.P. 8(b).

Reis also seeks to strike Concept's prayer for attorneys fees and costs. As a general matter, Illinois follows the "American rule," such that attorneys fees and costs are ordinarily not awarded to the prevailing party unless authorized by statute or provided for by contract. Concept responds that it is merely attempting to preserve its ability to obtain fees should it later be determined that it is entitled to do so. At this early stage of the litigation, the Court cannot determine as a definitive matter that fees and costs are wholly unavailable to Concept. Thus, the Court declines to strike the request for attorneys fees and costs.

4. Amendments

Federal Rules of Civil Procedure

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) *Time to Respond.* Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) *Based on an Objection at Trial.* If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) *For Issues Tried by Consent.* When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) *When an Amendment Relates Back.* An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

[ ]

4.1 When Amendments are Allowed

Shiflet v. Allstate Ins. Co., 233 F.R.D. 465 (D.S.C. 2006)

DUFFY, District Judge.

This matter is before the court on Defendant Allstate Insurance Company's Motion to Amend the Answer. Plaintiff Kathryn Shiflet opposes this motion. For the reasons set forth herein, Defendant's motion is granted.

BACKGROUND

On January 4, 2004, Plaintiff Kathryn Shiflet's mobile home and personal belongings were destroyed by fire. At the time of the fire, Plaintiff's mobile home was covered under an insurance policy provided by Allstate Insurance. On November 3, 2004, Plaintiff initiated this action against Defendant Allstate Insurance for breach of contract, bad faith, and violation of [the S.C. insurance claims practices statute], after Allstate allegedly wrongfully denied Plaintiff's claim.

Defendant Allstate originally filed its answer to the original complaint on December 6, 2004. Then, on May 31, 2005, Plaintiff amended the original complaint with the leave of the court. On June 3, 2005, Defendant filed its answer to the Amended Complaint, including a motion to join Mr. Shiflet as a necessary party or, if that is not feasible, that the action be dismissed.1(#co_footnote_B00112008358850_1) On November 10, 2005, Defendant filed a motion to amend its answer to the Amended Complaint so as to include the defense of arson. Five days after Defendant filed this motion to amend, the court adopted, with the consent of both parties, a Second Amended Scheduling Order. This Order specified that any amended pleadings would be due by December 15, 2005 and that discovery was to be completed by March 1, 2006.

On January 13, 2006, Plaintiff filed her response in opposition to Defendant's motion to amend its answer. Plaintiff argues that the proposed amendment should be denied because it is prejudicial to Plaintiff, in bad faith, and would be futile.

DISCUSSION

Rule 15(a) of the Federal Rules of Civil Procedure provides that "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." While the decision to grant a party leave to amend a pleading is within the sound discretion of the trial court, that discretion is limited by the general policy favoring the resolution of cases on the merits.

In exercising its discretion to amend, a court should focus on factors like "undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, futility of amendment, etc." Mere delay unaccompanied by prejudice, bad faith, or futility in moving to amend is not a sufficient reason to deny leave to amend. The Fourth Circuit has held that "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." Moreover, the Supreme Court has declared that leave to amend "shall be freely given when justice so requires."

Here, the court believes that Defendant's motion for leave to amend its answer should be granted. First, Defendant filed the motion to amend its answer within the time as provided by the scheduling order and when over three months remained before discovery was due. Accordingly, Defendant timely amended and Plaintiff is not prejudiced by undue delay. Additionally, Defendant alleges that it has uncovered "new additional information" through discovery that was not available when Defendant filed its amended answer. As such, Defendant is not acting in bad faith in moving to amend, but rather, is preserving a defense that may well be available to it.

Further, because the proposed additional defense of arson is a complete defense to Plaintiff's claims, the court believes that allowing amendment will aid in resolving the case on the merits. Despite Plaintiff's arguments to the contrary, the court does not believe that Defendant's amendment is futile, as Defendant seeks to raise a potentially viable complete defense. In short, the court finds that Defendant's proposed amendment is not prejudicial to Plaintiff, not in bad faith, and not obviously futile. Accordingly, the court grants Defendant's motion, and directs Plaintiff to file appropriate responsive pleadings to the First Amended Answer.

CONCLUSION

It is therefore ORDERED, for the foregoing reasons, that Defendant's Motion to Amend Answer is GRANTED.

Dolphin Kickboxing Co. v. Franchoice, Inc., No. 19-cv-1477 (D. Minn. May 6, 2020)

ELIZABETH COWAN WRIGHT, Magistrate Judge.

This matter is before the Court on Plaintiffs' Motion to Amend Complaint. For the reasons stated below, the Motion is granted in part and denied in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

The "Facts" section of the proposed amended complaint is exactly the same as found in the original Complaint. For the sake of brevity, the Court incorporates the "Facts" section found in its Report and Recommendation into this Order. The proposed amended complaint also contained the same claim for fraud as found in the original Complaint. Defendants did not move to dismiss the common law fraud claim as part of their Motion to Dismiss. The claim alleged that Defendants committed fraud by knowingly making false representations to Plaintiffs for the purpose of inducing them to purchase an ILKB franchise.In addition, the fraud claim alleges that these representations proved to be untrue; Plaintiffs reasonably relied on this information in deciding to purchase an ILKB franchise, and as a result Plaintiffs have suffered damages of no less than $500,000.

The only substantive addition to the proposed amended complaint is Count V seeking punitive damages. This proposed count incorporates the allegations in the preceding paragraphs and then alleges as follows:

> Defendants deliberately and intentionally disregarded the rights of Plaintiffs and disregarded the substantial likelihood of serious injury and damages to Plaintiffs by representing that they offered to match Plaintiffs only with franchises that Defendants had investigated and vetted; that such franchises were of high quality; and that Defendants would provide Plaintiffs with all knowledge necessary to make an informed

> decisions sic, when, in fact: > > - Defendants knew that the founder of ILKB, Michael Parrella, had filed for bankruptcy in 2003 and that his discharge had been vacated in 2008; and knew or should have known, in the exercise of reasonable inquiry of Parrella's bankruptcy consistent with their representations to Plaintiffs, that Parrella's discharge had been revoked for failure to pay federal taxes and that there were two adversary proceedings in the bankruptcy accusing Parrella of fraud and fraudulent transfers. > > - Defendants failed to perform any serious, systematic or professional due diligence upon ILKB; instead all they did was talk to a few existing franchisees, many of whom did not own the type of ILKB franchise that Plaintiffs were considering buying, and Defendants prepared no report, summary or investigation of ILKB. > > - Defendants simply took representations of ILKB about the nature of the franchise, including the representations that it was suitable for absentee ownership; that no units had closed; that average ILKB franchisees made revenues and profits at a certain level; and that ILKB did all of the marketing for franchisees, and passed them on to Plaintiffs without checking on them. > > - Defendants knew that ILKB engaged in blatantly illegal marketing techniques as early as March 2015 and never questioned whether such techniques had ceased, thus exposing Plaintiffs to the high likelihood, if not certainty, that Plaintiffs would be the victims of fraud. > > - Defendants disregarded complaints and warning signs from ILKB franchisees as the whining of "stupid, selfish and ungrateful franchisees" instead of investigating such complaints and determining whether they were true. > > - Defendants made specific representations as set forth in the proposed amended complaint about ILKB without investigating or verifying them, when such representations were false and were known or should have been known to Defendants as false.

According to the proposed amended complaint, as a result of Defendants' deliberate disregard of Plaintiffs' rights, Plaintiffs are entitled to punitive damages.

II. LEGAL STANDARD

Rule 15(a) sets the general standard for amending pleadings in Federal court. Fed. R. Civ. P. 15. Rule 15(a) provides that leave to amend "shall be freely given when justice so requires." The determination as to whether to grant leave to amend is entrusted to the sound discretion of the trial court.The Eighth Circuit has held that although amendment of a pleading "should be allowed liberally to ensure that a case is decided on its merits ... there is no absolute right to amend."

Denial of leave to amend may be justified by "undue delay, bad faith on the part of the moving party, futility of the amendment or unfair prejudice to the opposing party." "Denial of a motion for leave to amend on the basis of futility means the district court has reached the legal conclusion that the amended complaint could not withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Accordingly, in reviewing a denial of leave to amend we ask whether the proposed amended complaint states a cause of action under the *Twombly* pleading standard. ..."

The relevant legal basis for punitive damages under Minnesota law provides:

> Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.

b. A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

1. deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or
2. deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

III. ANALYSIS

With respect to Rule 15, Defendants argue that the Motion should be denied because it is futile. Plaintiffs' amendment is not futile if the proposed amended complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Here, the question is whether the proposed amended complaint plausibly alleges facts showing that the acts of Defendants show deliberate disregard for the rights or safety of others where:

> A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:
>
> 1. deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or
> 2. deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Under these criteria, "a defendant operates with 'deliberate disregard' by acting with intent or indifference to threaten the rights or safety of others." As such, "the mere existence of negligence or of gross negligence does not rise to the level required so as to warrant a claim for punitive damages." Moreover, Plaintiffs must allege that Defendants were aware of a high probability that their conduct would cause injury to Plaintiffs. Put another way, the Court looks to whether the allegations in the proposed amended complaint plausibly allege that Defendants knew of facts, or intentionally disregarded facts, that created a high probability that Defendants' actions would harm the rights or safety of Plaintiffs.

Defendants argue that the proposed amended complaint lacks allegations of Defendants' "knowledge of facts" that create a high probability of injury to the rights or safety of others. This includes allegations in the proposed amended complaint that: "Defendants knew ILKB's founder, Michael Parrella, had filed for bankruptcy in 2003; that his discharge from bankruptcy had been vacated in 2008 for failure to pay federal taxes; and that adversary proceedings in the bankruptcy accused Parrella of fraud and fraudulent transfers." According to Defendants, nothing in the

proposed amended complaint plausibly suggests that withholding this information created a high probability that Plaintiffs' rights would be harmed as it relates to purchasing an ILKB franchise. This Court agrees. It is hard to understand how an omission of a bankruptcy in 2003, a failure to pay taxes discovered in 2008, and accusation of an unexplained fraud (without any indication as to the outcome), necessarily created a high probability of injury to the rights or safety of Plaintiffs in relation to purchasing an ILKB franchise almost 10 years later. In other words, even assuming that Defendants knowingly omitted these facts from Plaintiffs, the Court finds that these allegations do not plausibly allege that Defendants were aware, based on these facts, that there was the high probability that purchasing an ILKB franchise would harm Plaintiffs.

The Court also agrees with Defendants that allegations in the proposed amended complaint regarding representations made by Defendants to Plaintiffs offering to match them "only with franchises that Defendants had investigated" and then not conducting "any serious, systematic or professional due diligence upon ILKB" or taking ILKB's representations at face value at most amounts to gross negligence on the part of Defendants as to their duty to Plaintiffs. However, the mere showing of negligence, even gross negligence, is not sufficient to sustain a claim of punitive damages. Moreover, there are no allegations, save for the alleged illegal marketing (addressed below), that would have given Defendants reason not to believe ILKB's representations so as to create a high probability of harm to Plaintiffs.

The Court acknowledges that Plaintiffs allege Defendants knew that ILKB engaged in blatantly illegal marketing techniques as early as March 2015 and never questioned whether such techniques had ceased, thus exposing Plaintiffs to the high likelihood, if not certainty, that Plaintiffs would be the victims of fraud. To comply with Rule 8, a claimant "must 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" As pointed out by Defendants, the allegations regarding illegal marketing are conclusory, as Plaintiffs do not identify in the proposed amended complaint the marketing techniques communicated to or used by Plaintiffs. These conclusory allegations do not give Defendants adequate notice of the claim for the purposes of Rule 8 and therefore, it is futile with respect to those allegations for the purposes of the punitive damages claim. Similarly, the proposed amended complaint alleges that Defendants disregarded complaints and warning signs from ILKB franchisees as the whining of "stupid, selfish and ungrateful franchisees" instead of investigating such complaints and determining whether they were true. These allegations do not provide adequate notice of a claim for punitive damages because they do not set forth what those complaints entailed and how they bore on the Defendants' alleged misconduct with respect to Plaintiffs so as to find that Defendants' disregard created a high probability of harm to Plaintiffs.

However, Plaintiffs do allege that Defendants made specific representations about ILKB without investigating or verifying them, when such representations were false and were known or should have been known to Defendants as false. The specific representations Plaintiffs appear to be referencing pertain to Defendants' representations to Plaintiffs, including that: ILKB owners were making over $200,000 per year in profits, and this level of profitability for them was normal; if Gould bought three franchises, he could increase his profits; an ILKB franchise was suitable for semi-absentee ownership; and that no ILKB franchises had ever closed. These alleged misrepresentations were made to induce Plaintiffs into purchasing an ILKB franchise. As a starting point, the Court rejects any argument by Defendants that these allegations fail to state a claim for punitive damages merely because Plaintiffs allege in part that Defendants should have known that their representations regarding ILKB were false. Defendants contend that such allegations, if proven true, at most demonstrate negligence, as opposed to willful or willfully indifferent conduct, which is required for punitive damages. However, this argument ignores the alternative allegation that Defendants "knew" the representations were false. Rule 8 expressly authorizes pleading in the alternative.

Defendants do not argue that punitive damages are not available in cases involving fraud. Indeed, courts have concluded that such damages are appropriate in the context of fraud. In this case, allegations regarding representations by Defendants that ILKB franchises were making over $200,000 per year in profits, and this level of profitability for them was normal; if Gould bought three franchises, he could increase his profits; an ILKB franchise was suitable for semi-absentee ownership; and that no ILKB franchises had ever closed, all go to the financial viability of an ILKB franchise. Assuming as true the allegations that Defendants made these representations to Plaintiffs, and the allegations that Defendants knew these representations were false when they made them to Plaintiffs, when construed in the light most favorable to Plaintiffs, these allegations set forth a plausible claim that Defendants consciously or with indifference provided Plaintiffs with inaccurate information about ILKB in order to entice them into investing in an ILKB franchise thereby creating a high probability that Defendants' actions would harm Plaintiffs' rights with respect to their franchise purchase.

In sum, Plaintiffs' Motion is granted only to the extent that it seeks to add a claim for punitive damages in relation to the specifically alleged fraudulent representations made by Defendants to Plaintiffs that: (1) ILKB franchises were making over $200,000 per year in profits, and this level of profitability for them was normal; (2) if Gould bought three franchises, he could increase his profits; (3) an ILKB franchise was suitable for semi-absentee ownership; and (4) no ILKB franchises had ever closed. The Motion is otherwise denied. The Court reminds Plaintiffs that this analysis was conducted under the liberal pleading standard of Rule 15, and the fact of the Court granting them leave to amend does not imply that they are likely to succeed with their claim for punitive damages.

4.2 Relation Back of Amendments

Moore v. Baker, 989 F.2d 1129 (11th Cir. 1993)

MORGAN, Senior Circuit Judge:

Appellant contends that her doctor violated Georgia's informed consent law by failing to advise her that ethylene diamine tetra acetic acide chelation (EDTA) therapy was available as an alternative to surgery. The district court granted summary judgment in favor of defendants/appellees on the ground that EDTA therapy is not a "generally recognized or accepted" alternative treatment for coronary surgery. We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant, Judith Moore, was suffering from a partial blockage of her left common carotid artery, which impeded the flow of oxygen to her brain and caused her to feel dizzy and tired. In April of 1989, she consulted with appellee Dr. Roy Baker, an employee of the Neurological Institute of Savannah, P.C. (NIS), about her symptoms. Dr. Baker diagnosed a blockage of her left carotid artery due to artherosclerotic plaque and recommended that she undergo a neurosurgical procedure known as a carotid endarterectomy to correct her medical problem.

Dr. Baker discussed the proposed procedure with Moore and advised her of the risks of undergoing the surgery. He did not advise her, however, of an alternative treatment known as EDTA therapy. Moore signed a written consent allowing Dr. Baker to perform the carotid endarterectomy on April 7, 1989. Following surgery, she appeared to recover well, but soon the hospital staff discovered that Moore was weak on one side. Dr. Baker reopened the operative wound and removed a blood clot that had formed in the artery. Although the clot was removed and the area repaired, Moore suffered permanent brain damage. As a result, Moore is permanently and severely disabled.

On April 8, 1991, the last day permitted by the statute of limitations, Moore filed a complaint alleging that Dr. Baker committed medical malpractice by failing to inform her of the availability of EDTA therapy as an alternative to surgery in violation of Georgia's informed consent law. According to Moore's complaint, EDTA therapy is as effective as carotid endarterectomy in treating coronary blockages, but it does not entail those risks that accompany invasive surgery.

On August 6, 1991 Dr. Baker filed a motion for summary judgment on the issue of informed consent. On August 26, 1991, Moore moved to amend her complaint to assert allegations of negligence by Dr. Baker in the performance of the surgery and in his post-operative care of Moore. Originally, on September 3, 1991, the district court granted Moore's motion to amend her complaint. Shortly thereafter, the district court granted Dr. Baker's motion for summary judgment on the informed consent issue, finding that EDTA therapy is not a "generally recognized or accepted" alternative treatment for coronary surgery. One month later, the district court vacated its September 3rd order and denied Moore's motion to amend her complaint, thus terminating all of Moore's outstanding claims. Moore now appeals the denial of her motion to amend her complaint as well as the grant of summary judgment in favor of Dr. Baker and NIS.

I.

Moore claims that the district court abused its discretion by vacating it's earlier order and denying Moore's motion to amend her complaint. Leave to amend a complaint "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). While a decision whether to grant leave to amend is clearly within the discretion of the district court, a justifying reason must be apparent for denial of a motion to amend. In the instant case, the lower court denied leave to amend on the ground that the newly-asserted claim was barred by the applicable statute of limitations and that allowing the amendment would, therefore, be futile. If correct, the district court's rationale would be sufficient to support a denial of leave to amend the complaint.

Moore filed her original complaint on the last day permitted by Georgia's statute of limitations. Accordingly, the statute of limitations bars the claim asserted in Moore's proposed amended complaint unless the amended complaint relates back to the date of the original complaint. An amendment relates back to the original filing "whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed.R.Civ.P. 15(c). The critical issue in Rule 15(c) determinations is whether the original complaint gave notice to the defendant of the claim now being asserted. "When new or distinct conduct, transactions, or occurrences are alleged as grounds for recovery, there is no relation back, and recovery under the amended complaint is barred by limitations if it was untimely filed."

Moore relies heavily on *Azarbal v. Medical Center of Delaware, Inc.* which addressed the doctrine of relation back in the context of a medical malpractice case. In *Azarbal,* the original complaint alleged negligence in the performance of an amniocentesis on the plaintiff, resulting in injury to the fetus. After the statute of limitations had expired, the plaintiff sought to amend the complaint to add a claim that the doctor failed to obtain her informed consent prior to performing a sterilization procedure on her because the doctor did not tell her that the fetus

had probably been injured by the amniocentesis. The district court found that "the original complaint provided adequate notice of any claims Ms. Azarbal would have arising from the amniocentesis, including a claim that Dr. Palacio should have revealed that the procedure had caused fetal injury."

The instant case is clearly distinguishable from *Azarbal.* Unlike the complaint in *Azarbal,* the allegations asserted in Moore's original complaint contain nothing to put Dr. Baker on notice that the new claims of negligence might be asserted. Even when given a liberal construction, there is nothing in Moore's original complaint which makes reference to any acts of alleged negligence by Dr. Baker either during or after surgery.[2] The original complaint focuses on Baker's actions before Moore decided to undergo surgery, but the amended complaint focuses on Baker's actions during and after the surgery. The alleged acts of negligence occurred at different times and involved separate and distinct conduct. In order to recover on the negligence claim contained in her amended complaint, Moore would have to prove completely different facts than would otherwise have been required to recover on the informed consent claim in the original complaint.

We must conclude that Moore's new claim does not arise out of the same conduct, transaction, or occurrence as the claims in the original complaint. Therefore, the amended complaint does not relate back to the original complaint, and the proposed new claims are barred by the applicable statute of limitations. Since the amended complaint could not withstand a motion to dismiss, we hold that the district court did not abuse its discretion in denying Moore's motion to amend her complaint.

2 (n.1 in opinion) Moore's original complaint is very specific and focuses solely on Dr. Baker's failure to inform Moore of EDTA therapy as an alternative to surgery. Although the complaint recounts the details of the operation and subsequent recovery, it does not hint that Dr. Baker's actions were negligent. In fact, the only references in the original complaint relating to the surgery or post-operative care suggest that Dr. Baker acted with reasonable care. The complaint states that "the nurses noticed a *sudden onset* of right sided weakness of which they *immediately informed Defendant Baker.*" "Upon being informed of this [right sided weakness], Defendant *Baker immediately* caused Plaintiff to be returned to the operation suite.... Although the *clot was promptly removed* by Defendant Baker...."

4.3 Change of Party or Naming of Party

Palacio v. City of Springfield, 25 F.Supp.3d 163 (D. Mass 2014)

NEIMAN, United States Magistrate Judge

Carlos A. Palacio, Sidney G. Gaviria Orrego and Carlos D. Palacio ("Plaintiffs") seek to amend their complaint to substitute the names of five police officers—Greg Bigda, Clayton Roberson, Steven Kent, Sean Arpin, and Barry Delameter—for the four "John Does" originally named as defendants with the City of Springfield and William Fitchet, Springfield's Police Commissioner. The City and Fitchet oppose the motion not only as untimely but as failing the "relation-back" provision set forth in Fed.R.Civ.P. 15(c)(1)(C). For the reasons which follow, the court will allow the motion, as Plaintiffs seek, pursuant to another subdivision of Rule 15, namely, (c)(1)(A).

I. Background

Plaintiffs filed their complaint in the Hampden County Superior Court on July 31, 2013, against the City, Fitchet and certain "John Does" who were employed by the City as police officers. Plaintiffs' complaint asserted claims against all these defendants under 42 U.S.C. §§ 1983 and 1985, Mass. Gen. Laws ch. 12, §§ 11H and 11I (Massachusetts Civil Rights Act), and Chapter 214, § 1B (Massachusetts Right to Privacy Act), arising out of what Plaintiffs claim was an unjustified, unconstitutional, warrantless breaking and entering into and search of their home starting in the evening of August 4 through to the early morning of August 5, 2010. On August 14, 2013, the City and Fitchet filed their Notice of Removal of the action to this federal forum. The court thereafter entered a scheduling order on November 25, 2013, establishing February 25, 2014, as the deadline for filing motions to amend pleadings or join additional parties. This latter deadline was subsequently extended to April 15, 2014. Plaintiffs filed their instant motion for leave to amend on April 14, 2014.

II. Discussion

As the parties are well aware, leave to amend a complaint under Rule 15(a) is to be "freely given when justice so requires" absent an adequate basis to deny the amendment, such as futility, bad faith, undue delay or dilatory motive. In this vein, as Plaintiffs assert, the addition of new defendants or the assertion of new claims closely related to the original claims are the types of amendments that are generally permissible under the rule. Without more, therefore, the substitution of the true names of the John Doe defendants in the case at bar would be relatively commonplace. The amendment would be timely, i.e., not long after suit was filed and within the deadline set by the court, and none of the recently-identified John Does would appear to suffer undue prejudice were the amendment allowed; discovery is not scheduled to close until August 25, 2014, and, apparently, no depositions have yet been taken. The fact that Plaintiffs wish to substitute five named individuals for four John Does is immaterial.

As Plaintiffs acknowledge, however, their motion to amend comes more than three years after the precipitating incident in August of 2010, i.e., beyond the three year statute of limitations which the parties agree applies. That is easily remedied, Plaintiffs argue, because the proposed amendment would "relate back" to July 31, 2013, the date they filed the original complaint. In so arguing, Plaintiffs rely on Rule 15(c), which provides two different ways in which an amended complaint can relate back to the original. First, Rule 15(c)(1)(A) allows for relation back "when the law that provides the applicable statute of limitations," in this case, Massachusetts law, "allows relation back." Second, Rule 15(c)(1)(C) allows for relation back when the following requirements are met: (1) the claim "arose out of the same conduct, transaction or occurrence set out—or attempted to be set out—in the origi-

nal pleading"; (2) the new party "received such notice of the action that it will not be prejudiced in defending on the merits"; (3) the party being added received such notice within the time period of Rule 4(m), 120 days; and (4) the party being added "knew or should have known [within the Rule 4(m) time period] that the action would have been brought against it, but for a mistake concerning the proper party's identity." *See Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 547 (2010).

In response to Plaintiffs' motion, the City and Fitchet ignore Plaintiffs' argument with respect to subsection (c)(1)(A) of Rule 15 and ground their entire opposition on subsection (c)(1)(C). Indeed, there is a fair amount of support for their argument that John Doe substitutions do not relate back to the original complaint under Rule 15(c)(1)(C) when the sought-after substitutions arise after the applicable statute of limitations has run on the underlying claim. Although the First Circuit has not specifically addressed the issue, other circuits have concluded rather uniformly that a "plaintiff's lack of knowledge of the intended defendant's identity is not a mistake concerning the identity of the proper party within the meaning of Rule [15(c)(1)(C)]." In essence, these circuit courts have determined that section (c)(1)(C) simply does not cover the John Doe situation. In this District, Magistrate Judge David Hennessy recently came to the same conclusion, although he determined in the particular matter before him that the plaintiff's ability to amend his complaint was preserved by the doctrine of equitable tolling.

This approach is not without its critics, most particularly the Third Circuit in *Singletary v. Pennsylvania Dep't of Corrections*. To be sure, the Third Circuit acknowledged that "the bulk of authority from other Courts of Appeals takes the position that the amendment of a 'John Doe' complaint—i.e., the substituting of real names for 'John Does' or 'Unknown Persons' named in an original complaint—does not meet the 'but for a mistake' requirement in 15(c)[(1)(C)], because not knowing the identity of a defendant is not a mistake concerning the defendant's identity." Nonetheless, the Third Circuit opined, this was only a "plausible theory" subject to challenge "in terms of both epistemology and semantics." Indeed, the Third Circuit continued, the approach taken by the other circuits was "highly problematic." The Third Circuit explained:

> It is certainly not uncommon for victims of civil rights violations (e.g., an assault by police officers or prison guards) to be unaware of the identity of the person or persons who violated those rights. This information is in the possession of the defendants, and many plaintiffs cannot obtain this information until they have had a chance to undergo extensive discovery following institution of a civil action. If such plaintiffs are not allowed to relate back their amended "John Doe" complaints, then the statute of limitations period for these plaintiffs is effectively substantially shorter than it is for other plaintiffs who know the names of their assailants; the former group of plaintiffs would have to bring their lawsuits well before the end of the limitations period, immediately begin discovery, and hope that they can determine the assailants' names before the statute of limitations expires. There seems to be no good reason to disadvantage plaintiffs in this way simply because, for example, they were not able to see the name tag of the offending state actor.

That said, the Third Circuit appeared to be comfortably bound by its previous ruling in *Varlack v. SWC Caribbean, Inc.*, which held that the amendment of a "John Doe" complaint could meet all the conditions of Rule 15(c)(1)(C) relation-back, including the "but for a mistake" requirement. Nonetheless, in the case before it, the Third Circuit affirmed the lower court's denial of the plaintiff's motion to amend, since the party who was proposed as a substitute, a psychologist who worked at the corrections institution, could not fairly be said to fall within the "Unknown Corrections Officers" named in the original complaint.

Here, the court need not resolve the instant motion by siding with one side or the other in the circuit split as it concerns Rule 15(c)(1)(C), interesting as that issue is. Instead, the court has determined that Rule 15(c)(1)(A) provides more than sufficient grounds to relate-back Plaintiffs' amendment to the date of their original complaint. As Plaintiffs posit, Rule 15(c) was specifically amended in this regard in 1991 "to clarify that relation back may be permitted even it does not meet the standard of the federal rule if it would be permitted under the applicable limitations law." As the First Circuit explained in *Morel v. DaimlerChrysler AG*, Rule 15(c)(1)(A) "cements in place a one-way ratchet; less restrictive state relation-back rules will displace federal relation-back rules, but more restrictive state relation-back rules will not." Accordingly, as Plaintiffs argue, the two parts of Rule 15(c)(1), subparagraphs (A) and (C), in essence enable a party to invoke the more permissive relation back rule. Thus, even were a court to conclude that subparagraph (c)(1)(C) does not apply, subparagraph (c)(1)(A) does provide the relief Plaintiffs seek in amending their complaint.

One further note in this regard. While this is not a diversity case—the more common route to applying Rule 15(c)(1)(A)—relation back is nonetheless available in the context of a section 1983 claim such as this so long as the borrowed limitation period, under state law, is subject to relation back. "Rule 15(c)(1)(A) instructs courts, then, to look to the entire body of limitations law that provides the applicable statute of limitations." Since section 1983 derives its statute of limitations from state law, "under Rule 15(c)(1)(A), [the court] must determine if ... state law provides a 'more forgiving principle of relations back' in the John Doe context, compared to the federal relation back doctrine under Rule 15(c)(1)(C)."

Where federal law establishes a cause of action but does not specify an applicable limitations period for asserting claims, courts "borrow" the statute of limitations for analogus claims under state law. *See Owens v. Okure,* 488 US 235, 240 (1989) (state statute of limitations for personal injury claims applies to federal civil rights claims under 42 U.S.C. § 1983).

Although, as noted, the City and Fitchet do not address subparagraph (c)(1)(A) at all, they do acknowledge that a federal court which is called upon to adjudicate a section 1983 claim ordinarily must borrow the forum state's limitation period governing personal injury causes of action. In this regard, the parties agree that Massachusetts prescribes a three year statute of limitations for personal injury actions, and that the First Circuit has adopted this prescriptive period for section 1983 cases arising in Massachusetts.[3]

3 (n.1 in opinion) In turn, the statute of limitations for Plaintiffs' state law claims are, respectively, three years for the Massachusetts Civil Rights Act, and three years for a Massachusetts right to privacy claim.

Given these agreements, the City and Fitchet must per force acknowledge that the law of the Commonwealth further provides that "any amendment allowed pursuant to [Mass. Gen. Laws c. 231, § 51] or pursuant to the Massachusetts Rules of Civil Procedure shall relate to the original pleading." Thus, Massachusetts employs a liberal relation back rule that permits new parties to be added to an ongoing case even after the expiration of the limitations period. In short, Massachusetts law is more liberal than federal law with respect to the relation back principle and is, therefore, controlling.

That is not to say, of course, that plaintiffs can will-nilly amend their complaints to substitute or add defendants. As the Supreme Judicial Court explained with respect to Mass. Gen. Laws ch. 231, § 51, various factors inform a decision to permit an amendment to a pleading. "Such factors include (1) whether an honest mistake had been made in selecting the proper party; (2) whether joinder of the real party in interest had been requested within a reasonable time after the mistake was discovered; (3) whether joinder is necessary to avoid an injustice; and (4) whether joinder would prejudice the nonmoving party."

These factors are not unlike those applied by the courts to Fed.R.Civ.P. 15(a), namely, undue delay, bad faith, dilatory motive and undue prejudice. Indeed, in many ways, subsections (a) and (c) of Rule 15 act in tandem. Under subsection (a), the court must first determine whether an amendment to a complaint may be had before trial, whereupon the court will separately determine, if need be, whether the amendment relates back to the date of the original pleading. These two questions are generally addressed simultaneously. Still, depending on the circumstances, it would not necessarily be "procedurally fatal" for a court to first allow a complaint to be amended so as to join a defendant and, much later, ruling against the plaintiff on relation back and limitations grounds.

> Federal Rule of Civil Procedure 15(a) sets forth the conditions under which a party may amend his complaint without mentioning whether an amendment relates back. Rule 15(c) then provides the limited conditions under which an amended complaint will relate back. (It is undisputed those conditions were met here.) Thus, unlike in Massachusetts, the mere allowance of an amendment does not resolve the relation back issue favorably to the amending party.

Here, the City and Fitchet acknowledge that, at the time the complaint was filed, Plaintiffs lacked knowledge of the John Doe defendants' true names, but argue that had they been more diligent in filing their suit they likely could have obtained the records identifying the police officers through discovery within the limitations period. That may be, but it does not foreclose the relief which Plaintiffs presently seek. Taking into account these factors, the court cannot say that there was undue delay in Plaintiffs' seeking the amendment or that there will be undue prejudice to the defendants occasioned thereby. In sum, these particular factors do not militate against Plaintiffs' proposed amendment to their complaint.

The only factor which might call for a denial of Plaintiffs' motion is possible "futility," a factor that is inextricably intertwined with the relation-back issue. Thus, were Rule 15(c)(1)(C) controlling, Plaintiffs' proposed amendment might be deemed futile given its "but for a mistake" language. For all the reasons explicated, however, Rule 15(c)(1)(A) applies. Accordingly, Plaintiffs' proposed amendment to the complaint can readily be found to relate back to the original complaint, thereby avoiding the statute of limitations barrier upon which the City and Fitchet seek to interpose.

What does the court mean here?

5. Truthfulness & Good Faith

Federal Rules of Civil Procedure

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By 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:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) 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; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

1. In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) Requirements for an Order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

5.1 Factual & Legal Foundation

Turton v. Virginia Dept. of Education, No. 3:14cv446 (E.D. Va. Jan. 15, 2015)

ROBERT E. PAYNE, Senior District Judge.

This matter is before the Court on DEFENDANT PATRICK T. ANDRIANO'S MOTION FOR SANCTIONS TO RULE 11. For the reasons set forth herein, the motion will be granted.

FACTUAL AND PROCEDURAL BACKGROUND

Counsel for the 28 plaintiffs in this case filed the Amended Complaint on July 11, 2014. The Complaint generally alleges various incidents of discrimination against black and special education students in a number of local school divisions and includes both federal and state law claims. The Virginia Department of Education, Chesterfield, Essex, Henrico, and Nottoway County Public Schools, specific principals and teachers, and two attorneys, including Patrick T. Andriano ("Andriano"), the proponent of the current Motion for Rule 11 Sanctions, are among those named as defendants in the suit.

Andriano is an attorney with Reed Smith, LLP "who represented the Henrico and Chesterfield County School Boards regarding issues with Individualized Education Plans ("IEP") developed for five of the Plaintiffs who are or were students in certain public schools in either Henrico County or Chesterfield County." The Amended Complaint asserted claims against Andriano "individually and in his official capacity as counsel for school districts in Central Virginia, including Henrico County Public Schools, Chesterfield County Public Schools, Essex County Public Schools and Nottaway County Public Schools."

The Amended Complaint alleges that Andriano was "present in many IEP meetings in Henrico and Chesterfield Counties wherein he advised school officials to violate federal and state special education laws. . . ." It is then alleged that Andriano's actions and omissions "resulted in conspiracy to violate federal and state education laws, and amounted to Negligence, Gross Negligence, Reckless Disregard, and/or Breach of Duty Arising from Special Relationship. Specifically, the acts and omissions attributed to Andriano and alleged in the Amended Complaint include:

1. Denying parents access to their child's school records;

> 2. Advising school officials to conduct IEP meetings when parents were not present and did not waive their right to present in violation of federal law;
>
> 3. Advising school officials that it was appropriate to bring criminal charges against parents who were vocal about the violations of federal and state education laws related to their children and who disagreed with placement decisions made by the school IEP team;
>
> 4. Engaging in conduct in IEP meetings that essentially amounted to the bullying and harassment of parents who tried to participate in the meeting;
>
> 5. Advising school officials to disregard the recommendations of a treating physician with regard to the needs of the SPED student; and
>
> 6. Conspiring with officials to deny students their right to a FAPE (free appropriate public education) in the least restrictive environment

Many of the Defendants, including Adriano, filed Motions to Dismiss based on various legal theories.

After considering these motions, this Court entered an Order dismissing the Amended Complaint as to all defendants without prejudice on September 23, 2014. In so doing, the Court found that the Complaint violated Fed. R. Civ. P. 8(a) (2) and Fed R. Civ. P. 10(b). The motions to dismiss pursuant to Rules 12(b)(1) and/or 12(b)(6) were denied as moot.

Andriano filed his Motion for Rule 11 Sanctions on September 9, 2014, before the Order dismissing the Amended Complaint was entered, and the Order provides that: "the Court retains jurisdiction to decide Defendant Patrick T. Andriano's Motion for Sanctions pursuant to Rule 11."

LEGAL STANDARD UNDER RULE 11

Fed. R. Civ. P. 11 provides in relevant part:

> By presenting to the court a pleading the attorney or unrepresented party is certifying that to the best of that person's knowledge, information, and belief formed after an inquiry reasonable under circumstances:
>
> 1. it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> 2. the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; and
>
> 3. 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.

Violation of any one of these prescriptions is sufficient to trigger the mandatory imposition of a sanction. Andriano argues that Plaintiffs and their attorneys have violated all three.

In situations like these where multiple types of Rule 11 violations are alleged, the Fourth Circuit instructs that district courts consider whether the claims advanced in the pleading are supported by the facts and the law (or a reasonable argument for extending, modifying, or reversing the law) before making a determination of improper purpose. That approach is logical because "whether the pleading has a foundation in fact or is well grounded in law will often influence the determination of the signer's purpose. Additionally, the inquiry under Rule 11(b)(1), which focuses on the signer's central purpose for filing the pleading, is somewhat different than the inquiry under Rule 11(b)(2) and (b)(3), both of which focus on the reasonableness of the signer's inquiry into the factual and legal bases for the claim(s).

When sanctions are sought pursuant to Rule 11(b) (2) and (b) (3), the standard is one of "objective reasonableness" and the court must focus on "whether a reasonable attorney in like circumstances could believe his actions to be factually and legally justified." When engaging in this analysis, the court is tasked with assessing "what was reasonable to believe at the time the pleading was filed." As the rule itself indicates, the relevant circumstances must be considered, and factors such as time pressures and attorney experience may influence the court's reasonableness determination. If, pursuant to this analysis, the court determines that the signer "failed to conduct a reasonable inquiry into the applicable law" and/or facts prior to filing the pleading or motion at issue, Rule 11 sanctions are mandated.

When a sanction is sought under Rule 11(b) (1), the assessment is made using an "objective standard of reasonableness" in that it is not appropriate to consider the "consequences of the signer's act, subjectively viewed by the signer's opponent." However, it is appropriate to consider "the signer's subjective beliefs to determine the signer's purpose in filing the suit, if such beliefs are revealed through an admission that the signer knew the motion or pleading was baseless but filed it nonetheless."

The text of Rule 11 teaches that "to harass or to cause unnecessary delay or needless increase in the costs of litigation" are all examples of improper purposes. However, those examples are not exclusive. The governing principle is that a complaint must be filed with the sincere and central purpose of vindicating rights in court. If not, its purpose is improper under Rule 11. When a complaint is filed for the proper purpose of vindicating rights *and* one or more other purposes of which the Court "does not approve," sanctions are only appropriate if "the added purpose is [ ] undertaken in bad faith or is [ ] so excessive as to eliminate a proper purpose."

DISCUSSION

Andriano argues that the claims against him: (1) lack legal basis; (2) lack factual basis; and (3) were filed for an improper purpose. He also notes that Plaintiffs and their counsel were put on notice after the Amended Complaint was filed that their claims against him lacked factual and legal support, but that they nevertheless continued to pursue those claims. Andriano now seeks Rule 11 Sanctions, asking this Court to "enter an order imposing the maximum sanctions permitted by law against plaintiffs and their counsel."

A. Alleged Lack of Legal Basis

Andriano argues that the claims against him lacked legal basis because: (1) the Court lacks subject matter jurisdiction over the claims against him; and (2) the claims are "fatally flawed as a matter of law."

First, Andriano argues, as he did in his Motion to Dismiss Pursuant to Rule 12(b)(1), that this Court "lacks diversity jurisdiction and lacks federal question jurisdiction to adjudicate purely state law claims brought by Virginia residents against a Virginia resident." Plaintiffs concede that their claims against Mr. Andriano "are in the form of state law claims," but argue that the claims against Mr. Andriano "are so intertwined with the conduct involved in the federal law claims outlined in the Amended Complaint, that they must be reviewed in conjunction with the federal matters." Adriano's jurisdictional argument fails because the Amended Complaint was based on federal question jurisdiction as to defendants other than Adriano and because 28 U.S.C. § 1367(a) provides for pendant party jurisdiction over Adriano. And, supplemental jurisdiction over claims against a non-diverse party exists if the supplemental claim at issue arises from the same case or controversy i.e., "if the state and federal claims derive from a common nucleus of operative fact" and are such that "the plaintiff would ordinary be expected to try all of them in one judicial proceeding."

Plaintiffs' counsel frames her argument on the subject matter jurisdiction issue by asserting that there was a "direct correlation" between the asserted federal claims against other defendants and that the claims against Adriano were "intertwined" with those other claims. It thus appears that a reasonable attorney in like circumstances could have similarly believed that there was subject matter jurisdiction over the claims brought against Andriano.

Second, Andriano argues that the Court lacks subject matter jurisdiction because Plaintiffs failed to exhaust all administrative remedies before filing suit. Plaintiffs provide an explanation for why they did not exhaust all administrative remedies, citing the number of students whose rights were repeatedly and egregiously violated. Specifically, Plaintiffs contend that it would have been "futile" to seek a remedy in an administrative proceeding and argues for "an extension of federal law in

the Fourth Circuit ... to include a much needed exception to the requirement to exhaust all administrative remedies." That argument, as to its merits, is unsupported by any citation to decisional law. Counsel's cogitation that an exception is needed to the rather well-settled exhaustion doctrine cannot be the basis upon which to conclude that an exception is warranted under legal principles. Thus, the Court cannot find that there was a reasonable basis for the failure to exhaust administrative remedies.

Third, Andriano argues that Plaintiffs' state law claims against him lack legal basis and could not be based on a reasonable inquiry into the applicable law. However, the only state common law claim that Andriano found worthy of a detailed review is the claim based on "breach of duty arising from a special relationship." On that point, Andriano asserts that "even a cursory review of the applicable Virginia law would have revealed to Plaintiffs' counsel that no such special relationship could ever exist." In support, Andriano cites numerous Virginia decisions holding that, "in providing legal representation, an attorney's sole duty is to his or her client, and not to any third party." Based on the fundamental nature of this "bedrock rule," Andriano argues that "Plaintiffs' counsel either knew the applicable law and chose to ignore it, or failed to conduct even the most basic research to determine what the applicable law is."

Andriano also correctly asserts that, "at no point have plaintiffs identified what, if any, legal research they claim was performed prior to filing the Complaint or Amended Complaint against Mr. Andriano."

The law of Virginia is quite clear on this subject. Plaintiff's counsel has not shown that any prefiling legal research was undertaken in an effort to find legal support for the "special relationship" assertions in the Amended Complaint. And, given the clear and settled nature of Virginia law on the subject, it is difficult to conclude that any such research was undertaken. On this record then, the Court finds that there was no prefiling inquiry into the law that applies to the special relationship assertions in the Amended Complaint.

B. Factual Basis

Next, Andriano asserts that Plaintiffs' claims against him are factually unsupported. In short, Andriano argues that the "Complaint fails to set forth specific factual allegations supporting Plaintiffs' purported claims" and Plaintiffs' counsel failed to make an effort to determine that their claims are factually supported. Andriano argues that it is not enough that Plaintiffs allege that Mr. Andriano was "present at certain unspecified meetings and that he provided legal advice to his clients."

In response, Plaintiffs' counsel asserts that counsel attended fifty or more IEP meetings at which Andriano was present ten or more times, and counsel has recordings of these meetings evidencing Andriano's attempt to bully, harass, and intimidate parents and improperly advise administrators and teachers to violate federal law. In addition, Plaintiffs' counsel asserts shehas spent "in excess of 200 hours attending IEP meetings, reviewing school records and IEP documents and meetings with parents."

That record shows a substantial basis for the allegations about Adriano's presence at, and his observed conduct during, some of the meetings alleged in the Amended Complaint. However, the record now shows that the allegation that Adriano was not counsel for the School Board of Essex and Nottoway Counties. Thus, "even a cursory investigation" would have revealed that Adriano did not represent the school boards for either Nottoway County or Essex County and that he was not involved in the development of IEPs for the student-plaintiffs attending schools in those counties. In sum, there was not an adequate investigation into the factual basis for allegations to the contrary.

C. Improper Purpose

Finally, Andriano argues that Plaintiff's claims against him are not asserted for any proper purpose. In support, Andriano cites the fact that plaintiffs sought monetary damages in excess of $20,000,000.00 based on "putative claims that do not contain common factual issues or common questions of law." Additionally, Andriano suggests that, if Plaintiffs truly had a proper purpose in filing their Complaint, they would not have failed to exhaust administrative remedies, would not have waited until some of the student-plaintiffs failed to be enrolled in the defendant school systems, and would not have sought such an exorbitant sum of money. Id.

Andriano alleges that Plaintiffs "primary motives were to gain publicity, and to embarrass teachers, principals, and state and county officials." Id. Of course, if that allegation is true, sanctions would be mandated because the only proper central purpose for filing a complaint is to vindicate rights in court, not to gain publicity or embarrass officials into acting as Plaintiffs' counsel think they should. To support his contention, Andriano cites counsel's public statements which include, "We took a chance because there was not a lot of case law on doing something like this, but something had to be done to wake up the defendants and get the information out there."

Andriano cites Kunstler as an example of a similar case where the "primary motives in filing the complaint were to gain publicity, to embarrass state and county officials. . ." However, in Kunstler, the "district court concluded that plaintiffs' counsel never intended to litigate the § 1983 action," and that determination clear-

ly supported the award of sanctions based on improper purpose. Here, it is not clear that Plaintiffs never intended to follow through with and litigate their claims against Andriano, and the Court cannot conclude that counsel used the threat of litigation as a mere bargaining chip.

As discussed above, the subjective views of Andriano about Plaintiffs' purpose in filing the suit are irrelevant to the analysis. Rather, the Court must determine Plaintiff's purpose based on objective or otherwise reliable evidence. There is no direct evidence on which to make such a finding. However, the Court's findings on the existence of reasonable factual and legal support for claims can affect the analysis under this prong of Rule 11. In that regard, where "counsel willfully files a baseless complaint, a court may properly infer that it was filed. . .for some purpose other than to vindicate rights through the judicial process."

D. Are Sanctions Appropriate?

Given the findings that there was a lack of legal support for, and a lack of legal inquiry into, the special relationship theory that lies at the core of claims against Adriano, and considering the public statements of Plaintiffs' counsel, the Court concludes that sanctions are appropriate.

E. Appropriate Sanction(s) and Possible Need for a Hearing

Sanctions under Rule 11 may be monetary or nonmonetary, and only "the least severe sanction adequate to serve the purposes of Rule 11 Should be imposed. The case law makes clear that the primary purpose of Rule 11 is to deter improper litigation rather than to compensate the opposing party for the costs of defending the lawsuit. In fashioning a sanction, the court should consider: (1) the reasonableness of the opposing party's attorney's fees; (2) the minimum to deter; (3) ability to pay; and (4) factors related to the severity of the Rule 11 violation. The court may also"consider factors such as the offending party's history, experience, and ability, the severity of the violation, the degree to which malice or bad faith contributed to the violation, the risk of chilling, the type of litigation involved, and other factors as deemed appropriate in individual circumstances."

There is not a sufficient record on which to make the determination of what a reasonable sanction would be. Counsel shall confer and advise the Court, by January 31, 2015, how such a record can be framed. Alternatively, counsel could agree on a sanction and propose it for consideration.

5.2 Good Faith Arguments for Change in Law

Hunter v. Earthgrains Co. Bakery, 281 F.3d 144 (4th CIr. 2002)

KING, Circuit Judge.

By Order of October 23, 2000, appellant Pamela A. Hunter, a practicing attorney in Charlotte, North Carolina, and an active member of the North Carolina State Bar, was suspended from practice in the Western District of North Carolina for five years. Ms. Hunter appeals this suspension, imposed upon her pursuant to Rule 11 of the Federal Rules of Civil Procedure. As explained below, we conclude that her appeal has merit, and we vacate her suspension from practice by the district court.

I.

Ms. Hunter, along with her co-counsel N. Clifton Cannon and Charlene E. Bell, represented a group of workers at a Charlotte, North Carolina, bakery owned by appellee Earthgrains Company Bakery ("Earthgrains"). These three lawyers filed a class action lawsuit against Earthgrains on February 24, 1997, in the Superior Court of Mecklenburg County (the "First Lawsuit"). The class action complaint, verified by the three named plaintiffs, alleged violations of Title VII of the Civil Rights Act of 1964, and it also asserted fraudulent misrepresentation on the part of Earthgrains in the closing of its Charlotte bakery. Earthgrains promptly removed the First Lawsuit to the Western District of North Carolina.

Earthgrains responded to the class action complaint on April 15, 1997. The plaintiffs thereafter filed certain motions in the district court, specifically: (1) seeking certification of the class; (2) to amend the complaint; (3) to amend the motion for class certification; and (4) for intervention by other plaintiffs. The plaintiffs also filed responses to several motions made by Earthgrains. Throughout the wrangling concerning the various motions, Ms. Hunter and her co-counsel maintained certain essential assertions, including: (1) that a pattern and practice of racial discrimination existed at Earthgrains' Charlotte bakery; (2) that the workers there were more skilled, but paid less, than those at other Earthgrains bakeries; (3) that the hourly wage workforce at the Charlotte bakery was predominantly African-American, while the workforce at other Earthgrains bakeries was predominantly white; and (4) that Earthgrains management had represented to its Charlotte employees that the Charlotte bakery was profitable and would remain open after a corporate spinoff, but that it was nonetheless closed. The plaintiffs alleged various incidents of racial discrimination by Earthgrains, including an assertion by an Earthgrains manager that he wanted to change the "complexion" of the work-

force in the Charlotte bakery. Earthgrains denied the allegations of the First Lawsuit and moved for summary judgment, contending, first, that its Charlotte employees were bound to arbitrate their Title VII claims under their collective bargaining agreement (the "Earthgrains CBA"); second, that the plaintiffs had failed to establish a prima facie case of racial discrimination; and third, that if a prima facie case had been shown, the plaintiffs had failed to rebut Earthgrains' legitimate nondiscriminatory reasons for closing its Charlotte bakery. In response, the plaintiffs consistently asserted, inter alia, that the Earthgrains CBA did not apply to the Title VII claims at issue.

By Order entered on April 22, 1998, the district court awarded summary judgment to Earthgrains. It concluded that the plaintiffs were obligated to arbitrate under the Earthgrains CBA, and alternatively, that they had failed to rebut the nondiscriminatory reasons proffered by Earthgrains for the closing of its Charlotte bakery. Further, the court determined that the plaintiffs had failed to establish a prima facie case of fraudulent misrepresentation under North Carolina law. The court included in its Order a sua sponte directive that plaintiffs' lawyers show cause why Rule 11 sanctions should not be imposed on them for their conduct in the First Lawsuit (the "Show Cause Order").[4] On May 6, 1998, the lawyers responded to the Order, seeking reconsideration of the summary judgment decision and requesting a stay of the Show Cause Order pending their appeal of the summary judgment award. By Order of July 21, 1998, the stay was granted and reconsideration of the summary judgment was denied.

4 (n.4 in opinion) In the Show Cause Order, the court stated that it appeared the plaintiffs' attorneys had not made a sufficient prefiling inquiry before initiating suit. Further, the court noted that the plaintiffs had filed four motions, which appeared to violate Rule 11.

On February 9, 1999, Ms. Hunter and Mr. Cannon filed another lawsuit against Earthgrains in North Carolina state court concerning the closing of the Charlotte bakery. This complaint (the "Second Lawsuit") was not of the class action variety, but instead named individual plaintiffs and alleged the tort of fraudulent misrepresentation under North Carolina law. In response, Earthgrains filed its own lawsuit in the Western District of North Carolina, seeking an injunction under 28 U.S.C. § 2281 (the Anti Injunction Act), and asserting that the Second Lawsuit constituted a collateral attack on the summary judgment awarded to Earthgrains on April 22, 1998. The Second Lawsuit was voluntarily dismissed on May 4, 1999.

On April 21, 1999, this Court affirmed the summary judgment award to Earthgrains, concluding that plaintiffs had failed to rebut the legitimate, nondiscriminatory rationale offered by Earthgrains for the closing of its Charlotte bakery, and also concluding that plaintiffs had failed to make a prima facie showing of fraudulent misrepresentation under North Carolina law. In that decision, we explicitly declined to address whether the plaintiffs were required under the Earthgrains CBA to submit their claims to arbitration.

On May 3, 2000, Ms. Hunter filed another complaint against Earthgrains in North Carolina state court (the "Third Lawsuit"), this time alleging the tort of negligent misrepresentation under North Carolina law. The Third Lawsuit, which Earthgrains promptly removed to the Western District of North Carolina, arose from the same essential facts and circumstances as the two earlier cases. Thereafter, on October 23, 2000, the district court concluded that federal jurisdiction was lacking, and it remanded the Third Lawsuit to state court.

For over two years, from May 1998 until June 2000, no action was taken with respect to the Show Cause Order of April 22, 1998. On June 16, 2000, however, Earthgrains filed a motion in district court seeking Rule 11 sanctions against Ms. Hunter and her co-counsel, entitled "Motion for Rule 11 Sanctions Pursuant to Show Cause Order" (the "Sanctions Motion"). The bases asserted for the motion were twofold: (1) the Fourth Circuit had affirmed summary judgment for Earthgrains, and (2) plaintiffs' lawyers (Ms. Hunter in particular) had filed two subsequent lawsuits on the same facts. On July 17, 2000, Ms. Hunter and her co-counsel filed a "Memorandum in Objection" to the Sanctions Motion, pointing out that the Show Cause Order related only to the First Lawsuit, and referring the court to their response to the Show Cause Order, filed on May 6, 1998, as establishing their compliance with Rule 11.

On October 23, 2000, the district court entered the order we are called upon to review in this appeal. Finding the attorneys' behavior to be sanctionable, the court barred Ms. Hunter from the practice of law in the Western District of North Carolina for a period of five years. It also reprimanded Ms. Hunter's co-counsel, and it admonished them "to be conscious of and strictly abide by the provisions of Rule 11 in the future." The court based its Sanctions Order on the following:

a. first and foremost, counsel's assertion of a legal position contrary to the holding of our 1996 decision in *Austin v. Owens-Brockway Glass Container, Inc.,* 78 F.3d 875 (4th Cir.1996), which the court characterized as a "frivolous legal contention."

b. counsel's lack of judgment and skill; and

c. Ms. Hunter's sanction by the same court eleven years earlier.

Ms. Hunter has timely appealed the suspension imposed upon her, maintaining that Rule 11 sanctions are unwarranted and that her suspension from practice was an overly severe penalty. We possess jurisdiction under 28 U.S.C. § 1291.

II.

B.

Although Rule 11 does not specify the sanction to be imposed for any particular violation of its provisions, the Advisory Committee Note to the Rule's 1993 amendments provides guidance with an illustrative list. A court may, for example, strike a document, admonish a lawyer, require the lawyer to undergo education, or refer an allegation to appropriate disciplinary authorities. While a reviewing court owes "substantial deference" to a district court's decision to suspend or disbar, it is axiomatic that asserting a *losing* legal position, even one that fails to survive summary judgment, is not of itself sanctionable conduct.

Under Rule 11, the primary purpose of sanctions against counsel is not to compensate the prevailing party, but to "deter future litigation abuse."[5] Importantly, a sua sponte show cause order deprives a lawyer against whom it is directed of the mandatory twenty-one day "safe harbor" provision provided by the 1993 amendments to Rule 11.[6] In such circumstances, a court is obliged to use extra care in imposing sanctions on offending lawyers. The Advisory Committee contemplated that a sua sponte show cause order would only be used "in situations that are akin to a contempt of court," and thus it was unnecessary for Rule 11's "safe harbor" to apply to sua sponte sanctions. Furthermore, when imposing sanctions under Rule 11, a court must limit the penalty to "what is sufficient to deter repetition of such conduct," and "shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed." Fed.R.Civ.P. 11(c).[7]

III.

B.

The primary basis for the suspension of Ms. Hunter is that she advanced a frivolous legal position in the First Lawsuit. By presentation of a pleading to a court, an attorney is certifying, under Rule 11(b)(2), that the claims and legal contentions made therein "are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." In its Sanctions Order, the district court found the legal assertions of Ms. Hunter to be "utter nonsense" that were "paradigmatic of a frivolous legal contention."

We have recognized that maintaining a legal position to a court is only sanctionable when, in "applying a standard of objective reasonableness, it can be said that a reasonable attorney in like circumstances could not have believed his actions to be legally justified." That is to say, as Judge Wilkins recently explained, the legal argument must have "absolutely no chance of success under the existing prece-

5 (n.7 in opinion) The circumstances involving Ms. Hunter are unusual, in that the notion of sanctions was first raised by the court sua sponte in April 1998. However, sanctions were not imposed until after a motion was filed more than two years later by Earthgrains. This distinction is important because, as we shall explain, differing standards apply.

6 (n.8 in opinion) The "safe harbor" of Rule 11 forbids filing or presenting a motion for sanctions to the court "unless, within 21 days after service of the motion ..., the challenged paper ... is not withdrawn or appropriately corrected." Fed.R.Civ.P. 11(c)(1)(A).

7 (n.9 in opinion) An order levying sanctions should spell out with specificity both the legal authority under which the sanctions are imposed and the particular behavior being sanctioned. Although there are multiple sources of authority for the imposition of sanctions, not all sanctions upon lawyers are appropriate under each source; thus, a court must ensure that the authority relied upon supports the sanctions imposed.

dent." Although a legal claim may be so inartfully pled that it cannot survive a motion to dismiss, such a flaw will not in itself support Rule 11 sanctions — only the lack of any legal or factual basis is sanctionable. We have aptly observed that "the Rule does not seek to stifle the exuberant spirit of skilled advocacy or to require that a claim be proven before a complaint can be filed. The Rule attempts to discourage the needless filing of groundless lawsuits." And we have recognized that "creative claims, coupled even with ambiguous or inconsequential facts, may merit dismissal, but not punishment."

In its Sanctions Order, the court maintained, with respect to Ms. Hunter, that "plaintiffs' standing to file suit was challenged based on a binding arbitration clause in the Earthgrains CBA. Plaintiffs' response to this gateway issue rested on a tenuous, if not preposterous, reading of the CBA and applicable law." The court was correct that the legal position it found frivolous — that a collective bargaining agreement ("CBA") arbitration clause must contain specific language to mandate arbitration of a federal discrimination claim — had been rejected by us four years earlier in *Austin v. Owens-Brockway Glass Container, Inc.* However, our reasoning in *Austin,* as of April 22, 1998 (when the Show Cause Order issued), stood alone on one side of a circuit split. Six of our sister circuits (the Second, Sixth, Seventh, Eighth, Tenth, and Eleventh) had taken the legal position contrary to *Austin* on whether a CBA could waive an individual employee's statutory cause of action. In point of fact, and consistent with the foregoing, none of our sister circuits, as of April 1998, had agreed with the position we took in _Austin.

The circuit split evidenced by these decisions concerned whether collective bargaining agreements containing general language required arbitration of individuals' statutory claims, such as those arising under the ADEA and Title VII. The disagreement of the circuits on this issue resulted from varying interpretations of the Court's decisions in *Alexander v. Gardner-Denver Company*, and _Gilmer v. Interstate/Johnson Lane Corp.[8] This Court, in *Austin,* had deemed *Gilmer* to be the controlling authority, while the other circuits chose the alternate route, finding the Court's decision in *Alexander* to control.

In opposition to Earthgrains' summary judgment motion, Ms. Hunter repeatedly relied upon the Supreme Court's decision in *Alexander* (failing, however, to rely on the decisions of the six circuits that had followed *Alexander*). She further sought to align her case against Earthgrains with *Alexander* by discussing the generality of the applicable clause of the Earthgrains CBA, which included the agreement not to "illegally discriminate." She contended that this provision was not sufficiently specific to require her clients to arbitrate.

The district court was particularly concerned with Ms. Hunter's attempt to distinguish her case from our decision in *Brown v. Trans World Airlines*. She maintained to the court that *Brown* had distanced itself from *Austin* on essentially the same facts, and she inferred from this the reluctance of our *Brown* panel to follow

8 (n.16 in opinion) In its 1974 decision in *Alexander,* the Court determined that an employee who had filed a grievance in accordance with a CBA did not forfeit a Title VII discriminatory discharge lawsuit, and it distinguished between contractual and statutory rights. In 1991, the Court concluded in *Gilmer* that there was a presumption of arbitrability, and that an age discrimination claim could be subject to compulsory arbitration. Ms. Hunter, in response to the Show Cause Order, explained her basis for the First Lawsuit by making the pertinent observation that *Gilmer* involved an individual employment contract, while *Alexander* concerned arbitration under a CBA. She accordingly asserted that the *Alexander* decision controlled in the First Lawsuit.

Austin. Ms. Hunter argued that, as in *Brown,* "the provisions of the collective bargaining agreement which allegedly proscribe racial discrimination, do not mention Title VII, 42 U.S.C. § 1981 or common law fraud," and that "the language of the collective bargaining agreement between plaintiffs and defendant is not sufficient to require plaintiffs to first arbitrate their claim." Earthgrains contended, on the other hand, that the agreement "not to *illegally* discriminate" in the Earthgrains CBA compelled arbitration of Title VII claims under *Austin.* The district court agreed with Earthgrains and based its suspension of Ms. Hunter largely on this legal contention. As we have pointed out, however, there was a good-faith basis for Ms. Hunter to assert the position she propounded. We would be reaching to conclude that, as of 1998, Ms. Hunter's position had "no chance of success" under existing law. And subsequent legal developments render Ms. Hunter's position on the *Austin* issue not only tenable, but most likely correct.

On November 16, 1998 — nearly two years before the Sanctions Order of October 23, 2000 — the Supreme Court decided that, in order for a CBA to waive individuals' statutory claims, it must at least "contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination." *Wright v. Universal Mar. Serv. Corp.,* 525 U.S. 70 (1998). The Court declined to address whether even a clear and unmistakable waiver of the right to take one's statutory discrimination claim to court would be enforceable. It also observed that "the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA," and that a clause requiring arbitration of "matters under dispute" was not sufficiently explicit to meet the standard. The Court distinguished its earlier decision in *Gilmer* on the basis that *Gilmer* involved "an individual's waiver of his own rights, rather than a union's waiver of the rights of represented employees," and thus it was not subject to the "clear and unmistakable standard." When the district court suspended Ms. Hunter for advancing a legal position that was "not the law of this circuit," it was itself propounding a legal proposition in conflict with the Supreme Court's *Wright* decision.[9]

In *Blue v. United States Dept. of Army,* we had occasion to address a Rule 11 sanctions issue in a similar, but distinguishable, context. We there affirmed an award of sanctions where the attorneys had pursued a claim after it became clear that it was factually without merit. Of significance, the plaintiffs' counsel had espoused a legal position contrary to circuit precedent (regarding the necessary showing for a prima facie case of discrimination), but arguably more consistent with Supreme Court authority. In *Blue,* the district court recognized that the question of law at issue was "in a state of flux," and it declined to impose Rule 11 sanctions based on the legal contention being asserted. In this appeal, the suspension of Ms. Hunter was in large part premised on her legal contention on the arbitrability of discrim-

9 (n.17 in opinion) After *Wright* was decided in 1998, and prior to the Sanctions Order of October 2000, our Court examined CBA provisions similar to the one at issue in this case and found that they did not compel plaintiffs to arbitrate.

ination claims under the Earthgrains CBA, a legal position being asserted in connection with a body of law that was "in a state of flux." Indeed, the district court sanctioned Ms. Hunter for advocating a legal proposition supported by a majority of our sister circuits, which was later substantially adopted by the Supreme Court.

In pursuing the First Lawsuit, Ms. Hunter, under Rule 11(b)(2), was plainly entitled (and probably obligated),[10] to maintain that *Austin* was incorrectly decided. While she could expect the district court to adhere to *Austin,* she was also entitled to contemplate seeking to have this court, en banc, correct the error (perceived by her) of its earlier *Austin* decision. If unsuccessful, she might then have sought relief in the Supreme Court on the basis of the circuit split. Indeed, our good Chief Judge, in his *Blue* decision, observed that if it were forbidden to argue a position contrary to precedent,

> the parties and counsel who in the early 1950s brought the case of *Brown v. Board of Ed.,* might have been thought by some district court to have engaged in sanctionable conduct for pursuing their claims in the face of the contrary precedent of *Plessy v. Ferguson,*. The civil rights movement might have died aborning.

This astute observation of Judge Wilkinson is especially pertinent in the context of this case. The district court's erroneous view of the law in its suspension of Ms. Hunter necessarily constitutes an abuse of discretion. Although Ms. Hunter and the other lawyers (i.e., her co-counsel and the lawyers for Earth-grains) failed to provide the court with a thorough exposition on the circuit split and the Supreme Court's decision in *Wright,* their lack of thoroughness does not render her position frivolous. Because Ms. Hunter's legal contentions in the First Lawsuit on the issue of arbitrability were not frivolous, her suspension from practice in the Western District of North Carolina on this basis does not withstand scrutiny.

10 (n.18 in opinion) *See* North Carolina Rule of Professional Conduct 1.3 cmt. (2001) ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); *McCoy v. Court of Appeals of Wisconsin,* 486 U.S. 429 (1988) ("In searching for the strongest arguments available, the attorney must be zealous and must resolve all doubts and ambiguous legal questions in favor of his or her client.") (discussing criminal defense attorneys).

5.3 Improper Purpose

Sussman v. Bank of Israel, 56 F.3d 450 (2d Cir. 1995)

KEARSE, Circuit Judge

Nathan Lewin, Esq., an attorney for the plaintiffs herein whose complaint was dismissed on the ground of forum non conveniens, appeals from so much of a judgment of the United States District Court for the Southern District of New York, as imposed a $50,000 sanction against Lewin pursuant to Fed. R.Civ.P. 11 and the court's inherent power on the ground that the complaint, signed by Lewin, had been filed in part for an improper purpose. The court held that, although plaintiffs were also motivated in part by a proper purpose, the presence of an improper purpose warranted the imposition of sanctions. On appeal, Lewin contends principally (1) that the criticized purpose was not improper, and (2) that sanctions could not

properly be imposed because the claims asserted in the complaint were not frivolous. Defendants cross-appeal, contending that the sanctions should have been more severe. For the reasons that follow, we agree with Lewin that the award of sanctions was an abuse of discretion. We therefore reverse the judgment and dismiss the cross-appeal.

I. BACKGROUND

For the purposes of this appeal, the events are not in dispute. The plaintiffs are Erwin Sussman and the estate of Ira Guilden (Guilden and/or the estate referred to as "Guilden"), who died in 1984. Sussman, a Swedish citizen who lives in the United States, and Guilden, a United States citizen who resided in New York, were founders, directors, and shareholders of North American Bank Ltd. ("NAB"), an Israeli bank. Defendants are the Bank of Israel ("BOI"), which insured deposits in Israeli banks, and several other Israeli entities and individuals.

A. The Collapse of NAB and the Litigation in Israel

In 1985, NAB collapsed after years of fraud, embezzlement, and mismanagement by its senior managers in Israel. BOI made payments to NAB depositors and obtained the appointment of the Official Receiver of the State of Israel (the "Receiver") to liquidate NAB's remaining assets. In 1989, the Receiver commenced a civil action in Israel in the name of the State of Israel (the "Israeli action"), naming as defendants Sussman, Guilden, and several other officers and directors of NAB, and alleging, *inter alia,* that the NAB directors had been negligent and had breached their fiduciary duties by failing to monitor adequately the management of NAB and to ensure that NAB operated in compliance with Israeli banking regulations. The Receiver's complaint sought recovery from the defendants, jointly and severally, of more than $100 million dollars to compensate for losses allegedly incurred by BOI as a result of NAB's collapse.

Sussman and Guilden, represented by Israeli counsel, raised affirmative defenses to the Receiver's claims and asserted third-party claims against BOI and two of its officials. In addition to alleging that BOI and the officials had been negligent in failing to carry out their supervisory duties with respect to NAB, the third-party claims alleged that BOI and the officials had deliberately misrepresented NAB's financial condition and concealed from NAB's non-Israeli directors certain financial transactions stemming from a 1983 banking scandal in Israel, which came to be known as the "Bank Shares Crisis" following revelations that many Israeli banks were artificially and unlawfully inflating the market prices of their respective shares. The third-party claims alleged that BOI and the Israeli Ministry of Finance (the "Ministry") had sought to avert the financial collapse of NAB by extending it a secret $10 million loan in order to allow NAB's senior managers to continue their manipulation of NAB's stock price; that the third-party-defendant officials, despite learning of the NAB managers' improper activities, had continued to mis-

represent NAB's situation to its nonresident directors and sought to prevent public disclosure of BOI's role in the NAB stock-manipulation scheme; and that NAB would not have collapsed but for the actions of BOI and the defendant officials. Sussman and Guilden sought contribution and indemnification for any amounts that they might be required to pay in the Israeli action.

B. The Preparation and Filing of the New York Complaint

Thereafter, Sussman and Guilden retained Lewin, a partner in the Washington, D.C. law firm of Miller, Cassidy, Larroca & Lewin, to investigate the circumstances underlying the Israeli suit and to evaluate the prospects for further litigation against BOI and other Israeli officials involved in the events at NAB. In 1991, as the Israeli action was nearing its scheduled trial date, Lewin drafted a complaint to be filed in New York (the "New York complaint"), naming as defendants BOI; the Ministry; three BOI officials, including the two named as third-party defendants in the Israeli action; and Bank Hapoalim, Ltd. ("Bank Hapoalim"), an Israeli bank with a branch office in New York.

The New York complaint substantially repeated Sussman and Guilden's assertions in the Israeli action that BOI and its officials had helped NAB managers to manipulate the price of NAB stock following the Bank Shares Crisis. It also alleged that the secrecy of the scheme was maintained by routing the Ministry's clandestine $10 million loan to NAB through Bank Hapoalim's New York office; that BOI and Ministry officials contemporaneously assured Sussman that NAB was well-managed and financially stable, thereby inducing him not to sell his NAB shares; that BOI knew that the directorships held by NAB's foreign investors were largely honorary and that the investors were relying on BOI to monitor NAB's Israeli operations; and that Sussman and Guilden had relied on the representations of BOI and the Ministry in not taking action to protect their investments. The complaint also alleged that the filing of the Israeli action was itself part of BOI's continuing scheme to force Sussman and Guilden to bear the costs of BOI's failure to rectify the fraud and mismanagement at NAB. Sussman and Guilden sought, *inter alia,* damages totaling $17 million for the lost value of their investments in NAB.

Before filing the complaint, Lewin sent identical letters dated May 30, 1991 (the "May 1991 warning letter"), to several Israeli government officials, including then-Prime Minister Yitzchak Shamir, then-Minister of Finance Yitzchak Moda'i, and BOI Governor Michael Bruno, warning them of Sussman and Guilden's intention to bring the present suit, and proposing settlement discussions. After describing the general nature of the charges contained in the draft complaint, the letter stated:

> This is a matter of extreme urgency because, in the absence of any satisfactory resolution of our differences, the lawsuit will be filed in New York within the next ten days. The agencies of the Government of Israel that are engaged in an effort directed against our clients are also pressing a trial in the Jerusalem District Court that is scheduled to begin shortly.
>
> If this controversy erupts into public view with the filing of our lawsuit and the inception of the Israeli proceeding, it will not only result in a grave injustice to individuals who have been among Israel's most constant and generous supporters, but will seriously damage foreign investment in Israel in the future.

The letter further asserted that Sussman and Guilden "were, at most, honorary directors of NAB", and that they had had no involvement in the improper activities of NAB's managers and had "relied on BOI and its inspectors to supervise NAB and to insure that its business was run properly". It then concluded:

> The case now pending in Jerusalem is the culmination of years in which improprieties at North American Bank were overlooked or deliberately ignored by the Bank of Israel. It is grossly unjust for the Bank of Israel now to shift the blame for its own conduct to individuals who have always supported Israel emotionally and financially and seek to hold these foreign supporters liable, in an amount exceeding 200 million *shekalim,* for the losses caused by the failure of NAB.
>
> In addition to the loss of their investments, which amounted to millions of dollars, our clients estimate that they have been forced to spend in excess of one million dollars fighting baseless claims made in the Israeli courts. Our lawsuit in federal court in New York will seek recovery against the Ministry of Finance, the Bank of Israel and individual government officials for these losses and for other harm caused to our clients.
>
> Our clients have heretofore been reluctant to take the step of filing suit because a full airing of this outrageous conduct by the Government of Israel will surely deter many potential foreign investors who might otherwise be interested in lending financial resources to Israel. However, the enormity of this injustice and the relentless prosecution of the case in Jerusalem leaves them no option.
>
> If you believe that discussions on this subject can lead to a fruitful and mutually satisfactory resolution, I am prepared to come to Jerusalem promptly to meet with you.

Equivalent to about U.S. $67 million in 1995.

In response to the letter, Amihud Ben-Porath, an Israeli attorney representing BOI, telephoned Lewin and requested a copy of the draft complaint. Lewin sent a copy with a June 3, 1991 covering letter stating, "I have not, in our conversation, overstated my clients' anger at how shabbily they have been treated in Israel, and I hope you appreciate it and are able to communicate this feeling.... Maybe we can save both our clients much travail." Ben-Porath thereafter met with Lewin, Sussman, and Guilden in New York and talked with Lewin several times by telephone. After Ben-Porath advised Lewin that Israeli officials were unwilling to settle the dispute and withdraw the Israeli action, Lewin filed the New York complaint on June 17, 1991.

C. The District Court Proceedings

1. The Dismissal of the New York Complaint

"*Forum non conveniens* is a discretionary power that allows courts to dismiss a case where another court, or forum, is much better suited to hear the case. This dismissal does not prevent a plaintiff from refiling his or her case in the more appropriate forum. This doctrine may be invoked by either the defendant, or by the court." Wex Legal Dictionary.

In lieu of an answer, BOI moved to dismiss the New York complaint on numerous substantive and procedural grounds, but principally argued the ground of forum non conveniens. In opposition to the forum non conveniens motion, plaintiffs argued, *inter alia,* that some evidence available to them in the New York action, including Sussman's own testimony, would be unavailable in Israel. They stated that Sussman could not travel to Israel to testify without the risk of being detained there by the Israeli government; Sussman stated in an affidavit that his prior requests of defendants and other Israeli government officials for a guarantee of safe passage into and out of Israel for that purpose had been denied.

The district court dismissed on the forum non conveniens ground. While acknowledging that the forum preferences of Sussman, a United States resident, and Guilden, a deceased American citizen whose estate was being administered in New York, were entitled to some degree of deference, the court held that other factors pointed to Israel as the more appropriate forum. It noted principally that all of the claims in the New York complaint would be governed by Israeli law; that Sussman and Guilden had voluntarily elected to invest in Israel; and that parallel litigation arising out of the same alleged conduct was already proceeding there. The court rejected Sussman and Guilden's contention that their claims arose out of the alleged secret $10 million loan transmitted through Bank Hapoalim's branch in New York, concluding that the New York conduct "cannot be regarded, in the overall scheme of things, as other than peripheral" to alleged acts and omissions "occurring entirely in Israel." The court also rejected the contention that an Israeli court would be predisposed against Sussman and Guilden's claims. It concluded that, in light of the complexity of the case and the interests of international comity, the claims in the New York complaint presented "a quintessential case for application of the forum non conveniens doctrine." The court did not otherwise address the substance of Sussman and Guilden's allegations; rather, it conditionally dismissed the New York complaint "without prejudice to the merits of plaintiffs' claims."

The court imposed two conditions on the grant of dismissal. First, it required defendants to waive any statute-of-limitations defense under Israeli law that might have become available after the commencement of the New York action. Second, the court required the Israeli government to provide Sussman with "written assurances" that he would not be detained in Israel should he travel there for the purpose of defending the Israeli action or of asserting claims covered by the New York complaint. Defendants complied with the court's conditions, and the complaint was dismissed. An appeal by Sussman and Guilden from the dismissal was rejected in a per curiam opinion.

2. The Rule 11 Motion and the Sanctions Award

Following this Court's affirmance of the forum non conveniens dismissal, BOI moved in the district court for an award of sanctions pursuant to Fed.R.Civ.P. 11, 18 U.S.C. § 1927, and the court's inherent power. They argued (a) that the New York lawsuit had been instituted for an "improper purpose," and (b) that the New York complaint and other papers filed by Sussman and Guilden "contained numerous arguments lacking factual and legal basis."

The district court granted the motion to the extent of imposing sanctions of $50,000 against Lewin pursuant to Rule 11 and the court's "inherent power to deal with abusive litigation." The court declined to rule on BOI's contention that the allegations of the complaint were unsubstantiated, noting that it "did not reach the merits in dismissing the complaint on forum non conveniens grounds, and declining to expend more judicial resources in exploring them now." Rather, it imposed its sanctions "based solely" on what the court described as "the manifestly improper purpose which played a significant part in plaintiffs' motivation for filing their complaint".

In finding an improper purpose, the court quoted extensively from Lewin's May 1991 warning letter and his June 1991 letter to Ben-Porath and found that they were designed to force the withdrawal of the Israeli action by threatening the Israeli government with negative publicity that would result in "economic damage to Israel." While acknowledging that Rule 11 sanctions may be imposed only for an abusive "pleading, motion, or other paper," and that prelitigation letters do not fall within the scope of the Rule, the court stated that Lewin's strategy constituted an "abuse of the litigation process," and that the letters provided "powerful evidence of the improper purpose for which the New York complaint was filed." In addition, the court found that Lewin's "prediction" of adverse publicity "came to pass with Mr. Lewin as a participant." The court cited an article in the June 18, 1991 edition of the *Jerusalem Post,* quoting Lewin as saying that NAB's foreign investors "'were very badly treated by the Israeli court system,'" and an October 31, 1991 *New York Times* article quoting Lewin as saying, "'The message is that if you lend your name to anything in Israel, you can no longer be sure that some lawyer and court won't come after you with huge liabilities.'" The district court stated that

> the filing of a complaint in a highly doubtful venue, for the express purpose of putting pressure on a foreign government to drop or compromise that government's action against the plaintiffs in the foreign nation's courts, furnishes a stark example of improper and oppressive litigation. That proposition seems to me self-evident. I see no need to discuss the many cases cited in the voluminous briefs on this motion. The issue is intensely fact-oriented.
>
> Plaintiffs protest that their purpose in filing the complaint was to secure an American forum for their fraud claims against defendants. They say the purity and fixity of their purpose should be inferred from the vigor with which they litigated their right to do so in this Court and the Court of Appeals. I accept that plaintiffs were also moti-

> vated by their forum preference, and that they did not go gently from it. It is commonplace, however, that the law recognizes multiple motives in human behavior. In this case plaintiffs had two motives. One was to pressure the Israeli Government to cease prosecution of the Jerusalem action against them by threatening to file, and eventually filing, a sensational complaint against the Government in New York. The other motive was to obtain American jurisdiction if the threats failed, as in fact they did. The conduct inspired by the first motive was improper.

After noting that the decision as to where an action is to be filed is "essentially a legal decision" typically made by a plaintiff's attorney, the court declined to sanction plaintiffs themselves and imposed the sanctions solely against Lewin. The court also indicated that the amount of the sanction was not intended to compensate defendants for the expense of defending the action in New York but rather was meant to deter similar filings.

Lewin has appealed the award of sanctions. Defendants have cross-appealed, contending that the amount of the award should have been higher.

II. DISCUSSION

On appeal, Lewin contends that the sanctions award should be overturned because (1) the goal of pressuring BOI to withdraw or settle the Israeli action was not an improper purpose, and (2) even if such a purpose were improper, the filing of a complaint that is well grounded in fact and warranted by existing law cannot, as a matter of law, furnish a valid basis for the imposition of sanctions. Defendants seek to have sanctions upheld not only on the basis adopted by the district court but also on the grounds that the claims asserted in the complaint were frivolous; that the choice of New York as a forum was likewise frivolous because it "lacked any legitimate reason,"; and that the court should have awarded sanctions under 28 U.S.C. § 1927 on the ground that the filing of the New York complaint unreasonably and vexatiously multiplied litigation. They also argue that the award of sanctions should have been higher.

We review all aspects of a district court's award of sanctions under an abuse-of-discretion standard, giving recognition to the premise that "the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard" that informs its determination as to whether sanctions are warranted. We nonetheless remain mindful that "a district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."

Under this standard of review, we find that the imposition of sanctions in the present case constituted an abuse of discretion. The district court erred as a matter of law (a) in concluding that it is improper for an attorney to file a nonfrivolous complaint in a new and proper forum partly as a means of enhancing his client's

chances of obtaining the settlement of another pending action, and (b) in concluding that sanctions may be imposed for the filing of a complaint that not only is not found to be frivolous but also wins for the plaintiff a measure of judicially imposed relief.

A. Rule 11 Sanctions

The pre-1993 version of Rule 11, which is applicable to the present case, provided that an attorney's signature on a "pleading, motion, or other paper" constituted a certification that

> to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation....

This version of the Rule, with the exception of technical changes, was adopted in 1983. Although prior to 1983, Rule 11 contemplated the imposition of sanctions only upon a finding of bad faith, the 1983 revision of the Rule substituted an objective standard of reasonableness. Applying the new objective standard in *Eastway,* we rejected the notion that an attorney who signed an objectively unreasonable court paper could escape the imposition of sanctions by showing that he had a good faith subjective belief in its validity; and in *Oliveri v. Thompson,* we rejected the proposition that a court paper that was not objectively unreasonable could form the basis for the imposition of sanctions where the attorney was guilty of only a subjective violation of the Rule. As discussed below, we conclude that the award of sanctions in the present case did not comply with the objective standard.

2. Improper Purpose as Sanctionable

The question remains whether the court could properly impose sanctions for the filing of a nonfrivolous complaint which resulted in the court's award of some benefits to plaintiffs, on the basis of its finding that plaintiffs also had a purpose that was not proper. This Court has not squarely addressed the question. In one case we stated that "even if there is an arguable legal and factual basis for a motion, an attorney or party violates Rule 11 by presenting that motion to the court for an improper purpose,"; but that statement was dictum, since we overturned the award of sanctions because the challenged motion had a reasonable legal basis and the district court had not found an improper purpose. In a latter decision, we expressly declined to reach the question "of whether a complaint that is warranted by existing law may be sanctionable if filed for the improper purpose of harassment," because in that case the complaint both lacked a good faith basis and had been filed to harass.

An objective standard of analysis is required even with respect to whether a filing was made with an improper purpose. Thus, the court is not to "delve into the attorney's subjective intent" in filing the paper, but rather should assess such objective factors as

> whether particular papers or proceedings caused delay that was unnecessary, whether they caused increase in the cost of litigation that was needless, or whether they lacked any apparent legitimate purpose. Findings on these points would suffice to support an inference of an improper purpose. The court can make such findings guided by its experience in litigation, its knowledge of the standards of the bar of the court, and its familiarity with the case before it, and by reference to the relevant criteria under the Federal Rules such as those in Rule 1 and Rule 26(b)(1).
>
> It is crucial to the effectiveness of Rule 11 that this approach be followed. Were a court to entertain inquiries into subjective bad faith, it would invite a number of potentially harmful consequences, such as generating satellite litigation, inhibiting speech and chilling advocacy....
>
> ....
>
> .... If a reasonably clear legal justification can be shown for the filing of the paper in question, no improper purpose can be found and sanctions are inappropriate.

The courts have expressed somewhat divergent views as to whether an improper purpose can warrant the imposition of sanctions for a nonfrivolous filing. The Seventh Circuit has stated that "filing a colorable suit for the purpose of imposing expense on the defendant rather than for the purpose of winning" would be sanctionable under Rule 11. Several other Circuits have distinguished between complaints and other court papers, taking the view that, whatever the analysis applicable to motions and other papers filed after the commencement of the litigation, special care must be taken to avoid penalizing the filing of a nonfrivolous complaint, for otherwise a plaintiff who has a valid claim may lose his right "to vindicate his rights in court".

In *Townsend v. Holman Consulting Corp*, the Ninth Circuit's analysis was as follows:

> Although the "improper purpose" and "frivolousness" inquiries are separate and distinct, they will often overlap since evidence bearing on frivolousness or non-frivolousness will often be highly probative of purpose. The standard governing both inquiries is objective.... With regard to complaints which initiate actions, we have held that such complaints are not filed for an improper purpose if they are non-frivolous. Since subjective evidence of the signer's purpose is to be disregarded, ... the "improper purpose" inquiry subsumes the "frivolousness" inquiry in this class of cases. The reason for the rule regarding complaints is that the complaint is, of course, the document which embodies the plaintiff's cause of action and it is the vehicle through which he enforces his substantive legal rights. Enforcement of those rights benefits not only individual plaintiffs but may benefit the public, since the bringing of meritorious lawsuits by private individuals is one way that public policies are advanced.... [I]t would be counterproductive to use Rule 11 to penalize the assertion of non-frivolous substantive claims, even when the motives for asserting those claims are not entirely pure.

> .... A determination of improper purpose must be supported by a determination of frivolousness when a complaint is at issue.

We are in agreement with the *Townsend* analysis, especially in circumstances such as those present here, where the court not only did not find the claims to be objectively unreasonable but imposed restrictions on defendants in an effort to ensure that plaintiffs would have an adequate opportunity to have their claims adjudicated on the merits. 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.

3. Whether the Criticized Purpose Was Improper

Finally, we turn to the question of whether the finding that there was an improper purpose was correct. The district court held that the filing of the complaint with a view to exerting pressure on defendants through the generation of adverse and economically disadvantageous publicity reflected an improper purpose. To the extent that a complaint is not held to lack foundation in law or fact, we disagree. It is not the role of Rule 11 to safeguard a defendant from public criticism that may result from the assertion of nonfrivolous claims. Further, unless such measures are needed to protect the integrity of the judicial system or a criminal defendant's right to a fair trial, a court's steps to deter attorneys from, or to punish them for, speaking to the press have serious First Amendment implications. Mere warnings by a party of its intention to assert nonfrivolous claims, with predictions of those claims' likely public reception, are not improper.

Nor do we think it was appropriate for the district court to find that Lewin's prelitigation letters were evidence that the New York complaint was filed for an improper purpose. It is hardly unusual for a would-be plaintiff to seek to resolve disputes without resorting to legal action; prelitigation letters airing grievances and threatening litigation if they are not resolved are commonplace, sometimes with salutary results, and do not suffice to show an improper purpose if nonfrivolous litigation is eventually commenced. Indeed, it would be ironic to hold that Rule 11 sanctions may be awarded based solely on evidence that the plaintiff has given the defendant a warning that the complaint will be filed unless an allegedly tortious lawsuit is withdrawn, in light of the fact that the current version of Rule 11 itself, *see* Fed. R.Civ.P. 11(c)(1) (effective Dec. 1, 1993), essentially forbids the filing of a motion for sanctions unless the movant has given his opponent a warning that such a motion will be filed if the allegedly sanctionable paper is not withdrawn.

B. Inherent Power

A court has the inherent power to supervise and control its own proceedings and to sanction counsel or a litigant for bad-faith conduct. While Rule 11 extends only to papers filed with the court, the court's inherent power is broader and would permit the court to impose sanctions on the basis of related bad-faith conduct prior to the commencement of the litigation. Though the imposition of sanctions for bad faith obviously entails an inquiry that is at least in part subjective, we conclude that the court's use of its inherent power in the present case constituted an abuse of discretion, for the court's expressed goal of deterrence was inappropriate with respect to a complaint whose merits were not addressed and whose filing properly led the court to grant some relief to the plaintiffs.

We note that the award of sanctions would have been no more supportable if it had been designed to compensate defendants for attorneys' fees and other expenses. The general American rule is that a prevailing party in federal court litigation cannot recover attorney's fees, and an exception for bad-faith conduct may be made only where there is "'clear evidence' that the claims 'are entirely without color *and* made for reasons of harassment or delay or for other improper purposes.'". Even assuming that defendants could be regarded as the prevailing parties in this controversy whose merits have not been determined, defendants did not meet the exception to the American Rule since they did not persuade the district court that the claims asserted in the New York complaint were without color.

Finally, we note that though defendants sought sanctions under 28 U.S.C. § 1927 as well as under Rule 11 and the court's inherent power, arguing that the filing of the complaint had needlessly and vexatiously multiplied the litigation, the court plainly did not treat the present action as congruent with the Israeli action, for it refused to dismiss the New York action unconditionally and instead granted plaintiffs relief that they had previously been unable to obtain from defendants. In the circumstances, it cannot be concluded that the filing of the New York complaint either was in bad faith or caused "delay that was *unnecessary*" or initiated "litigation that was *needless*" or without "*any* apparent legitimate purpose." The court properly denied defendants' request for an award of sanctions under § 1927.

CONCLUSION

We have considered all of defendants' arguments in support of sanctions and have found them to be without merit. In light of our conclusion that an award of sanctions was improper on any of the bases proffered below, defendants' cross-appeal, arguing that the sanctions should have been more severe, is moot.

So much of the judgment as imposed sanctions against Lewin is reversed. The cross-appeal is dismissed.

6. Review Questions

Question 1

Guy Mackendrick was injured while attending a party at the office of Sterling Cooper, P.C., a New York advertising agency that handles advertising for Mackendrick's business. During the party, a Sterling Cooper employee named Lois Sadler, who was drunk, drove over Mackendrick's foot with a John Deere riding lawnmower.

As a result of this incident, Mackendrick has lost all of the toes on his left foot. He will require reconstructive surgery and extensive physical therapy. He has also experienced recurring nightmares about the incident, and has developed a morbid fear of garden tools, leaving him unable to enjoy his previous hobby of gardening.

Mackendrick hires you to represent him in a suit over his injury. You conclude that Mackendrick has two viable claims:

a. A claim against Sadler for her negligence in operating the mower. Under the applicable law, this claim requires that the plaintiff show (1) that the defendant breached a duty of care owed to the plaintiff, (2) that the plaintiff suffered harm, and (3) that the defendant's breach was the proximate cause of the plaintiff's injury.

b. A claim against Sterling Cooper seeking to hold them vicariously liable for Sadler's negligence ("respondeat superior"). Under the applicable law, this claim requires that the plaintiff show that (1) the plaintiff was injured by an employee of the defendant, (2) that the employee was acting within the scope of their employment, and (3) that the employee's activity benefitted the employer.

What facts must you allege in the complaint to satisfy the pleading requirements under the FRCP? Are there any additional facts, beyond those provided above, that you would need?

Question 2

After working at the Sterling Cooper advertising agency for about 18 months, Peggy Olson was very much surprised when her boss, Don Draper, called her into his office and told her she was being fired for poor performance. Olson believes the real reason was her rejection of Don's repeated and unwelcome advances.

Olson sues Sterling Cooper in federal court, asserting a claim for wrongful termination in breach of her employment contract. Assume that the court has personal and subject matter jurisdiction.

Olson's complaint includes the following allegations:

> 1. Olson entered into a contract of employment with Sterling Cooper on January 1, 2018.
>
> 2. Olson's contract provides that she is to be employed by Sterling Cooper for a term of three years.
>
> 3. Olson's contract further provides that, during the stated term of employment, Sterling Cooper may not terminate her employment without cause, and that "cause for termination includes, but is not limited to, employee misconduct, dishonesty, or unsatisfactory performance of assigned duties."
>
> 4. On July 30, 2019, Don Draper, managing director of Sterling Cooper and Olson's immediate supervisor, called Olson into his office. Draper told Olson, "Peggy, you're fired," and handed her a letter stating that her employment was terminated effective immediately. The letter did not identify a reason for the termination of Olson's employment.
>
> 5. Before leaving Draper's office, Olson asked why she was being fired. Draper told Olson, "I don't have to give you a reason." When Olson pressed further, Draper then told her, "I'm not satisfied with your performance. Leave my office, pack your things, and get out of here."
>
> 6. Prior to her conversation with Draper on the day she was fired, Olson had received only favorable employment reviews, and had received no complaints about her work performance. To the contrary, Olson received a substantial merit-based bonus in December 2018, based on her performance in the previous year. In February 2019, Draper told Olson, "I've got my eye on you. If you play your cards right, you will have a bright future at this place."
>
> 7. Defendant fired Olson without cause, in breach of her employment contract.
>
> 8. As a proximate and foreseeable result of Defendant's breach, Olson has suffered financial damages and severe emotional distress.

Under Hudson state law, the elements of a claim for wrongful termination in breach of an employment contract are as follows:

- The plaintiff was employed by the defendant under an express (written or oral) contract of employment for a definite time period.
- The contract expressly provided that the employer could not terminate the plaintiff's employment during the stated term without cause.
- The employer terminated the plaintiff's employment without cause during the contract term.

Sterling Cooper moves to dismiss for failure to state a claim under FRCP Rule 12(b)(6), asserting that the allegations in the complaint are insufficient to state a claim for breach of contract.

Should the court grant the motion to dismiss?