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COMMENT

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READ MY *LIPSKY*: RELIANCE ON CONSENT ORDERS  
IN PLEADINGS

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INTRODUCTION ..... 422

I. RELIANCE ON CONSENT ORDERS UNDER *LIPSKY*  
AND RULE 12(f) ..... 426

    A. *The Lipsky Decision* ..... 427

    B. *Lipsky in the Lower Courts* ..... 429

    C. *Rejecting the Broad Application of Lipsky* ..... 431

        1. A Close Reading of *Lipsky* ..... 432

        2. Rule 12(f) and Pleadings Law and Policy ..... 433

II. RELIANCE ON CONSENT ORDERS AND RULE 11(b)(3) ..... 436

    A. *The Duty of Independent Investigation* ..... 437

    B. *Policing Factors to Ensure Adequate Investigation* ..... 440

        1. Notice ..... 440

        2. Reliability ..... 441

        3. Good Faith Attempt at Independent Verification ..... 444

III. PUBLIC POLICY IMPLICATIONS ..... 446

CONCLUSION ..... 450

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## INTRODUCTION

On January 26, 2011, the U.S. Commodity Futures Trading Commission (CFTC) settled charges against respondents Daniels Trading Group LLC and two of its employees.<sup>1</sup> According to the CFTC, the respondents violated the Commodities Exchange Act (CEA) by exceeding speculative position limits in rough rice futures contracts traded on the Chicago Board of Exchange.<sup>2</sup> The CFTC described its case against the respondents in a publicly released Order Instituting Proceedings (CFTC Order).<sup>3</sup> In the Order, the CFTC explained that it had “reason to believe” that the respondents violated the CEA because they traded in excess of speculative position limits on at least thirty-eight trading days, among other violations.<sup>4</sup> Moreover, the CFTC stated that the respondents “were able to repeatedly violate speculative limits because [they] concealed the actual ownership and control of certain rough rice futures positions.”<sup>5</sup> Although the respondents consented to the entry of the Order, they did so “[w]ithout admitting or denying any of the findings.”<sup>6</sup>

The plaintiffs’ bar reacted quickly. One day later, on January 27, 2011, a class action complaint was filed in the Northern District of Illinois against all of the respondents named in the CFTC Order.<sup>7</sup> Like the CFTC, the plaintiffs alleged that the defendants attempted to manipulate the rough rice futures market by trading in excess of speculative position limits.<sup>8</sup> In their complaint, the plaintiffs quoted extensively from the CFTC Order.<sup>9</sup> For example, the plaintiffs alleged that the defendants “were able to repeatedly violate speculative limits because [they] concealed the actual ownership and control of certain rice futures positions.”<sup>10</sup>

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<sup>1</sup> See Press Release, U.S. Commodity Futures Trading Comm’n, CFTC Orders Ill. Traders Andrew Daniels, Ed Taylor & Daniels Trading Grp. LLC to Pay \$2 Million & Imposes Trading Prohibition for Violating Rough Rice Speculative Position Limits & Concealing Material Facts from the CME Grp. (Jan. 26, 2011), available at <http://www.cftc.gov/PressRoom/PressReleases/pr5975-11>.

<sup>2</sup> *Id.*

<sup>3</sup> *In re Daniels et. al*, 11-05, Order Instituting Proceedings (CFTC Jan. 26, 2011), available at <http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfdaniel.sordero12611.pdf> [hereinafter CFTC Order]. The Order also described the CFTC’s legal findings and the proposed settlement and ordered various forms of relief. *Id.* at 3-8.

<sup>4</sup> *Id.* at 1, 3.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.* at 1.

<sup>7</sup> See Class Action Complaint at 1, *In re Rough Rice Commodity Litig.*, No. 11-618, 2012 WL 473091, at \*7 (N.D. Ill. Feb. 9, 2012).

<sup>8</sup> *Id.* at 2-3.

<sup>9</sup> See *id.* at 9-11 (quoting CFTC Order, *supra* note 3, at 3-4).

<sup>10</sup> *Id.* at 10.

The district court took a dim view of the allegations that were “derived wholesale” from the CFTC Order.<sup>11</sup> It dismissed the complaint because plaintiffs’ recitation of the CFTC’s findings did not state a claim under the CEA.<sup>12</sup> In reaching its decision, the court adopted the reasoning of the 1976 Second Circuit opinion *Lipsky v. Commonwealth United Corp.*<sup>13</sup> for the “well-established precedent” that plaintiffs may not cite unadjudicated findings from consent decrees in their pleadings.<sup>14</sup>

Contrary to the district court’s pronouncement, *Lipsky*’s meaning is not settled. Questions of whether and to what extent plaintiffs may properly rely on findings from consent orders have been litigated mostly at the district court level. Among the courts of appeals, only the Second Circuit in *Lipsky* has confronted the issue directly.<sup>15</sup> Furthermore, commentators have provided little clarification, mostly offering functional advice for practitioners.<sup>16</sup> Because the law on this question is unsettled, litigants have frequently disputed the matter, typically through motions to strike pursuant to Rule 12(f) or Rule 11(b)(3) of the Federal Rules of Civil Procedure.

On its face, Rule 12(f) does not require courts to strike references to consent orders. Rather, Rule 12(f) permits courts to strike any “redundant, immaterial, impertinent, or scandalous matter.”<sup>17</sup> To prevail on a motion to strike, the moving party generally must show: (1) no admissible evidence in support of the allegations is available; (2) the allegations are irrelevant; and

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<sup>11</sup> *In re Rough Rice*, 2012 WL 473091, at \*4 (internal quotation marks omitted).

<sup>12</sup> *Id.* at \*4-7.

<sup>13</sup> 551 F.2d 887 (2d Cir. 1976).

<sup>14</sup> *In re Rough Rice*, 2012 WL 473091, at \*4. “A consent decree is a judgment or order that reflects the [parties’] settlement terms . . . and that contains an injunction.” Anthony DiSarro, *Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation*, 60 AM. U. L. REV. 275, 277 (2010). In contrast, a settlement without injunctive relief, but often with monetary relief, is referred to as a consent judgment. *See id.* at 277 n.2. For consistency, I will refer to “consent orders” without reference to the relief imposed because the technical differences between consent decrees, judgments, and orders are not relevant to my argument. Unlike most settlement agreements, consent orders are typically public. *See id.* They also tend to include a description of the facts and legal analysis, since many consent orders are submitted to courts for approval and enforcement. *See id.* (“[B]ecause a consent decree is a court order, the issuing federal court has the inherent power to enforce the consent decree.”). Some consent orders, like the CFTC Order, *supra* note 3, are adopted by an administrative agency but not by a court. This distinction is not relevant to my Comment.

<sup>15</sup> *Cf. In re Rough Rice*, 2012 WL 473091, at \*5 (noting that the court could not locate any circuit court decisions answering the question of whether plaintiffs may state a market-manipulation claim by “parroting” allegations from an unadjudicated CFTC settlement).

<sup>16</sup> *See, e.g.,* Jonathan Eisenberg, *Beyond the Basics: Seventy-five Defenses Securities Litigators Need to Know*, 62 BUS. LAW. 1281, 1373-74 (2007) (summarizing recent decisions striking references to consent orders in complaints).

<sup>17</sup> FED. R. CIV. P. 12(f).

(3) the moving party would be prejudiced if the allegations were permitted to stand.<sup>18</sup>

Lower courts, however, are divided in their application of Rule 12(f) to allegations relying on consent orders. Citing *Lipsky*, some courts hold that these allegations must be struck as per se immaterial under Rule 12(f). Other courts limit *Lipsky*'s reach and interpret Rule 12(f) to permit plaintiffs to derive allegations from consent orders. The latter group more persuasively argues that neither *Lipsky* nor Rule 12(f) requires courts to strike every allegation based on a consent order. Part I of this Comment describes the *Lipsky* decision and its application in lower courts. Properly construed, *Lipsky* has a narrow scope; it supports striking only those references to consent orders that ultimately would be inadmissible at trial. Otherwise, *Lipsky* and Rule 12(f) permit plaintiffs to rely on consent orders to allege facts establishing a claim of liability.

But that does not settle the matter. Plaintiffs must also satisfy the duty of independent investigation. Under Rule 11(b)(3), by submitting a signed pleading to the court, the attorney certifies that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances[,] . . . 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."<sup>19</sup> Judges may strike allegations that do not satisfy Rule 11(b)(3), though they need not engage in a separate Rule 12(f) inquiry to do so.<sup>20</sup>

Recently, lower courts have considered whether plaintiffs can satisfy their Rule 11(b)(3) obligations when relying on consent orders. Part II describes various applications of Rule 11(b)(3) to complaints relying on consent orders and argues that courts should adopt a flexible approach because the duty of independent investigation varies with the circumstances of each case. Although courts generally agree that plaintiffs may not copy and paste allegations from consent orders without any independent investigation, courts have applied divergent standards in more nuanced situations. In particular, courts have struggled to answer whether plaintiffs must

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<sup>18</sup> *In re Fannie Mae 2008 Sec. Litig.*, 891 F. Supp. 2d 458, 471 (S.D.N.Y. 2012) (quoting *SEC v. Lee*, 720 F. Supp. 2d 305, 340 (S.D.N.Y. 2010) (citation omitted)); *see also* 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1382 (3d ed. 2004) (describing the elements of a Rule 12(f) motion to strike and noting that judges possess "considerable discretion" to dispose of Rule 12(f) motions).

<sup>19</sup> FED. R. CIV. P. 11(b)(3).

<sup>20</sup> *See* 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1336.3 (3d ed. 2004) (discussing Rule 11 sanctions without reference to Rule 12(f) considerations).

independently verify each allegation derived from consent orders and whether consent orders are sufficiently reliable sources. To effectively police compliance with Rule 11(b)(3) when plaintiffs derive allegations from consent orders, courts should require plaintiffs to provide notice of their reliance and to reasonably attempt to verify the information through other sources. Moreover, while courts should not treat all consent orders as inherently suspect, they should inquire into the reliability of a particular consent order.

Although this Comment separates discussions of Rule 12(f) and Rule 11(b)(3) into different Parts, the Rules interact and, in some instances, overlap.<sup>21</sup> Notably, both rules limit the plaintiff's evidentiary burden at the pleadings stage. Under Rule 11(b)(3), a plaintiff is not required to plead admissible evidence. The plaintiff must only allege the existence of facts that will likely have evidentiary support after reasonable opportunity for further investigation or discovery. And under Rule 12(f), courts may strike allegations only after finding that there will be no available admissible evidence supporting the allegations.<sup>22</sup> Neither rule requires any allegation or source to be especially probative or reliable.<sup>23</sup>

Thus, Parts I and II share an argument: by aggressively striking references to consent orders, many courts have imposed evidentiary and investigative obligations on plaintiffs that are improper at the pleadings stage. When plaintiffs allege facts derived from consent orders, they will rarely violate Rule 11(b)(3), Rule 12(f), or even *Lipsky* if properly interpreted.

Notwithstanding this argument, Part III raises the concern that permitting plaintiffs to rely on consent orders in pleadings could hamper regulatory enforcement policy. Regulatory agencies have compelling reasons to settle enforcement actions through consent orders. Accordingly, agencies typically limit the collateral effects of consent orders to preserve defendants' incentives to settle. These incentives may shift if the law clearly permitted plaintiffs to rely on consent orders when bringing suits that "piggyback" off of regulatory actions. However, Part III surmises that any shifts in incentives would be minor. But even if regulatory enforcement policy favors

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<sup>21</sup> Both rules, for example, permit courts to strike needless vulgarity or personal attacks from pleadings. Compare FED. R. CIV. P. 12(f) (stating that courts may strike any "impertinent[] or scandalous matter"), with FED. R. CIV. P. 11(b)(1) (stating that a party may not submit a signed pleading or paper for "any improper purpose, such as to harass").

<sup>22</sup> See *In re Fannie Mae*, 891 F. Supp. 2d at 471 ("To prevail on a motion to strike, a party must demonstrate that . . . no evidence in support of the allegations would be admissible." (citation and internal quotation marks omitted)).

<sup>23</sup> Rule 12(f) allows courts to strike "immaterial" allegations. Rule 11(b) does not require allegations to be relevant, although subsection (1) prohibits plaintiffs from submitting pleadings for "any improper purpose."

prohibiting plaintiffs from relying on consent orders, Parts I and II show that courts should not stretch Rules 11(b)(3) and 12(f) to give effect to this policy.

I. RELIANCE ON CONSENT ORDERS UNDER  
*LIPSKY* AND RULE 12(f)

Federal appellate courts rarely confront motions to strike under Rule 12(f) of the Federal Rules of Civil Procedure.<sup>24</sup> As a result, *Lipsky* has influenced dozens of district courts that are faced with motions to strike, including those where plaintiffs attempt to rely on consent orders.<sup>25</sup> However, lower courts have struggled to apply *Lipsky* consistently because of the conflicting policies and rules it articulates, as well as the confusing set of facts underlying the decision.

Section I.A describes the *Lipsky* opinion and suggests that the opinion is inconclusive on the extent to which plaintiffs may rely on consent orders in their pleadings. On the one hand, the opinion potentially supports a broad rule requiring courts to strike almost any allegation derived from a consent order. On the other hand, the opinion could be read narrowly to permit plaintiffs to allege information derived from consent orders and to use them as a source of information to suggest that admissible evidence will likely be available at trial. Section I.B discusses the various justifications that lower courts have offered to support the broad and narrow applications of *Lipsky*. Finally, Section I.C argues that the narrow application should be adopted based on a close reading of *Lipsky*, generally accepted motion to strike law, and pleadings-stage policy.

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<sup>24</sup> Resolutions of Rule 12(f) motions generally are not “final decisions” subject to appellate jurisdiction. See 28 U.S.C. § 1291 (2006) (“The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . . .”); *Harvey Aluminum v. Int’l Longshoremen’s & Warehousemen’s Union, Local 8*, 278 F.2d 63, 64 (9th Cir. 1960) (explaining that an order granting a motion to strike portions of a complaint is “purely interlocutory and not appealable”); 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3914.1 (2d ed. 1992) (“Orders granting or denying a motion to strike are not final, at least so long as a viable pleading remains.” (footnote omitted)). Moreover, district courts have “considerable discretion” to resolve such motions and frequently grant leave to amend complaints that have had allegations struck. WRIGHT & MILLER, *supra* note 18.

<sup>25</sup> See, e.g., *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 218 F.R.D. 76, 78-79 (S.D.N.Y. 2003) (citing district court opinions applying *Lipsky* in motions to strike).

### A. *The Lipsky Decision*

The plaintiff in *Lipsky* brought breach of contract claims against defendant Commonwealth United Corporation and a related entity.<sup>26</sup> The plaintiff alleged that Commonwealth failed to use its best efforts in registering its common stock held by the plaintiff.<sup>27</sup> Commonwealth had attempted to file a registration statement for the plaintiff's securities, but the Securities and Exchange Commission (SEC) never declared the statement effective.<sup>28</sup> To show that Commonwealth could not have used its best efforts during this process, the plaintiff alleged that Commonwealth had, in two other instances, filed registration and proxy statements that the SEC claimed were deficient.<sup>29</sup> The plaintiff also attached an SEC complaint alleging that Commonwealth violated the securities laws with respect to these registration and proxy statements.<sup>30</sup> Although these filings did not seek to register any of the plaintiff's securities, they did involve an identical class of Commonwealth stock and were relevant to the plaintiff's claims.<sup>31</sup> The defendants moved to strike all allegations referring to the SEC complaint and the attached complaint itself, and the district court granted their motion pursuant to Rule 12(f).<sup>32</sup>

On appeal, the Second Circuit affirmed the district court's decision.<sup>33</sup> The court found that the SEC complaint and allegations referring to it were "entirely immaterial" and could be struck under Rule 12(f)—but not because they were irrelevant to the merits.<sup>34</sup> Instead, the court reasoned that the

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<sup>26</sup> *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 890-91 (2d Cir. 1976).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; see also Brief for Defendants–Appellees: Iota Industries, Inc. & Commonwealth United Music, Inc. at 35, *Lipsky*, 551 F.2d 887 (No. 76-7125) (showing that the plaintiff relied not only on certain factual allegations from an SEC complaint, but also on the SEC's ultimate allegation of liability—that Commonwealth's filings were "subject to objection" under the securities laws for its omission of material facts (internal quotation marks omitted)).

<sup>30</sup> *Lipsky*, 551 F.2d at 891. Commonwealth ultimately settled the SEC enforcement action and agreed to the entry of a consent order, *id.* at 893, although the plaintiff did not attach the consent order to the complaint. Brief for Defendants–Appellees, *supra* note 29.

<sup>31</sup> See *Lipsky*, 551 F.2d at 894 n.9 (acknowledging that the other filings involved different blocks of the same common stock).

<sup>32</sup> *Id.* at 892.

<sup>33</sup> *Id.* at 894, 899.

<sup>34</sup> *Id.* at 893. Although the SEC enforcement action involved other Commonwealth filings that were not the subject of any agreement between the parties, those filings pertained to the same common stock held by the plaintiff. *Id.* at 894 n.9. Thus, the plaintiff's allegations were relevant because, if the SEC found those filings to be deficient, then Commonwealth might have engaged in a pattern of willful misconduct. See *id.* ("[Commonwealth] was registering different blocks of its same common stock and the district court could find that [Commonwealth's] actions as to one block shed light on [its] intentions as to another block of stock.").

allegations were immaterial because the SEC complaint and consent order would be inadmissible at trial.<sup>35</sup> The court reasoned as follows: First, motions to strike on grounds of immateriality should be rejected unless no evidence in support of the allegations would be admissible.<sup>36</sup> Second, since consent orders and complaints contain only unadjudicated findings of fact and law, they are equivalent to pleas of *nolo contendere*.<sup>37</sup> Therefore, under Rule 410 of the Federal Rules of Evidence, they are inadmissible to prove liability in subsequent litigation against the defendant.<sup>38</sup> Because the SEC complaint and consent order were not admissible at trial, they could have “no possible bearing” on the plaintiff’s action.<sup>39</sup> Accordingly, the court held that “neither a complaint nor references to a complaint which results in a consent judgment may properly be cited in the pleadings under the facts of this case.”<sup>40</sup>

The immediate effect of the decision on the plaintiff’s complaint was unclear. The decision affirmed the district court’s order, which struck not only the attached SEC complaint, but also all references to the SEC’s opinions regarding Commonwealth’s various securities filings.<sup>41</sup> The court granted the plaintiff leave to amend the complaint to “particularize the alleged inadequacies of the [filings involving the plaintiff’s own securities], omitting any references to the [SEC’s] complaint.”<sup>42</sup> But the court also acknowledged that deficiencies in other, similar Commonwealth filings might be relevant and admissible at trial because they suggested a pattern of intentional misconduct.<sup>43</sup> Thus, the court’s order raised a question: Could the plaintiff rely on factual information derived from the SEC complaint to allege a pattern of intentional misconduct by Commonwealth? The court did not answer that question directly.

Given this ambiguity, the *Lipsky* decision can be read narrowly or broadly. Under a broad interpretation, *Lipsky* bars plaintiffs from alleging even the substance of facts derived from an inadmissible consent order. For example, the plaintiff in *Lipsky* could not allege that Commonwealth’s other, similar securities filings omitted certain material facts because such allegations would be based on inadmissible statements from an SEC complaint.

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<sup>35</sup> *Id.* at 893-94.

<sup>36</sup> *Id.* at 893.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 893-94 (discussing FED. R. EVID. 410(a)(2)).

<sup>39</sup> *Id.* at 894.

<sup>40</sup> *Id.* at 893.

<sup>41</sup> *Id.* at 894.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 894 n.9.



Under a narrow interpretation, *Lipsky* holds that plaintiffs may not attach or refer to a consent order for purposes that would be inadmissible at trial. Applying this narrow rule, the plaintiff in *Lipsky* would have been permitted to allege, based at least in part on information learned from the SEC complaint, that Commonwealth's securities filings in other contexts had omitted certain material facts and that these omissions may have violated the securities laws. But the plaintiff could not, for example, have cited the consent order to allege that Commonwealth had settled SEC claims because the consent order would be inadmissible at trial for that purpose.<sup>44</sup> Today, lower courts have split along these lines in evaluating motions to strike allegations based on consent orders.

### B. Lipsky in the Lower Courts

Courts disagree about the extent to which plaintiffs may refer to or rely on consent orders in pleadings. Several courts cite *Lipsky* for the broad proposition that any allegation referring to a consent order or other unadjudicated finding is per se immaterial under Rule 12(f).<sup>45</sup> Some courts have even extended this rule by striking those allegations that appear to be derived from a consent order but do not expressly refer to one.<sup>46</sup> A notable example is the District Court for the Northern District of Illinois's opinion in *In re Rough Rice Commodity Litigation*.<sup>47</sup> Although the court was not faced with a Rule 12(f) motion to strike, it recognized that the complaint "substantially recited factual findings taken from a CFTC [consent] order," even though the complaint never expressly referred to the order.<sup>48</sup> The court held that allegations derived from the CFTC consent order were insufficient to

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<sup>44</sup> See FED. R. EVID. 410(a).

<sup>45</sup> See, e.g., *In re Platinum & Palladium Commodities Litig.*, 828 F. Supp. 2d 588, 593-94 (S.D.N.Y. 2011) (reasoning that allegations that "simply recast the CFTC's findings" regarding a manipulative trading scheme are "paradigms of the type of pleading prohibited by *Lipsky* and its progeny"); *Footbridge Ltd. v. Countrywide Home Loans, Inc.*, No. 09-4050, 2010 WL 3790810, at \*5 (S.D.N.Y. Sept. 28, 2010) (striking allegations that were based on pleadings and settlements from private actions and government investigations against the defendants); *Shahzad v. H.J. Meyers & Co.*, No. 95-6196, 1997 WL 47817, at \*13-14 (S.D.N.Y. Feb. 6, 1997) (striking references to seven consent orders with securities regulators).

<sup>46</sup> See *Dent v. U.S. Tennis Ass'n*, No. 08-1533, 2008 WL 2483288, at \*2-4 (E.D.N.Y. June 17, 2008) (striking allegations of a "legacy" of racial discrimination where the court found that the allegations were derived from a New York Attorney General investigation and other "unproved allegations of misconduct" (internal citation and quotation marks omitted)).

<sup>47</sup> No. 11-618, 2012 WL 473091 (N.D. Ill. Feb. 9, 2012).

<sup>48</sup> *Id.* at \*4. As discussed above, the complaint did in fact quote the CFTC order. See *supra* notes 9-11 and accompanying text.

state a market-manipulation claim and dismissed the complaint under Rule 12(b)(6).<sup>49</sup>

Even among courts adopting the broad interpretation of *Lipsky*, many have permitted limited references to consent decrees for purposes that would be admissible at trial. For example, consent orders may be admissible for the purpose of proving knowledge of a legal obligation.<sup>50</sup> Where an allegation refers to a consent decree for an admissible purpose, *Lipsky*'s reasoning suggests that courts should refrain from striking the allegation as immaterial.<sup>51</sup> But some courts have limited the reach of this exception by arguing that substantive facts derived from consent orders are inadmissible because plaintiffs use them to allege "the truth of the matters that led to the settlement agreement."<sup>52</sup>

Other courts, however, have adopted a narrow interpretation of *Lipsky*. These courts hold that neither Rule 12(f) nor *Lipsky* precludes plaintiffs from alleging facts derived from a consent order, regardless of whether the consent order itself is admissible.<sup>53</sup> For example, the District Court for the

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<sup>49</sup> *In re Rough Rice*, 2012 WL 473091, at \*5.

<sup>50</sup> *See, e.g.*, *United States v. Gilbert*, 668 F.2d 94, 97 (2d Cir. 1981) (holding that the district court correctly "admitted into evidence an earlier SEC civil consent decree" because it showed that the defendant "knew of the SEC reporting requirements involved in the decree"); *see also Mills v. United Producers, Inc.*, No. 11-13148, 2012 WL 1672948, at \*3 (E.D. Mich. May 14, 2012) (rejecting a motion to strike reference to a Department of Agriculture consent order because "any statement by a party may be offered against him by an opponent" (citation and internal quotation marks omitted)).

<sup>51</sup> *See Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976) (stating that a motion to strike on immateriality grounds may not be granted unless it is shown that "no evidence in support of the allegation would be admissible").

<sup>52</sup> *Dent v. U.S. Tennis Ass'n*, No. 08-1533, 2008 WL 2483288, at \*2 (E.D.N.Y. June 17, 2008). The *Dent* court misperceived the nature of the plaintiff's factual allegations that were based on a consent order. The plaintiff alleged that the defendants had a legacy of racial discrimination, which was exposed in a public consent order. *Id.* The plaintiff did not, as the court believed, allege the truth of the matters asserted in the consent order, nor did he allege that the consent order was evidence of the truth of past racial discrimination. *Id.* Rather, the allegations conveyed that the plaintiff had *reason to believe* the allegations were true and that the consent order was the source of his belief. *Id.* at \*1. No more is required at the pleadings stage. *See Anderson News, L.L.C. v. Am. Media, Inc.*, No. 09-2227, 2013 WL 1746062, at \*5 (S.D.N.Y. Apr. 23, 2013) ("Because a plaintiff need not plead specific, *admissible* evidence in support of a claim, [the plaintiff] is entitled to include allegations based on hearsay." (internal quotation marks omitted)); *In re Connetics Corp. Sec. Litig.*, 541 F. Supp. 2d 996, 1004 (N.D. Cal. 2008) ("Plaintiffs are undoubtedly correct that pleadings need not contain admissible evidence. The Court therefore agrees with plaintiffs that there is no basis to strike on evidentiary grounds." (citation omitted)).

<sup>53</sup> *See, e.g.*, *VNB Realty, Inc. v. Bank of Am. Corp.*, No. 11-6805, 2013 WL 5179197, at \*3 (S.D.N.Y. Sept. 16, 2013) ("A close reading of *Lipsky* reveals that it does not mandate the elimination of material from a complaint simply because the material is copied from another complaint."); *In re Bear Stearns Mortg. Pass-Through Certificates Litig.*, 851 F. Supp. 2d 746, 768 n.24 (S.D.N.Y. 2012) (refusing to extend *Lipsky* to disregard or strike allegations derived from

Southern District of New York in *In re Fannie Mae 2008 Securities Litigation* considered whether to strike allegations in a securities class action complaint that “closely track[ed]” an SEC complaint.<sup>54</sup> Although the SEC complaint itself was not admissible, the court reasoned that evidence supporting the allegations derived from the SEC complaint was.<sup>55</sup> Thus, the court held that *Lipsky* did not require the allegations to be struck.<sup>56</sup> As shown by this case and others cited above, courts are sharply divided in their application of *Lipsky*. This division is particularly pronounced in the Second Circuit where *Lipsky* controls.<sup>57</sup>

### C. Rejecting the Broad Application of Lipsky

It is possible, if ultimately unpersuasive, to interpret *Lipsky* broadly to prohibit any reliance on a consent order in a pleading. The text of the court’s holding appears applicable to most allegations that rely on a consent order: “[N]either a complaint nor references to a complaint which results in a consent judgment may properly be cited in the pleadings under the facts of this case.”<sup>58</sup> The court did not expressly permit the plaintiff to allege deficiencies in other Commonwealth filings that were the basis of the SEC enforcement action (although the court noted that such allegations might be relevant and ultimately admissible).<sup>59</sup> Also, a broad reading of the decision may be necessary to give it effect. If *Lipsky* does not apply broadly, then

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third-party civil complaints); *SEC v. Lee*, 720 F. Supp. 2d 305, 341 (S.D.N.Y. 2010) (“[T]here is nothing improper about utilizing information contained in an SEC complaint as evidence to support private claims under the [Private Securities Litigation Reform Act].”).

<sup>54</sup> 891 F. Supp. 2d 458, 471 (S.D.N.Y. 2012). As discussed in Part II, allegations that “closely track” another complaint may raise red flags under Rule 11(b)(3). *See infra* notes 91-98 and accompanying text. But the court in *In re Fannie Mae* did not consider whether the plaintiffs violated Rule 11(b)(3), perhaps because the plaintiffs found additional support for their allegations from early discovery and from publicly available information. *See* 891 F. Supp. 2d at 472.

<sup>55</sup> *See id.* at 471.

<sup>56</sup> *Id.* at 471-72.

<sup>57</sup> *Compare id.* at 471 (“*Lipsky* does not . . . stand for the proposition that any factual allegation derived from a government investigation or pleading must be stricken . . .”), with *In re Platinum & Palladium Commodities Litig.*, 828 F. Supp. 2d 588, 593-94 (S.D.N.Y. 2011) (“[A]llegations [that] simply recast the CFTC’s findings . . . are paradigms of the type of pleading prohibited by *Lipsky* and its progeny.”).

<sup>58</sup> *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976). Courts citing this language in support of the broad reading sometimes omit the qualifying text “under the facts of this case.” *See, e.g., In re Platinum & Palladium*, 828 F. Supp. 2d at 593.

<sup>59</sup> *See Lipsky*, 551 F.2d at 894 (“We agree that the SEC’s opinion on the sufficiency of the various statements may be relevant and . . . admissible. But we do not agree that it necessarily follows that its complaint is appropriately within the pleadings.” (footnote omitted)).

plaintiffs could circumvent its holding by omitting any mention of a consent order even as they copy allegations from one.<sup>60</sup>

But neither the *Lipsky* decision itself nor Rule 12(f) and pleadings law support this outcome. The court's analysis in *Lipsky* restricts the decision to the narrow circumstances in which plaintiffs rely on consent orders for purposes that would be inadmissible at trial. Moreover, the broad reading ignores or misperceives the requirements of Rules 12(f) and 11(b)(3), under which courts examine the relevance of the allegations, the potential availability of supporting admissible evidence, and the prejudice associated with granting or denying a motion to strike. These inquiries will generally favor plaintiffs who rely on consent orders to allege facts that they believe to be true and that they anticipate supporting with admissible evidence at the trial stage.

### 1. A Close Reading of *Lipsky*

The *Lipsky* court likely did not intend the decision to have an extensive scope. Despite its broadly worded holding, the court expressed that the decision was limited to the facts of the case,<sup>61</sup> so that future plaintiffs might distinguish their reliance on consent orders. It further noted that "ordinarily neither a district court nor an appellate court should decide to strike a portion of the complaint—on the grounds that the material could not possibly be relevant—on the sterile field of the pleadings alone."<sup>62</sup> Finally, the court cautioned against "tamper[ing] with the pleadings" because pleadings law and policy had "long departed from the era . . . when lawsuits were won or lost on the pleadings alone."<sup>63</sup>

Pleading standards have changed dramatically since the *Lipsky* decision. In *Bell Atlantic Corp. v. Twombly*<sup>64</sup> and *Ashcroft v. Iqbal*,<sup>65</sup> the Supreme Court "discarded the liberal, notice-pleading paradigm . . . in favor of a new paradigm of plausibility pleading."<sup>66</sup> Since plaintiffs today must show that their allegations of liability are plausible, they may need to rely on facts from consent orders to provide essential information that is not otherwise

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<sup>60</sup> Indeed, the plaintiffs in *Rough Rice* attempted such an approach but were stopped by a court citing *Lipsky*. See *supra* notes 11-14 and accompanying text.

<sup>61</sup> See *Lipsky*, 551 F.2d at 893.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* The court further noted that the plaintiff could still introduce relevant evidence of the SEC's opinion at trial, although he could not introduce the SEC complaint or consent order. *Id.* at 894.

<sup>64</sup> 550 U.S. 544 (2007).

<sup>65</sup> 556 U.S. 662 (2009).

<sup>66</sup> Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1310 (2010).

available at the pleading stage. As a result, the equities associated with motions to strike may have shifted in plaintiffs' favor.<sup>67</sup> The shift in equities is even greater in securities fraud class actions, where plaintiffs frequently rely on SEC complaints, because the Private Securities Litigation Reform Act (PSLRA) imposed heightened pleading requirements years after the *Lipsky* decision.<sup>68</sup>

A broad application of *Lipsky* would also improperly require courts to strike allegations that are potentially backed by admissible evidence. The *Lipsky* court observed that a Rule 12(f) motion on immateriality grounds should be rejected unless *no* evidence in support of the allegations would be admissible.<sup>69</sup> It further warned of the dangers involved in resolving evidentiary or relevance questions during the pleadings stage and in "tamper[ing] with the pleadings" in general.<sup>70</sup> Furthermore, the court noted that the substance of allegations derived from the SEC complaint might be relevant to the merits of the plaintiff's action and even potentially admissible at trial.<sup>71</sup> By its own analysis, the court appeared to indicate that Rule 12(f) protected such allegations through its relevance and admissibility inquiries. At a minimum, *Lipsky* is ambiguous, and subsequent courts should interpret it in light of the developments in Rule 12(f) law and other pleadings law and policy.

## 2. Rule 12(f) and Pleadings Law and Policy

Rule 12(f) case law does not support a broad reading of *Lipsky*. As mentioned above, under Rule 12(f), a court may strike any "redundant, immaterial, impertinent, or scandalous matter."<sup>72</sup> Courts have generally interpreted this rule to require the moving party to show the following: (1) there is no available admissible evidence in support of the allegations; (2) the allegations are irrelevant; and (3) the moving party would be prejudiced if the allegations were permitted to stand.<sup>73</sup>

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<sup>67</sup> See *id.* at 1314-16 (noting that *Twombly* and *Iqbal* heightened pleading standards by disregarding conclusory allegations and examining whether the remaining allegations plausibly suggested entitlement to relief).

<sup>68</sup> See Richard Casey & Jared Fields, *Piggybacking Through the Pleading Standards: Reliance on Third-Party Investigative Materials to Satisfy Particularity Requirements in Securities Class Actions*, SEC. LITIG. REP., June 2010, at 11, 13 ("Some members of the plaintiffs' bar complain that it is now more difficult to plead a securities fraud case than it is to prove one at trial.").

<sup>69</sup> See *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976).

<sup>70</sup> *Id.* According to the court, "Evidentiary questions . . . should especially be avoided at [the pleadings] stage." *Id.*

<sup>71</sup> *Id.* at 894.

<sup>72</sup> FED. R. CIV. P. 12(f).

<sup>73</sup> See *supra* note 18 and accompanying text.

The broad reading of *Lipsky* is inconsistent with the first admissibility inquiry because it would improperly require courts to strike factual allegations that would likely have evidentiary support at the trial stage. At the pleadings stage, plaintiffs have to meet only this low evidentiary burden.<sup>74</sup> Appropriately, courts have now recognized that the broad reading of *Lipsky* conflates the admissibility of the consent order itself and the admissibility of evidence supporting the allegations derived from the consent order.<sup>75</sup> While the consent order itself may be inadmissible at trial to prove the validity of a disputed claim or fact,<sup>76</sup> plaintiffs at the pleadings stage are not required to prove the validity of the facts they allege.<sup>77</sup> Rather, they only need to allege that they believe the facts are true and that they will likely be able to locate admissible evidence to support the allegations at the trial stage—an outcome that is probable when plaintiffs rely on a consent order dealing with the same defendants and issues.<sup>78</sup>

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<sup>74</sup> See FED. R. CIV. P. 11(b)(3) (requiring that “factual contentions [in pleadings] have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery”); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (explaining that the plausibility pleading standard “simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]”).

<sup>75</sup> See, e.g., *Marvin H. Maurras Revocable Trust v. Bronfman*, Nos. 12-3395, 12-6019, 2013 WL 5348357, at \*17 (N.D. Ill. Sept. 24, 2013) (rejecting a motion to strike allegation that “could be proved by evidence other than the inadmissible Minnesota Attorney General complaint and consent decree”); *In re Fannie Mae 2008 Sec. Litig.*, 891 F. Supp. 2d 458, 471 (S.D.N.Y. 2012) (“[W]hile the SEC complaint and the [Non-Prosecution Agreement] are not admissible, there is evidence in support of the factual allegations contained within these documents that would be admissible.”); cf. 29 AM. JUR. 2D *Evidence* § 530 (2008) (“Although Federal Rule of Evidence 410 precludes the admission of a nolo contendere plea, the underlying facts are not insulated from admissibility . . .”).

<sup>76</sup> See, e.g., FED. R. EVID. 408(a)(1) (excluding evidence against either party of a compromise offer or negotiation that is offered to prove or disprove the validity of a disputed claim); FED. R. EVID. 410(a)(2) (excluding evidence of a nolo contendere plea against a defendant who made the plea or participated in plea discussions).

<sup>77</sup> But see *Dent v. U.S. Tennis Ass’n*, No. 08-1533, 2008 WL 2483288, at \*2 (E.D.N.Y. June 17, 2008) (striking allegations based on a consent order because the plaintiff relied on the order to allege “the truth of the matters that led to the settlement agreement”). The *Dent* court’s analysis exemplifies the confusion among the lower courts regarding whether plaintiffs relying on consent orders are necessarily alleging the truth of a fact. See *supra* note 52.

<sup>78</sup> See *Berke v. Presstek, Inc.*, 188 F.R.D. 179, 181 (D.N.H. 1998) (“[T]he question properly posed is whether references in the complaint to the SEC’s consent decrees have any bearing on issues in this suit—not whether the allegations and exhibits attached to the complaint are, or might be, competent evidence if offered at trial.”); see also *SEC v. Lee*, 720 F. Supp. 2d 305, 341 (S.D.N.Y. 2010) (“[R]eliance on the SEC and CFTC allegations does not demonstrate that [the complaint] lacks evidentiary support, but rather provides it with the necessary evidentiary support.”). It is also tempting to criticize the *Lipsky* court for raising evidentiary questions at all during the pleadings stage. But this criticism is more accurately directed toward Rule 12(f) law

In addition to Rule 12(f) case law, pleadings policy weighs in favor of a narrow reading of *Lipsky*. Under a broad reading, courts would be obligated to strike all allegations derived from a consent order, but they would not be required to strike those same allegations had they been derived from a newspaper or other “unadjudicated” source.<sup>79</sup> In contrast, a narrow reading of *Lipsky* would avoid such arbitrary dispositions of Rule 12(f) motions.

As to Rule 12(f)’s prejudice inquiry, it is difficult to see how defendants will invariably be prejudiced if plaintiffs rely on the substance of a consent decree; defendants have already presumably faced a government investigation involving similar facts and issues.<sup>80</sup> Although defendants may find a broad *Lipsky* rule helpful for winning motions to dismiss,<sup>81</sup> the *Lipsky* court certainly did not purport to shift the balance of power between plaintiffs and defendants at the pleadings stage.<sup>82</sup>

Finally, a narrow interpretation will help give Rule 11(b)(3) effect by enabling plaintiffs to identify consent orders as a source of information that leads them to believe their allegations will likely be supported by admissible evidence. Plaintiffs would be unable to comply with that provision if *Lipsky* were read to prevent all references to consent orders.

For these reasons, a narrow application of *Lipsky* is the best interpretation of the decision, Rules 12(f) and 11(b)(3), and pleadings policy generally. What is left of *Lipsky* if courts adopt a narrow reading of it? As mentioned

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generally, which asks courts to consider the availability of admissible evidence in support of the allegations.

<sup>79</sup> See *In re Bear Stearns Mortg. Pass-Through Certificates Litig.*, 851 F. Supp. 2d 746, 768 n.24 (S.D.N.Y. 2012) (“It makes little sense to say that information[,] . . . which the [plaintiff] could unquestionably rely on if it were mentioned in a news clipping or public testimony[,] is immaterial simply because it is conveyed in an unadjudicated complaint.”); see also Brief of Amicus Curiae National Ass’n of Shareholders & Consumer Attorneys in Support of Neither Party at 15-17, *U.S. SEC v. Citigroup Global Mkts. Inc.*, 673 F.3d 158 (2d Cir. 2012) (No. 11-5227) [hereinafter Brief of Amicus Curiae National Ass’n of Shareholders & Consumer Attorneys] (describing other unadjudicated sources that courts have held may be cited in pleadings). A broad reading might even preclude plaintiffs from relying on relevant findings from a consent order involving different parties, although courts have rejected this theory so far. See, e.g., *Hyland v. Homeservices of Am., Inc.*, 2007-2 Trade Cas. (CCH) ¶ 75,794, at 108,430 (W.D. Ky. June 28, 2007) (refusing to extend *Lipsky* to strike references to a state regulatory consent decree where no defendants in the private lawsuit were parties to the consent decree); Brief of Amicus Curiae National Ass’n of Shareholders & Consumer Attorneys, *supra*, at 27 (“[A]t a minimum, *Lipsky* should not be read to bar the citation of complaints or consent decrees in allegations against different defendants.”).

<sup>80</sup> See *In re Fannie Mae*, 891 F. Supp. 2d at 472 (finding that allegations derived from an SEC complaint did not prejudice the defendants because they faced the same allegations in the SEC enforcement action).

<sup>81</sup> See Eisenberg, *supra* note 16, at 1373-74 (discussing cases where the courts have held that settlements with regulators “cannot be used to support plaintiff’s allegations in civil litigation”).

<sup>82</sup> See *Lipsky*, 551 F.2d at 893 (“[C]ourts should not tamper with the pleadings unless there is a strong reason for so doing.”).

above, the narrow reading permits plaintiffs to rely on a consent order for substantive allegations to establish a claim of liability and to identify the consent order as the source of their information. But under *Lipsky*, courts may strike as immaterial any allegations based on consent orders for purposes that would be inadmissible at trial. These inadmissible purposes might include asserting that the defendant was more likely to have committed illegal conduct because he entered into a consent order. As *Lipsky* directed, courts must “prun[e] [complaints] with care”<sup>83</sup> because the distinction between proper and improper references to consent orders can be subtle.

At first blush, this result may seem unsatisfactory because it permits plaintiffs to rely extensively on consent orders, despite the rather broad language of *Lipsky*'s holding. However, the narrow reading will not necessarily open the floodgates to “copy-and-paste” pleadings. Some causes of action with heightened pleading standards may not be pleaded solely through allegations derived from consent orders.<sup>84</sup> And Rule 11(b)(3) still governs attorneys who seek to rely on consent orders in their pleadings.

## II. RELIANCE ON CONSENT ORDERS AND RULE 11(b)(3)

The analysis above argues that Rule 12(f) and *Lipsky* do not prohibit plaintiffs from relying on consent orders to allege facts in a complaint. What if, however, an attorney relies *only* on a consent order to allege a claim? To answer that question, courts have looked to Rule 11(b)(3). Under Rule 11(b)(3), an attorney filing a pleading “certifies that to the best of [his] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances[,] . . . 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.”<sup>85</sup> As Section II.A explains, several courts have held that plaintiffs cannot meet their Rule 11(b)(3) burden by relying on a consent order alone. But these cases do not stand for the proposition that Rule 11(b)(3) bars any reliance on a consent order at the pleadings stage. As Section II.B shows, Rule 11(b)(3)

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<sup>83</sup> *Id.* at 894.

<sup>84</sup> For example, to satisfy the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure, plaintiffs may not plead the circumstances constituting fraud based on information and belief unless certain conditions are met. See *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 442-43 (7th Cir. 2011) (recognizing that plaintiffs can only plead fraud based on information and belief if the facts are inaccessible to the plaintiff and the plaintiff has grounds for suspicion).

<sup>85</sup> FED. R. CIV. P. 11(b)(3).



permits some reliance on a consent order in a prefiling investigation, subject to certain factors that courts use to police that reliance.

#### A. *The Duty of Independent Investigation*

Rule 11(b) imposes an affirmative duty on the attorney signing the pleading to determine that it is factually and legally warranted.<sup>86</sup> The duty is nondelegable; a signing attorney must personally apply his own judgment,<sup>87</sup> although the attorney may rely on the veracity of information acquired from others, such as witnesses or even other attorneys.<sup>88</sup> But absent compelling circumstances, attorneys must conduct a reasonable, personal inquiry into the merits of a case and may not rely solely on the representations of other attorneys to plead a cause of action.<sup>89</sup> Broadly stated, the attorney's duty of independent investigation is to "stop and think" before filing.<sup>90</sup>

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<sup>86</sup> FED. R. CIV. P. 11(b)(2)–(3); *see also* Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 125 (1989) (explaining that, by signing a filing with the court, an attorney represents that the filing is "factually and legally responsible").

<sup>87</sup> *See Pavelic*, 493 U.S. at 125.

<sup>88</sup> *See Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1278–79 (3d Cir. 1994) (recognizing that Rule 11's requirements do not prohibit attorneys from relying on information from others).

<sup>89</sup> *See id.* at 1280 (finding a clear Rule 11 violation where two attorneys "abdicated their own responsibilities and relied excessively on [another attorney]").

<sup>90</sup> WRIGHT & MILLER, *supra* note 20, § 1334. In the Ninth Circuit, a lawyer may be sanctioned for a Rule 11(b) violation only if his claim is both baseless and made without reasonable investigation. *See Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990). This decision permits plaintiffs to rely on allegations from consent orders if the claim ultimately has some merit, even if the plaintiffs did not attempt to investigate those allegations. The Third Circuit in *Garr* rejected the proposition that Rule 11(b) permits this "shot in the dark" pleading. *See Garr*, 22 F.3d at 1279 ("[A] signer making an inadequate inquiry into the sufficiency of the facts and law underlying a document will not be saved from a Rule 11 sanction by the stroke of luck that the document happened to be justified."). This Section does not seek to resolve the circuit split, because at issue here is whether courts should strike allegations from pleadings under Rule 11(b), not the application of sanctions. Faced with motions to strike, even district courts in the Ninth Circuit seem to agree that plaintiffs must comply with the duty of independent investigation, regardless of whether the claim appears to have some merit. *See, e.g.*, *Fraker v. Bayer Corp.*, No. 08-1564, 2009 WL 5865687, at \*4 (E.D. Cal. Oct. 6, 2009) (striking references to a Federal Trade Commission consent decree where the complaint alleged no other facts indicating that the plaintiffs conducted an independent investigation); *In re Connetics Corp. Sec. Litig.*, 542 F. Supp. 2d 996, 1005–06 (N.D. Cal. 2008) (striking references to an SEC complaint where plaintiffs did not independently investigate specific allegations drawn from the complaint). Moreover, even if the claim is baseless, courts in the Ninth Circuit must still determine whether the attorney complied with the duty of independent investigation. *See Townsend*, 929 F.2d at 1362 (holding that a filing must be baseless *and* made without reasonable investigation in order for a court to impose Rule 11(b) sanctions). Therefore, the analysis in this Section is relevant in the Ninth Circuit as well.

Courts have argued persuasively that attorneys cannot satisfy their duty of independent investigation by blindly relying on a consent order to plead an entire claim or element of a claim.<sup>91</sup> In *Geinko v. Padda*, the plaintiffs attempted to cure their pleading deficiencies for a securities fraud claim by attaching third-party filings in addition to an SEC complaint.<sup>92</sup> The District Court for the Northern District of Illinois found that the plaintiffs did not satisfy their Rule 11(b)(3) duty when they merely stated, “the SEC alleges certain additional facts.”<sup>93</sup> Moreover, the court rejected the plaintiffs’ argument that they could not have investigated the attached materials because they lacked the resources of the SEC or of class action attorneys.<sup>94</sup> The court’s analysis is consistent with the letter and spirit of Rule 11(b)(3), which requires attorneys to conduct an independent investigation even if they duplicate another attorney’s efforts.<sup>95</sup>

However, the duty of independent investigation does not prohibit all forms of reliance on consent orders. The cases cited above indicate that, absent compelling circumstances, a consent order cannot be the *only* source of information used by an attorney to investigate a claim.<sup>96</sup> Some district courts have moved cautiously before determining that a consent order was the attorney’s sole source in investigating the claim. For example, district courts in the Ninth Circuit have suggested that a court should strike allegations derived from a consent order only after scouring the complaint for any independent factual support and finding none.<sup>97</sup> The Ninth Circuit’s approach acknowledges that an attorney has complied with his duty of

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<sup>91</sup> See *In re Connetics Corp.*, 542 F. Supp. 2d at 1005 (holding that “an attorney may [not] rely entirely on another complaint as the sole basis for his or her allegations”).

<sup>92</sup> [2001–2002 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,711, at 98,261 (N.D. Ill. Feb. 26, 2002).

<sup>93</sup> *Id.* at 98,265 (internal quotation marks omitted).

<sup>94</sup> See *id.* at 98,265 n.10.

<sup>95</sup> See *Garr*, 22 F.3d at 1280 (“The advantage of duplicate personal inquiries is manifest: while one attorney might find a complaint well founded . . . , another, even after examining the materials available to the first attorney, could come to a contrary conclusion.”).

<sup>96</sup> See *Fraker v. Bayer Corp.*, No. 08-1564, 2009 WL 5865687, at \*3 (E.D. Cal. Oct. 6, 2009) (“[W]hile [the complaint] may refer to allegations set forth in a complaint in a different action, [it] may not ‘rely entirely on another complaint.’” (citing *In re Connetics Corp.*, 542 F. Supp. 2d at 1005)); see also *In re Connetics Corp.*, 542 F. Supp. 2d at 1005 (“[T]he SEC complaint appears to be the only basis for the allegations against defendants . . .”).

<sup>97</sup> See, e.g., *Fraker*, 2009 WL 5865687, at \*5 (analyzing the complaint and concluding, after “stripping” the derived allegations from the complaint, that there was “no independently acquired evidence that would tend to support” the plaintiff’s legal contentions); *In re Connetics Corp.*, 542 F. Supp. 2d at 1005 (“Although plaintiffs contend that the SEC complaint is one of many bases for plaintiffs’ complaint, they do not contend that they . . . had any additional bases for the specific allegations pertaining to [the defendants].”).

independent investigation when he has verified the substance of an allegation derived from a consent order.<sup>98</sup>

Thus, courts have addressed the outer limits of the duty of independent investigation. An attorney does not satisfy the duty when he fails to personally investigate *any* of the allegations derived from a consent order. In contrast, an attorney satisfies this duty when he locates independent support for *every* such allegation. Between these two poles, the analysis is less clear. What if an attorney attempts to verify the substance of allegations from a consent order but is unable to locate any relevant information? What if the attorney needs to rely on a consent order to provide context but not to establish an entire element or claim?

Rule 11(b)(3) permits courts to evaluate these questions on a case-by-case basis. Following the Rule, an attorney need not locate support for every allegation; he may plead on information and belief so long as the allegations “will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”<sup>99</sup> Although the attorney generally must attempt some independent investigation, the attorney needs to conduct only an inquiry that is reasonable under the circumstances.<sup>100</sup> Moreover, the duty of independent investigation does not require the attorney to individually confirm each allegation.<sup>101</sup> Rather, the attorney must “stop and think” before filing the complaint, which may entail seeking other factual support, considering the credibility of second-hand information, and evaluating competing interpretations.<sup>102</sup> This analysis suggests that courts have broad

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<sup>98</sup> See *De La Fuente v. DCI Telecomms., Inc.*, 259 F. Supp. 2d 250, 260 (S.D.N.Y. 2003) (holding that the plaintiff properly utilized information from SEC complaints when his counsel certified that “every allegation in the complaint was verified . . . through independent investigation”).

<sup>99</sup> FED. R. CIV. P. 11(b)(3); cf. *Kiobel v. Millson*, 592 F.3d 78, 81 (2d Cir. 2010) (“A statement of fact can give rise to the imposition of sanctions only when the ‘particular allegation is utterly lacking in support.’” (citing *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 388 (2d Cir. 2003))).

<sup>100</sup> See *Garr*, 22 F.3d at 1278-79 (clarifying that “the standard under Rule 11 is fact specific” and “the court must consider all the material circumstances in evaluating the signer’s conduct” (citation and internal quotation marks omitted)). Courts have considered a variety of factors that may reasonably affect the scope of an attorney’s investigation, including the complexity of the issues involved and the difficulty of obtaining information within the control of an adverse party. See generally 1 RONALD E. MALLEEN ET AL., *LEGAL MALPRACTICE* § 11:7 (2013 ed.) (citing cases where courts have considered “the extent of research and investigation that was practical” and “the complexity of the factual and legal issues”).

<sup>101</sup> See *Garr*, 22 F.3d at 1280 (suggesting that reliance on information gathered by other persons is acceptable so long as the attorney does not evade his obligation to personally inquire into the allegations); *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 851 F. Supp. 2d 1299, 1311 (S.D. Fla. 2011) (permitting reliance on “detailed notes and memoranda” prepared by investigators).

<sup>102</sup> See *WRIGHT & MILLER*, *supra* note 20, at § 1334 (discussing how the 1993 amendment to Rule 11(b) did not alter attorneys’ obligation to “stop and think” before submitting a filing).

discretion to permit reliance on consent orders in pleadings depending on the circumstances of a case. Fortunately, courts have identified several factors that help to police reliance on consent orders.

### B. Policing Factors to Ensure Adequate Investigation

Courts have applied at least three procedural requirements to give effect to Rule 11(b)(3) when plaintiffs rely on consent orders. First, some courts require plaintiffs to identify allegations derived from consent orders. Although this notice requirement could be cumbersome in practice, courts have permitted plaintiffs to provide more general notice in complex and lengthy pleadings. Second, some courts evaluate the reliability of information derived from consent orders. According to these courts, Rule 11(b)(3) should not bar plaintiffs from using the often probative information found in consent orders. Third, some courts require that plaintiffs attempt in good faith to verify information derived from consent orders. This requirement advances Rule 11's policy objectives of improving the quality of pleadings and the thoroughness of prefiling investigations. Together, these three factors provide a starting point—though not an exhaustive test—for courts to ensure that plaintiffs have complied with the duty of independent investigation.

#### 1. Notice

Courts may require notice that the plaintiff has relied on a consent order. In *In re Spiegel, Inc. Securities Litigation*, the District Court for the Northern District of Illinois permitted the plaintiffs to allege facts derived from an independent examiner's report prepared pursuant to an SEC settlement.<sup>103</sup> Since the report was quite extensive, the court ordered the plaintiffs to amend their complaint to identify allegations derived from the examiner's report.<sup>104</sup> The court agreed with the defendants that such amendments were necessary to enable the court to exercise its "gatekeeping role" in evaluating whether the plaintiffs had a reasonable basis for allegations made on information and belief.<sup>105</sup> Although *Spiegel* involved the requirements under the PSLRA, its reasoning also applies to Rule 11(b)(3) inquiries, since Rule 11(b)(3) requires plaintiffs to "specifically" identify which

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<sup>103</sup> 382 F. Supp. 2d 989, 1013-14 (N.D. Ill. 2004).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* (internal quotation marks omitted). *Spiegel* involved securities fraud claims governed by the PSLRA, which requires plaintiffs to state with particularity all facts on which an allegation made on information and belief is based. See 15 U.S.C. § 78u-4(b)(1) (2006).

allegations will likely have evidentiary support after a reasonable opportunity for further investigation or discovery. For example, the court in *Geinko v. Padda* held that the plaintiffs violated Rule 11(b)(3) because they failed to specifically identify which alleged facts resulted from their own investigation and which they “merely [asserted] that someone else ha[d] alleged.”<sup>106</sup>

A notice requirement introduces practical challenges for plaintiffs and courts. For instance, should plaintiffs be required to identify every allegation for which they relied on a consent order, even to a trivial extent? As with other Rule 11(b) inquiries,<sup>107</sup> courts have adopted a flexible approach that varies with the circumstances. The *Spiegel* court required the plaintiffs to identify each and every allegation that was based on the independent examiner’s report because the PSLRA required that level of detail.<sup>108</sup> But even for claims without a statutory particularity requirement, Rule 11(b)(3) might require greater specificity in cases involving exceedingly long or complex complaints.<sup>109</sup> In contrast, courts have generally permitted plaintiffs to identify whether they relied on a consent order as part of a mix of sources where it would be impractical to identify every instance of reliance.<sup>110</sup> Although these cases may provide insufficient guidance, plaintiffs can err on the side of caution by providing as much specificity as possible under the circumstances.

Moreover, Rule 12(f) and *Lipsky* would not require courts to strike allegations that refer to consent orders as sources of information if Rule 12(f) and *Lipsky* are read narrowly as part of a comprehensive pleadings scheme. Under Rule 11(b)(3), courts may require plaintiffs to identify the sources of allegations made on information and belief. By identifying consent orders as a source of information, plaintiffs indicate they believe that the allegations are true and that admissible evidence will likely be available through discovery. This outcome is appropriate under Rule 12(f) and *Lipsky*.

## 2. Reliability

Courts also evaluate the reliability of information derived from a consent order. This information, some commentators assert, is inherently suspicious. Richard Casey and Jared Fields—both practicing defense

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<sup>106</sup> [2001–2002 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,711, at 98,265 (N.D. Ill. Feb. 26, 2002).

<sup>107</sup> See *supra* notes 96–102 and accompanying text.

<sup>108</sup> See *In re Spiegel*, 382 F. Supp. 2d at 1013–14.

<sup>109</sup> For example, the complaint in *Spiegel* included 216 pages and 477 paragraphs. *Id.* at 1014.

<sup>110</sup> See, e.g., *In re Livent, Inc. Sec. Litig.*, 78 F. Supp. 2d 194, 216 (S.D.N.Y. 1999) (holding that the plaintiff provided sufficient notice by identifying an SEC complaint as one source among others in the complaint).

lawyers—note that an examiner’s report, such as the one at issue in *Spiegel*, may be a “fishing expedition”<sup>111</sup> designed to “conjure claims on behalf of the bankruptcy estate.”<sup>112</sup> The authors also observe that administrative agencies are not neutral parties in the context of an enforcement action, although they do not doubt agencies’ good faith.<sup>113</sup> Other commentators, often members of the defense bar, have attacked the SEC for deploying broadly worded settlement documents with relaxed evidentiary standards, often with the goal of creating new legal precedent.<sup>114</sup> Some courts even have raised concerns that allegations in consent orders are less reliable because they are unadjudicated.<sup>115</sup> Given these concerns, should plaintiffs approach consent orders with skepticism when conducting their prefiling investigation?

Perhaps, but these cautionary points should not preclude reliance on consent orders under Rule 11(b)(3). Factual allegations in consent orders are not inherently unreliable or biased. Though some commentators attack the

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<sup>111</sup> See Casey & Fields, *supra* note 68, at 15 (quoting *In re Enron Corp. Sec., Derivative & “ERISA” Litig.*, No. MDL-1446, 2005 WL 3504860, at \*10 (S.D. Tex. Dec. 22, 2005)) (internal quotation marks omitted).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 15-16; see also Comm. on Fed. Regulation of Sec., *Report of the Task Force on SEC Settlements*, 47 BUS. LAW. 1083, 1158 (1992) (“[P]ersons may settle proceedings for reasons wholly unrelated to the merits of the case and . . . the settlement itself may therefore represent unreliable or incomplete findings on which no other consequences should depend.”). The Committee on Federal Regulation of Securities includes American Bar Association (ABA) members and “significant participation by SEC staff members” in its meetings. ABA, *Federal Regulation of Securities*, ABA BUS. L. SEC., <http://apps.americanbar.org/dch/committee.cfm?com=CL410000&edit=> (last visited Nov. 22, 2013). It is not, therefore, a wholly neutral observer. The Committee’s mission involves providing meetings, programs, and information to practitioners on securities laws. *Id.* The Committee also comments on SEC rule proposals and reviews the rules and procedures of the Financial Industry Regulatory Authority. *Id.*

<sup>114</sup> See Anne C. Flannery, *Time for a Change: A Re-examination of the Settlement Policies of the Securities and Exchange Commission*, 51 WASH. & LEE L. REV. 1015, 1017 (1994) (“While a court would likely dismiss a case with weak evidence regardless of its importance, the SEC may treat evidentiary issues with greater latitude because it has a strong commitment to the principles involved in a given case.”); Danné L. Johnson, *SEC Settlement: Agency Self-Interest or Public Interest*, 12 FORDHAM J. CORP. & FIN. L. 627, 652-58 (2007) (describing settlements in which the SEC “created a new legal standard”); Zachary W. Carter, *The SEC’s “Settlement-Prudence”: “Law” Creation Through a Coercive Settlement Process* (Dorsey & Whitney, LLP), June 30, 2004, at 9, available at [www.lawseminars.com/materials/07SDAMNY/carter.pdf](http://www.lawseminars.com/materials/07SDAMNY/carter.pdf) (describing SEC settlements as “one-sided imposition[s] of [the SEC’s] unchallenged views on an issue, to which the defendant/target acquiesces without much of a fight”). These commentators, two of whom have served at the SEC (Flannery and Johnson), all rely to some extent on the ABA committee’s findings from the 1992 *Report of the Task Force on SEC Settlements*, *supra* note 113. Flannery, *supra*, at 1017 n.3; Johnson, *supra*, at 668 n.203; Carter, *supra*, at 1 n.1.

<sup>115</sup> See *In re Apollo Grp., Inc. Sec. Litig.*, No. 10-1735, 2011 WL 5101787, at \*10 n.5 (D. Ariz. Oct. 27, 2011) (“[B]ecause allegations from other complaints are unproven and contested, they do not amount to ‘facts’ sufficient to establish a strong inference of scienter.”).

SEC's broadly worded settlement language, they focus on the SEC's exposition of legal standards rather than the factual allegations that plaintiffs rely on in their pleadings.<sup>116</sup> Casey and Fields observe that the SEC is not a neutral party in enforcement actions, but they concede that the "SEC presumably makes allegations in its complaints after investigation and with . . . good faith."<sup>117</sup>

Without clear evidence to the contrary, plaintiffs should not be discouraged from relying on factual allegations made by an agency that investigated a matter within its expertise.<sup>118</sup> Some consent orders are "replete with detailed factual information of obvious relevance to the case at hand."<sup>119</sup> For example, in *Spiegel*, the Independent Examiner's Report resulted from an investigation involving more than 800,000 documents and 51 witness interviews.<sup>120</sup> Likewise, in *Bear Stearns*, the court permitted the plaintiffs to cite a detailed study described in a third-party complaint because it provided data revealing widespread misconduct by the same defendants.<sup>121</sup> According to the court, it would be nonsensical to permit the plaintiffs to rely on such information if it were contained in a news report but not if it were found in a third-party complaint.<sup>122</sup> Unlike some news reports and other third-party complaints, agency complaints and consent orders often undergo a thorough review process involving public officials who do not have a direct financial stake in the action's outcome.<sup>123</sup> Finally, although the factual findings of

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<sup>116</sup> At most, Flannery suggested—in a paragraph discussing the SEC's efforts to "reform the law"—that the SEC "may treat evidentiary issues with greater latitude." Flannery, *supra* note 114, at 1017.

<sup>117</sup> Casey & Fields, *supra* note 68, at 16.

<sup>118</sup> See *De La Fuente v. DCI Telecomms., Inc.*, 259 F. Supp. 2d 250, 260 (S.D.N.Y. 2003) ("[I]t would have been irresponsible for plaintiff to have ignored the SEC's highly relevant allegations and findings." (internal quotation marks omitted)); see also Brief of Amicus Curiae National Ass'n of Shareholders & Consumer Attorneys, *supra* note 79, at 15 ("The conclusions of a government agency, reached after a detailed investigation and access to internal corporate documents, constitute exactly the sort of 'secondhand information' that a plaintiff might reasonably 'believe[] to be true' for the purposes of information-and-belief pleading . . . ." (alteration in original)).

<sup>119</sup> *In re Bear Stearns Mortg. Pass-Through Certificates Litig.*, 851 F. Supp. 2d 746, 768 n.24 (S.D.N.Y. 2012); see also *In re New Century*, 588 F. Supp. 2d 1206, 1221 (C.D. Cal. 2008) (refusing to strike allegations drawn from a bankruptcy examiner's report because the report was extremely detailed).

<sup>120</sup> *In re Spiegel, Inc. Sec. Litig.*, 382 F. Supp. 2d 989, 1013 (N.D. Ill. 2004).

<sup>121</sup> 851 F. Supp. 2d at 768 n.24.

<sup>122</sup> *Id.* The potential for arbitrary results applies equally in the Rule 12(f) and Rule 11 contexts. See *supra* note 79 and accompanying text; see also Brief of Amicus Curiae National Ass'n of Shareholders & Consumer Attorneys, *supra* note 79, at 10 (listing cases that permit reliance on various third-party sources).

<sup>123</sup> For example, the SEC employs a multi-step review process that subjects the Division of Enforcement's recommendations to approval by senior managers, directors of other SEC divisions, and ultimately by the independent Commissioners themselves. See OFFICE OF CHIEF

consent orders may be unadjudicated, the settlement process remains adversarial to some extent, giving defendants an opportunity to influence the language of a consent order.<sup>124</sup> Thus, there is little reason to treat consent orders as inherently suspicious during a prefiling investigation.

Even if consent orders are not neutral expositions of facts, Rule 11(b)(3) does not require plaintiffs to ignore the opinions and factual findings of government agencies. Rather, the Rule requires that attorneys evaluate whether the findings are sufficiently reliable for use in their complaints. The discussion above suggests several indicia of reliability, including the level of detail in the consent order, the susceptibility of the particular factfindings to distortion, the comprehensiveness of the government's investigation, and the nature of the agency's expertise relative to the case at hand.<sup>125</sup> This list is not exhaustive, and the inquiry does not demand certainty. Rule 11(b)(3) does not ask plaintiffs to certify that factual allegations are definitely true or that they have found admissible evidence in support of these allegations; rather, plaintiffs need to believe only that supporting evidence will likely be available after further discovery. When relying on consent orders, plaintiffs will usually be able to meet this standard.

### 3. Good Faith Attempt at Independent Verification

In some cases, courts may also require plaintiffs at least to attempt to verify facts from a consent order. This requirement addresses courts' well-grounded concern about "bootstrapping" complaints that merely recite unadjudicated findings from a consent order without any separate analysis by the filing attorney.<sup>126</sup> Like the plaintiffs' attorneys in *Garr*, who relied solely on the

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COUNSEL, SEC DIVISION OF ENFORCEMENT, ENFORCEMENT MANUAL 25-27 (2013), available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf> (setting forth the review process for Division of Enforcement recommendations); see also Johnson, *supra* note 114, at 633 (describing the "detail-oriented" SEC investigation process, which the author concludes "weed[s] out the meritless cases").

<sup>124</sup> See Comm. on Fed. Regulation of Sec., *supra* note 113, at 1092 ("The respondent also will seek the elimination of any inflammatory language . . .").

<sup>125</sup> See *supra* notes 118-124 and accompanying text; see also MALLEY ET AL., *supra* note 100, § 11:7; Brief of Amicus Curiae National Ass'n of Shareholders & Consumer Attorneys, *supra* note 79, at 11-12.

<sup>126</sup> See *Ledford v. Rapid-American Corp.*, 47 Fair Empl. Prac. Cas. (BNA) 312, 313 (S.D.N.Y. 1988) (dismissing part of a complaint for impermissibly relying on the nonadjudicative finding of the New York State Division of Human Rights that there was probable cause to believe age discrimination had occurred); cf. *In re Platinum & Palladium Commodities Litig.*, 828 F. Supp. 2d 588, 593-94 (S.D.N.Y. 2011) ("To the extent the Complaint describes the manipulative trading scheme, those allegations simply recast the CFTC's findings and are derived wholesale from the CFTC Order.").



representations of forwarding counsel,<sup>127</sup> attorneys who do no more than copy and paste allegations from a consent order have failed to attempt to conduct an independent investigation. This failure undermines Rule 11's objectives, even when the plaintiff derives allegations from a highly detailed and reliable consent order.

Bootstrapping avoids duplicative but necessary investigations that often enhance the quality of pleadings by encouraging attorneys to question legal theories and consider alternative interpretations of facts.<sup>128</sup> Bootstrapping also reduces attorneys' incentives to conduct any investigation whatsoever,<sup>129</sup> which subverts Rule 11's long-term goals of elevating professional standards and improving the thoroughness of pre-filing investigations.<sup>130</sup> As a result, courts should actively prevent bootstrapping based on consent orders.

But not all plaintiffs who rely on consent orders are bootstrapping in a manner that skirts the duty of independent investigation. When plaintiffs use a consent order along with a broader mix of sources, they will generally satisfy Rule 11(b)(3), even if they are unable to verify every allegation.<sup>131</sup> In such cases, reliance on consent orders may enhance the quality of pleadings by providing important context and additional factual support for claims. Moreover, consent orders may contain information that would otherwise be inaccessible to plaintiffs. In these cases, "bootstrapping" may be the only way for plaintiffs to bring a meritorious claim.<sup>132</sup> Where plaintiffs are unable to verify the information, the reliability inquiry helps ensure that plaintiffs derive allegations from consent orders that are likely backed by admissible evidence.

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<sup>127</sup> See *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1280 (3d Cir. 1994).

<sup>128</sup> See *id.* (acknowledging that there is an evident advantage to "duplicate personal inquiries").

<sup>129</sup> The *Geinko* court warned of a "pleading loophole" if litigants were permitted to cite third-party complaints. *Geinko v. Padda*, [2001–2002 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,711, at 98,265 n.8 (N.D. Ill. Feb. 26, 2002). Through this loophole, two plaintiffs could file separate actions and rely on each other's complaints for the substance of their allegations. *Id.* This potential abuse is less concerning in the context of relying on consent orders, assuming government agencies, unlike plaintiffs' lawyers, are generally unwilling to cooperate with other litigants in this manner.

<sup>130</sup> See Georgene Vairo, *Rule 11 and the Profession*, 67 *FORDHAM L. REV.* 589, 607 (1998) ("Imposing sanctions when a paper is well-grounded, but when the attorney failed to investigate, is an example of regulating the new professionalism standard.").

<sup>131</sup> See, e.g., *In re Cylink Sec. Litig.*, 178 F. Supp. 2d 1077, 1080 (N.D. Cal. 2001) (permitting the plaintiffs to rely on an SEC complaint that supplemented the plaintiffs' independently investigated allegations regarding scienter).

<sup>132</sup> See *Casey & Fields*, *supra* note 68, at 14 ("[C]omplaints prepared by . . . third parties typically provide putative plaintiffs insider information to which they would not have otherwise had access . . ."); cf. *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 443 (7th Cir. 2011) ("Pleading fraud based on information and belief is permissible, so long as (1) the facts constituting the fraud are not accessible to the plaintiff and (2) the plaintiff provides the grounds for his suspicions." (internal quotation marks omitted)).

Although it may be difficult to distinguish inappropriate bootstrapping from beneficial forms of reliance, courts have demonstrated that they are up to the challenge.<sup>133</sup> Moreover, Rule 11(b)(3) requires courts to ask whether an investigation was reasonable *under the circumstances*.<sup>134</sup> As discussed above, Rule 11(b)(3) permits reliance on consent orders when the defendant attempted a good faith investigation and incorporated the consent order into a mix of sources.<sup>135</sup> Courts, however, are free to require more when the plaintiff approached the line of impermissible bootstrapping.

As this discussion makes clear, policing reliance on consent orders implicates pleading policies more generally. A flexible notice requirement could burden courts and the parties with longer pleadings.<sup>136</sup> The reliability and attempted verification requirements may also expand the duty of independent investigation beyond what Rule 11(b)(3) requires on its face. Even the more permissive approach under Rule 12(f) and *Lipsky*, suggested in Part I, would shift some power to plaintiffs at the pleadings stage. But this analysis implicates more than pleadings policy in private actions. If civil plaintiffs were permitted to rely more broadly on consent orders, defendants might be less willing to settle government enforcement actions and investigations. Such a result might upset public policy, which favors negotiated settlements between the government and its enforcement targets.

### III. PUBLIC POLICY IMPLICATIONS

Although Rules 12(f) and 11(b)(3) permit broad reliance on consent orders at the pleadings stage, public policy may not prefer this result. Government agencies often seek to preserve defendants' incentives to settle enforcement actions by limiting the collateral effects of settlements. Accordingly, many agencies permit defendants to settle enforcement actions while denying or while neither admitting nor denying the allegations against them.<sup>137</sup> However,

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<sup>133</sup> See, e.g., *Fraker v. Bayer Corp.*, No. 08-1564, 2009 WL 5865687, at \*4-5 (E.D. Cal. Oct. 6, 2009) (explaining that courts should evaluate the complaint as a whole to determine whether it contains support apart from what was alleged in or inferable from a consent order).

<sup>134</sup> See *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1278-79 (3d Cir. 1994).

<sup>135</sup> See *supra* note 131 and accompanying text.

<sup>136</sup> Rule 8(a)(2) of the Federal Rules of Civil Procedure states that pleadings should include only "short and plain" statements. FED. R. CIV. P. 8(a)(2).

<sup>137</sup> For an example of a neither-admit-nor-deny consent order, see *supra* notes 3-6 and accompanying text. The Federal Trade Commission and Department of Justice have also permitted defendants to settle while denying wrongdoing. See Edward Wyatt, *Letting Companies Settle While Denying Guilt Reconsidered by F.T.C.*, N.Y. TIMES, Aug. 11, 2012, at B3 (discussing the Justice Department's settlement "with the pharmaceutical maker GlaxoSmithKline in which the company agreed to pay \$2 billion to settle civil charges . . . [but] expressly denied that it had engaged in any wrongful conduct").

after the financial crisis, the SEC in particular has been criticized for its neither-admit-nor-deny settlement policy.<sup>138</sup> Notably, Judge Jed Rakoff of the Southern District of New York refused to approve an SEC consent order resolving an enforcement action against Citigroup.<sup>139</sup> Citing *Lipsky*, Judge Rakoff stated that the settlement was not in the public interest because, among other reasons, third parties could not rely on the SEC's allegations to plead claims against Citigroup.<sup>140</sup> After Judge Rakoff's decision, the SEC defended its neither-admit-nor-deny policy as a means to induce settlement "on favorable terms."<sup>141</sup>

This ongoing debate suggests that any pleadings rule that would enhance the collateral consequences of consent orders should be scrutinized closely to ensure its impact is minimal. Regulatory agencies generally try to avoid any potential chilling effects on settlements, which preserve resources and secure relief without the risk and delay of litigation.<sup>142</sup> Likewise, targets of regulatory actions have strong incentives to settle in order to avoid the risks of litigating against the government, such as the collateral risks an adverse judgment would have in parallel private actions.<sup>143</sup> In the debate

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<sup>138</sup> See Edward Wyatt, *S.E.C., Responding to Critics, Defends 'No Wrongdoing' Settlements*, N.Y. TIMES DEALBOOK (Feb. 23, 2012), [http://dealbook.nytimes.com/2012/02/22/s-e-c-chairwoman-defends-settlement-practices/?\\_r=0](http://dealbook.nytimes.com/2012/02/22/s-e-c-chairwoman-defends-settlement-practices/?_r=0) ("Some people have questioned [the financial] deterrent effect and the value of relying on the 'neither admit nor deny' clause.").

<sup>139</sup> See *U.S. SEC v. Citigroup Global Mkts. Inc.*, 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011).

<sup>140</sup> *Id.* at 332-34. The Second Circuit stayed the district court's proceedings, noting that courts generally should not "second-guess" an agency's decision to enter into neither-admit-nor-deny settlements. *U.S. SEC v. Citigroup Global Mkts. Inc.*, 673 F.3d 158, 164-65, 169 (2d Cir. 2012).

<sup>141</sup> See Press Release, SEC, No. 2011-265, SEC Enforcement Director's Statement on Citigroup Case (Dec. 15, 2011), available at <http://www.sec.gov/news/press/2011/2011-265.htm> (arguing that "settling on favorable terms even without an admission serves investors, including investors victimized by other frauds," because settling frees up resources that can be used to investigate other claims). The SEC has since modified its neither-admit-nor-deny settlement policy in limited circumstances. See Public Statement, Robert Khuzami, Director of the SEC's Division of Enforcement, Public Statement by SEC Staff: Recent Policy Change (Jan. 7, 2012), available at <http://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1365171489600#.UgqdyZLmuSo> (announcing that the SEC would no longer permit neither-admit-nor-deny settlements "in the minority of our cases where there is a parallel criminal conviction (by plea or verdict) or criminal [non-prosecution agreement/deferred prosecution agreement] involving factual or legal claims" that overlap); see also James B. Stewart, *S.E.C. Has a Message for Firms Not Used to Admitting Guilt*, N.Y. TIMES, June 22, 2013, at B1 ("[T]he [SEC's] co-leaders of enforcement . . . said there might be cases that 'justify requiring the defendant's admission of allegations in our complaint or other acknowledgment of the alleged misconduct as part of any settlement.'").

<sup>142</sup> See Press Release, *supra* note 141 ("[A] settlement puts money back in the pockets of harmed investors without . . . the twin risks of losing at trial or winning but recovering less than the settlement amount."); see also Comm. on Fed. Regulation of Sec., *supra* note 113, at 1091-93 ("The caseload of the SEC is enormous, and its resources are limited.").

<sup>143</sup> See Comm. on Fed. Regulation of Sec., *supra* note 113, at 1093-94 (discussing the "less obvious" costs of litigating for defendants, including the possibility of "open[ing] up the

over neither-admit-nor-deny policies, defendants would have fewer incentives to settle if regulatory agencies required admissions of liability.<sup>144</sup>

If courts permit plaintiffs to rely on consent orders in the manner this Comment proposes, it is unclear how this rule would affect settlement policy. Defendants may worry that private plaintiffs will use consent orders to plead more claims that survive motions to dismiss, thereby increasing the litigation costs associated with regulatory settlement. This concern may lead defendants to delay settling in order to avoid the public disclosure of facts uncovered by the investigation or even to forego settling the action altogether. However, practical parties will likely realize that delay would force defendants to incur the costs and risks of litigating against the agency, and that private plaintiffs may still be able to incorporate the agency's findings into their case well after they file their initial complaint.<sup>145</sup> Moreover, even if defendants cannot prevent the release of the agency's investigative facts, they would still be free to contest the allegations in the private litigation. Defendants will generally be prepared to do so after dealing with an agency investigation involving the same substantive issues.<sup>146</sup> In sum, the rules proposed in this Comment may have little practical effect on settlement dynamics because they stop far short of requiring defendants to admit to the findings contained in a consent order.

Without detailed studies and opinions by experienced practitioners, however, one can only surmise that the effects on settlements would be limited. But the current state of affairs suggests this belief is reasonable. Defendants cannot currently expect to prevail on a motion to strike allegation reciting findings from consent orders because courts are divided on the issue.<sup>147</sup> It is unclear whether this uncertainty has hampered their willingness

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Commission's findings to discovery in private litigation and . . . even eliminat[ing] the [defendant's] right to deny the relevant conduct in such proceedings"); see also Brief of Defendant-Appellee-Cross-Appellant at 36-37, *U.S. SEC v. Citigroup Global Mkts. Inc.*, 673 F.3d 158 (2d Cir. 2012) (No. 11-5227), 2012 WL 1790381 (arguing that, in electing to settle on a neither-admit-nor-deny basis, "Citigroup's management and Board appropriately prioritized its current shareholders' interests in minimizing the adverse collateral consequences associated with being adjudicated at fault in this matter, including the enhanced risk of an adverse outcome in [] numerous pending private civil litigations").

<sup>144</sup> See Comm. on Fed. Regulation of Sec., *supra* note 113, at 1093-94 (describing incentives for defendants to settle with a public agency).

<sup>145</sup> The Federal Rules of Civil Procedure allow parties to amend their pleadings once, as a matter of course, within twenty-one days of service. FED. R. CIV. P. 15(a)(1)(A). After twenty-one days, parties may amend their pleadings only with the consent of the other parties or with the court's leave, but "[t]he court should freely give leave when justice so requires." FED. R. CIV. P. 15(a)(2).

<sup>146</sup> See *supra* note 80 and accompanying text.

<sup>147</sup> See *supra* Section I.B.

to settle or incentivized them to delay settling. The uncertainty may not have deterred private plaintiffs from piggybacking off of consent orders either, as defendant companies increasingly face simultaneous regulatory and private actions.<sup>148</sup> Moreover, negotiated settlements still carry some collateral risk for defendants that do not depend on whether a consent order's findings are recited in a complaint. For example, consent orders are admissible at trial for purposes other than to establish liability, such as to prove knowledge of a legal obligation.<sup>149</sup> Thus, the rules proposed in this Comment may not dramatically affect defendants' cost-benefit calculations in deciding whether or not to settle an enforcement action.

There may be other interests at stake, however, beyond preserving incentives to settle. If private plaintiffs can rely on consent orders to bring piggyback actions that are more likely to prevail on a motion to dismiss, defendants will wish to minimize "inflammatory language" in consent orders.<sup>150</sup> This outcome could affect other regulatory goals, such as using broadly worded settlement documents to "send a message" to industry participants.<sup>151</sup> But as argued above, it is by no means certain that agencies seek to send a message by deliberately overstating their factual (as opposed to legal) case in consent orders.<sup>152</sup> Courts can also require reasonably detailed and objective statements of fact before approving consent orders, although the predilection to do so may vary by judge.<sup>153</sup> Given the lack of evidence or even discussion about settlement dynamics involving statements of fact in consent orders,<sup>154</sup> it is not clear what impact this threat might have on public policy favoring negotiated settlements. Such concerns are worth evaluating carefully, and stakeholders should discuss them in light of how frequently plaintiffs seek to rely on consent orders.

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<sup>148</sup> Adam S. Hakki et al., *The Impact of the Financial Crisis on the Regulatory Landscape and the Resulting Implications for Securities Class Action Litigation* ("It is increasingly the norm for a company to face simultaneous government proceedings and private actions at the state and federal level."), in *HANDLING A SECURITIES CASE: FROM INVESTIGATION TO TRIAL AND EVERYTHING IN BETWEEN* 85 (2012).

<sup>149</sup> See *United States v. Gilbert*, 668 F.2d 94, 97 (2d Cir. 1981) (affirming the district court's decision to admit into evidence an SEC consent decree "to show that [the defendant] knew of the SEC reporting requirements").

<sup>150</sup> See Comm. on Fed. Regulation of Sec., *supra* note 113.

<sup>151</sup> *Id.* at 1092.

<sup>152</sup> See *id.*

<sup>153</sup> See DiSarro, *supra* note 14, at 278 (noting that "the injunctive provisions of a consent decree must be stated in reasonable detail" and "the court can insist that a proposed decree be changed"); see also *SEC v. Bank of Am. Corp.*, 653 F. Supp. 2d 507, 509 (S.D.N.Y. 2009) (describing the court's condition that it would not approve a consent judgment unless the parties provided detailed factual statements).

<sup>154</sup> See *supra* note 114 and accompanying text.

## CONCLUSION

*Lipsky* cautioned that “courts should not tamper with the pleadings unless there is a strong reason for so doing.”<sup>155</sup> This Comment demonstrates that courts have overlooked this warning by tampering too much with pleadings that rely on or refer to consent orders. Rules 12(f) and 11(b)(3) broadly permit plaintiffs to rely on consent orders to allege facts establishing a claim of liability, subject to certain conditions outlined above. But interested parties and commentators have yet to weigh in on whether broad permission to rely on consent orders is desirable given public policy favoring settlement of enforcement actions. If broad permission is not desirable, then we must determine how to implement new restrictions on plaintiffs at the pleadings stage.

As the discussion of *Lipsky* and its progeny suggests, courts should not interpret Rule 12(f) to require striking allegations based on consent orders because of regulatory enforcement policy. This result would undermine settled law granting motions to strike only for irrelevant, unsubstantiated, and prejudicial allegations. Nor should courts require a heightened duty of independent investigation under Rule 11(b)(3) solely for allegations relying on consent orders. This approach would not advance Rule 11’s objective of improving the quality of pleadings and the thoroughness of prefling investigations. The best method of preserving the status quo in regulatory enforcement may be to impose statutory restrictions on plaintiffs who rely on consent orders in certain high-risk areas. Congress, for example, has “tampered” with pleadings requirements involving private securities fraud claims to limit the impact of strike suits.<sup>156</sup> Our experience in that context may inform whether Congress should intervene here.

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<sup>155</sup> *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976).

<sup>156</sup> See Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(2)(A) (2006 & Supp. V 2012) (requiring plaintiffs in a private securities fraud action to “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind”).