NDNY FEDERAL COURT BAR ASSOCIATION, INC.
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The NDNY-FCBA's CLE Committee
Presents:

"Filing and Opposing Motions to Dismiss for Failure to State a Claim"

October 19, 2021

12:00 pm- 2:30pm

R.S.V.P. by October 15, 2021

Because of COVID-19 related restrictions, this CLE will be offered in a virtual setting, via Zoom. A link for the Zoom CLE will be provided to registered attendees.

Program Description

This is a seminar on motions filed pursuant to Federal Rule of Civil Procedure 12(b)(6) and will focus on a checklist of a dozen questions to be asked before filing a motion under this rule, and a dozen questions to be asked before opposing such a motion. Topics will include (1) when a motion arises under this rule as opposed to another one, (2) the two types of challenges that may be raised in a motion under this rule, (3) the documents that may be considered when deciding a motion under this rule, (4) common misunderstandings of the legal standard governing a motion under this rule, and (5) common mistakes made when filing or opposing a motion under this rule.

Presenter:

Michael Langan, Esq.
(Career Law Clerk to Hon. Glenn T. Suddaby)

Agenda:

12:00-12:05: Introduction

12:05-1:10: Presentation of Rule 12 Topics (Q&A in Chat Box throughout)

1:10-1:20: Break

1:20-2:00: Continuation of Presentation (Q&A in Chat Box throughout)

2:00-2:05: Break

2:05-2:30: Continuation of Presentation (Q&A in Chat Box throughout)

"Filing and Opposing Motions to Dismiss for Failure to State a Claim" has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for **2.5 Skills Credit**.

The Northern District of New York Federal Court Bar Association has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York.

A code will be provided at a particular point in the program, which can be used to claim CLE credit for participation in the webinar.

This program is appropriate for newly admitted and experienced attorneys. This is a single program. No partial credit will be awarded. This program is complimentary to all Northern District of New York Federal Court Bar Association Members.

29 QUESTIONS FOR MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM

11 Questions for Movant

1. Have you construed the pleading liberally?
2. Do any of the defects in the claims deprive the Court of subject-matter jurisdiction?
3. Do any of your challenges depend on documents outside the four corners of the pleading?
4. Have the pleadings closed?
5. Do the defects relate to the claim's pleading sufficiency or its legal cognizability?
6 Are you challenging the lack of detail or specificity rather than the lack of factual allegations plausibly suggesting a claim?
7. If you are alternatively moving for summary judgment, have you differentiated the grounds for each motion?
8. Have you requested dismissal with or without prejudice and explained why? What about pre-dismissal leave to amend?
9. Have you organized your challenges by claim, defendant or defense (or a combination thereof), and have you challenged all of the claims?
10. Does your memorandum of law comply with the page limitation and contain a table of contents that is both precise and parallel?
11. Do you have a good reason for requesting oral argument?

10 Questions for Non-Movant

12. Has the movant moved under the correct rule?
13. Has the movant relied on any impermissible documents?
14. Has the movant misconstrued or missed any of your claims?
15. Has the movant challenged merely a lack of specificity?
16. Can you correct the pleading defects by filing an amended pleading as a matter of right?
17. If not, are you requesting that any dismissal be without prejudice (or that you should be entitled to leave to amend before dismissal)?
18. Have you responded to all of the movant's arguments?
19. Does the movant's memorandum of law comply with the page limitation and contain a table of contents?
20. Does your opposition memorandum of law of law comply with the page limitation and contain a table of contents that is both precise and parallel?
21. Do you have a good reason for requesting oral argument?

8 More Questions for Movant (on Its Reply)

22. Has the non-movant filed an amended pleading as a matter of right?
23. Alternatively, has the non-movant requested leave to amend (or leave to move to amend)?
24. Has the non-movant failed to respond to any of your arguments?
25. In its opposition memorandum of law, has the non-movant either asserted or discussed a claim not fairly asserted in its pleading?
26. In your reply memorandum of law, have you replied to all of the arguments in the non-movant's opposition memorandum of law?
27. Does the non-movant's opposition memorandum of law comply with the page limitation and contain a table of contents?
28. Does your reply memorandum of law comply with the page limitation and contain a table of contents that is both precise and parallel?
29. In your reply memorandum of law, have you asserted any new arguments?

11 QUESTIONS FOR THE MOVANT

QUESTION 1: HAVE YOU CONSTRUED THE PLEADINGS LIBERALLY?

• What's your motion trying to dispose of? Defendants? So what happens is the Judge cracks his gavel and grunts, "You're dismissed!" And then the party snaps a salute, spins on his heals, and marches out of the courtroom?

• Your friend invites you trap shooting then says, "Watch me get all of them!" As the clouds drift by, you hear loud pops next to you and see clay pigeons explode in the sky, one after another. Afterward your friend says, "I got 20!" What question do you ask him?

Hint: It's the same question asked by the CRD as he or she is docketing the decision and order.

Hypothetical 1: You represent the defendant. The plaintiff is represented by counsel. The "Counts" section of her complaint labels only two counts: one count claiming "race discrimination under Title VII," and one count claiming "gender discrimination under Title VII." But the "Factual Background" and "Counts" sections of the complaint also repeatedly mention the plaintiff's "age" and once mention the "ADEA." In your memorandum of law, you don't have to address an age-discrimination claim, right? After all, a (represented) plaintiff is the "master" of her complaint, right?

Answer: No, you should probably address the age-discrimination claim to save time. The plaintiff may persuade the Court that she intended to assert (and did assert) it. If this happens, the Court should (for purposes of due process) give the plaintiff leave to file a sur-reply to your reply, prolonging the briefing, and letting the plaintiff get in the last word. (Your request to file a sur-reply may be denied, due to your initial oversight.)

Rule: *All* pleadings (not only those of *pro se* litigants) must be construed "liberally." *See* Fed. R. Civ. P. 8(e) ("Pleadings must be construed so as to do justice."); *Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001) ("In making this assessment [of the pleading sufficiency of a complaint filed by a plaintiff represented by counsel], we must . . . construe the complaint liberally.") (internal quotation marks omitted). Even pursuant to the *Twombly*/*Iqbal* standard, a complaint need not "[]perfect[ly] state[] . . . the legal theory supporting the claim asserted." *Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 346-47 (2014) (holding that there were no grounds for dismissal where the plaintiffs failed to invoke 42 U.S.C. § 1983 in their complaint but they invoked the Fourteenth Amendment and pled facts plausibly suggesting a claim § 1983).

Practice Tip: Discern as many claims as you can, because (if you fail to do so) the Court must do so. *See, e.g., Rodriguez v. Estate of Drown*, 10-CV-1172, 2011 WL 4592386, at *6 (N.D.N.Y. Sept. 30, 2011) (Suddaby, J.) ("While Defendant did not specifically challenge this portion of [the *pro se*] Plaintiff's due process claim in his memorandum of law (no doubt because it takes an extension of special solicitude to

Plaintiff to discern that portion of his claim in his Complaint), it was proper for Magistrate Judge Lowe to do so pursuant to 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A(b)."). Furthermore, if the Court does so and you haven't, you haven't moved for dismissal of the entire complaint. *See, e.g., Ford v. Smith,* 11-CV-0212, 2012 WL 4492181, at *6 (N.D.N.Y. Sept. 28, 2012) (Suddaby, J.); *Green v. LaClair*, 07-CV-0351, 2012 WL 1144569, at *14, 20 (N.D.N.Y. Feb. 24, 2012) (Peebles, M.J.), *adopted,* 2012 WL 1048764 (N.D.N.Y. Mar. 28, 2012) (Suddaby, J.).

Hypothetical 2: Again, you represent the defendant, and the plaintiff is represented by counsel. The complaint labels only one "Count" for "Breach of Contract." However, the count actually references three "causes of action": one for "breach of contract," one for "tortious inference with prospective economic advantage," and one for "declaratory judgment." In addition, the "Factual Background" section of the complaint appears to allege facts regarding one of the elements of a claim for tortious inference prospective economic advantage. In your memorandum of law, how many claims do you say there are?

Answer: Two (i.e., one for breach of contract and one for tortious inference prospective economic advantage). As in Hypothetical 1, you must liberally construe the plaintiff's labeling of the "Count," *even if she is represented*. Also, a request for a declaratory judgment is not a claim but a form of relief.

• *See, e.g., Lisa Coppola, LLC v. Higbee*, 19-CV-0678, 2020 WL 1154749, at *10 (W.D.N.Y. Mar. 10, 2020) ("[A] request for a declaratory judgment is not a cause of action; it is a request for a remedy that does not exist independent of a plausible underlying claim for relief.").

Practice Tip: This isn't to say that you shouldn't address why a declaratory judgment is not a claim. Just don't repeat the error (other than to perhaps use quotation marks when discussing this "claim").

Hypothetical 3: Again you represent the defendant, who this time is a state actor. The plaintiff is *pro se*. The "Counts" section of his complaint asserts a claim under "the Universal Declaration of Human Rights made applicable to the states through the Ninth Amendment." In support of that claim, the plaintiff alleges (in the "Factual Background" section) facts plausibly suggesting both that he suffered from a serious medical need and that the defendant was careless of it. In your motion to dismiss, do you construe the complaint as asserting (or attempting to assert) a claim for deliberate indifference to a serious medical need under the Constitution?

Answer: Yes, construe the complaint as asserting a claim for deliberate indifference to a serious medical need under the Constitution (even though the standard is recklessness, not negligence).

Rule: Where a plaintiff is proceeding *pro se*, a court must afford his complaint "special solicitude" or extra-liberal construction, pursuant to which it must construe his complaint as raising the strongest claims that it suggests, consistent with his complaint's factual allegations.

• *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976) ("[A] pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.") (internal quotation marks omitted); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) ("[W]e hold [the allegations of pro se complaints] to less stringent standards than formal pleadings drafted by lawyers . . . ."); *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474-75 (2d Cir. 2006) (recognizing that, where plaintiffs proceed *pro se*, courts must construe their complaints with "special solicitude" and interpret them to raise the "strongest [claims] that they suggest"); *Phillips v. Girdich*, 408 F.3d 124, 127 (2d Cir. 2005) (indicating that courts cannot read into *pro se* submissions claims that are not "consistent" with the *pro se* litigant's allegations).

Practice Tip: Use the section labeled "Counts," "Causes of Action" or "Claims" as merely a starting point. Scour the factual allegations for an unlabeled claim. In addition, look at the Civil Cover Sheet and "Relief Requested" for indications of an unlabeled claim.

Hypothetical 4: Same facts as in Hypothetical 3 but the plaintiff is represented. In your motion to dismiss, do you still construe the complaint as asserting (or attempting to assert) a claim for deliberate indifference to a serious medical need under the Constitution?

Answer: Yes (probably).

Rule: Even if a civil rights plaintiff is represented by counsel, his complaint must be construed extra liberally.

• *See United States v. City of New York*, 359 F.3d 83, 91 (2d Cir. 2004) ("Complaints alleging civil rights violations must be construed ***especially*** liberally.") (emphasis added); *cf. Weinstein v. Albright*, 261 F.3d 127, 132 (2d Cir. 2001) ("[The mandate to construe pleadings liberally] . . . is ***especially*** true when dealing with civil rights complaints like this one.") (emphasis added).

Practice Tip: This rule is neither well known nor often applied.

QUESTION 2: DO ANY OF THE DEFECTS IN THE CLAIMS DEPRIVE THE COURT OF SUBJECT-MATTER JURISDICTION?

Hypothetical 5: You represent the defendant. You strongly suspect that, in addition to failing to state a claim, the plaintiff's sole cause of action also may be one over which the Court lacks subject-matter jurisdiction. You decide to move as a threshold matter for

dismissal under Fed. R. Civ. 12(b)(6), and in the alternative for dismissal under Fed. R. Civ. P. 12(b)(1). Smart move?

Answer: Yes and no. Keep the alternative ground for dismissal but switch the order of the grounds.

Rule: Lack of subject-matter jurisdiction is a threshold inquiry. Fed. R. Civ. P. 12(h)(3). As a result, if the Court lacks subject-matter jurisdiction over a claim, "it lacks the authority to evaluate the pleading sufficiency of his Complaint under Fed. R. Civ. P. 12(b)(6)." *Silver v. Campbell*, 16-CV-0911, 2017 WL 4011259, at *6 (N.D.N.Y. Sept. 11, 2017) (Suddaby, C.J.).

Practice Tip: Remember three rules with regard to motions to dismiss for lack of subject-matter jurisdiction:

(1) A district court may look to evidence outside of the pleadings on such a motion. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

(2) The plaintiff bears the burden of proving subject-matter jurisdiction. *Makarova*, 201 F.3d at 113.

(3) Dismissals for lack of subject-matter jurisdiction must be without prejudice. *Katz v. Donna Karan Co., L.L.C.*, 872 F.3d 114, 121 (2d Cir. 2017).

Examples of Grounds Giving Rise to a Motion Under Fed. R. Civ. P. 12(b)(1):

• Failure to exhaust administrative remedies with regard to claim for relief that is available under the Individuals with Disabilities Education Act, or claim under the Controlled Substances Act. *Cave v. E. Meadow Union Free Sch. Dist.,* 514 F.3d 240, 245-46 (2d Cir. 2008); *Washington v. Barr*, 925 F.3d 109 (2d Cir. 2019).

• Untimeliness of claim for refund of taxes under the Internal Revenue Code. *Maiman v. C.I.R.,* 182 F.3d 900 (2d Cir. 1999).

• Absolute immunity. *Eulett v. Spiotta*, 14-CV-06191, 2015 WL 9460566, at *4 (W.D.N.Y. Dec. 23, 2015).

Examples of Grounds Giving Rise to a Motion Under Fed. R. Civ. P. 12(b)(6):

• Failure to exhaust administrate remedies or untimeliness with regard to a claim under Title VII or a claim under the Prison Litigation Reform Act. *Ft. Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1851 (2019); *Downey v. Runyon*, 160 F.3d 139, 145 (2d Cir. 1998); *Berry v. Kerik,* 366 F.3d 85, 87 (2d Cir. 2004) ("[A]dministrative exhaustion [under the PLRA] is not a jurisdictional predicate.").

• Res judicata, legislative immunity, prosecutorial immunity, or judicial immunity as to any claims. *Thompson v. Cnty. of Franklin*, 15 F.3d 245, 253 (2d Cir. 1994); *State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71, 77, n.4 (2d Cir. 2004); *Shmueli v. City of New York*, 424 F.3d 231, 236 (2d Cir. 2005); *Butcher v. Wendt*, 975 F.3d 236, 241 (2d Cir. 2020).

Examples When Answer Depends:

• Answer as to lack of standing depends on whether lack of standing applies to only this particular plaintiff. *Rent Stabilization Ass'n of New York City v. Dinkins*, 5 F.3d 591, 594 (2d Cir. 1993).

Examples When Answer Undecided or Unclear:

• Answer undecided as to sovereign immunity. *Compare Carver v. Nassau Cnty. Interim Fin. Auth.*, 730 F.3d 150, 156 (2d Cir. 2013) *with Dorking Genetics v. United States*, 76 F.3d 1261, 1264 (2d Cir. 1996).

• Answer unclear as to dismissal based on arbitration agreement. *See, e.g., Veliz v. Collins Bldg. Servs., Inc.,* 10-CV-06615, 2011 WL 4444498, at *3 (S.D.N.Y. Sept. 26, 2011) (citing case characterizing this question as "enigmatic" and declining to answer it because "[t]he parties have brought their motions under Rule 12(b)(6), no party objects to the application of Rule 12(b)(6), and, in any event, the result here would be the same under nearly any of the available mechanisms").

QUESTION 3: DO ANY OF YOUR CHALLENGES DEPEND ON DOCUMENTS OUTSIDE THE FOUR CORNERS OF THE PLEADING?

Hypothetical 6: You represent the defendant. The plaintiff has filed a complaint that attaches Exhibit A, references (but doesn't attach) Policy B, and heavily relies on (but doesn't attach or reference) Contract C. In your memorandum of law, what can you rely on?

Answer: All three.

Rule: There are four exceptions to the "four corners" rule (listed below).

Exception 1: Documents Attached to the Pleading Being Challenged (e.g., Complaint or Answer)

• Only one requirement: attachment. *See* Fed. R. Civ. P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.").

Practice Tip: A movant is able to rely on any contradictions between a pleading's allegations and its attachments. *See, e.g., Blue Tree Hotels Inv. (Canada), Ltd. v.*

Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 222 (2d Cir.2004) (finding that allegation was "belied" by letters attached to the complaint).

Exception 2: Documents Not Attached to the Pleading but Incorporated by Reference in It

• Four requirements: (1) the document is referenced in the pleading; (2) the document was provided by the parties; (3) the parties do not dispute the document's authenticity or accuracy; and (4) there is no clear dispute of material fact regarding the document's relevance.

• Examples include emails, prison misbehavior reports, and prison-disciplinary-hearing disposition sheets. *See DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (considering emails incorporated by reference in complaint but not others not incorporated); *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004) (considering prison misbehavior report and prison-disciplinary-hearing disposition sheet).

Practice Tip: Note that these documents do not include those attached to an answer when a complaint is being challenged (and no other exception applies). *See Lively v. WAFRA Investment Advisory Group, Inc.*, 4 F.4th 293 (2d Cir. 2021) ("[T]he district court erred by relying on several documents attached to Defendants' answer in deciding their Rule 12(c) motion without converting it into a motion for summary judgment as required by Rule 12(d).").

Exception 3: Documents that, Although Not Incorporated by Reference in a Pleading, Are "Integral" to It

• Five requirements: (1) the pleading relies heavily on the document's terms and effect; (2) the party either possessed the document or knew about it when he or she prepared the pleading; (3) the document was provided by the parties; (4) the parties do not dispute the document's authenticity or accuracy; and (5) there is no clear dispute of material fact regarding the document's relevance.

See DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010) ("Where a document is not incorporated by reference, the court may neverless consider it where the complaint relies heavily upon its terms and effect, thereby rendering the document 'integral' to the complaint. . . . However, even if a document is 'integral' to the complaint, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document. It must also be clear that there exist no material disputed issues of fact regarding the relevance of the document.") (internal quotation marks and citations omitted); *Rothman v. Gregor*, 220 F.3d 81, 88-89 (2d Cir. 2000) ("For purposes of a motion to dismiss, we have deemed a complaint to include . . . documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit."); *Cortec Indus. Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) ("Where plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated.").

• Examples include everything from e-mails to contracts to prison-disciplinary-conviction reversals. *See L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (considering e-mails that L-7 had sent or received as "integral" to the negotiation exchange that it identified as the basis for its complaint); *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004) (considering prison-disciplinary-conviction reversal order as "integral to [plaintiff's] ability to pursue" his cause of action); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-54 (2d Cir. 2002) (considering contracts as "integral" to complaint where complaint "relie[d] heavily upon [their] terms and effect" but not considering trade association codes); *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir.1995) (per curiam) (considering agreement between defendant and a third-party as "integral" to amended complaint).

Exception 4: Any Matter of Which the Court Can Take Judicial Notice Pursuant to Fed. R. Evid. 201 *for the Factual Background of the Case*

• Three requirements: (1) the matter is generally known within the Court's territorial jurisdiction; (2) the matter can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned; and (3) the matter is not relied on or used as a basis for the decision, but is used simply for background.

> *See* Fed. R. Evid. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); *Mangiafico v. Blumenthal,* 471 F.3d 391, 398 (2d Cir. 2006) ("[R]eference to a letter attached to the state's motion to dismiss was not erroneous because the court did not rely on the letter as a basis for its decision but simply referred to it for background."); *Hayden v. County of Nassau*, 180 F.3d 42, 54 (2d Cir.1999) ("[When] the court simply refers to supplementary materials, but does not rely on them or use them as a basis for its decision, the 12(b)(6) motion is not converted into a motion for summary judgment.").

• Two requirements of "background" evidence: (1) it does not involve a disputed matter; and (2) it aids understanding of a relevant matter. *See* Fed. R. Evid. 401, Advisory Committee Notes: 1972 Proposed Rules ("Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category.").

• Examples include state court records, other actions' docket sheets, case law, statutes, media reports, letters, Offers of Purchase, Joint Proxy Statements. *See Roberts v. Babkiewicz*, 582 F.3d 418, 419-20 (2d Cir. 2009) (taking notice of Superior Court records showing that nolle prosequi occurred on May 25, 2005, the same day as the plaintiff's guilty plea, in reviewing district court's decision of the defendant's motion for judgment on the pleadings); *Staehr v. Hartford Fin. Servs. Group, Inc.,* 547 F.3d 406, 425 (2d Cir. 2008) (considering "media reports, state court complaints, and regulatory filings");

Mangiafico v. Blumenthal, 471 F.3d 391, 398 (2d Cir.2006) (taking notice of docket sheet in another action); *Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006) (taking notice of a letter attached to the state's motion to dismiss); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998) ("It is well established that a district court may rely on matters of public record in deciding a motion to dismiss under Rule 12(b)(6), including case law and statutes."); *Kramer v. Time Warner, Inc.,* 937 F.2d 767, 774 (2d Cir. 1991) (considering an extraneous Offer to Purchase and Joint Proxy Statement).

Practice Tip: The common meaning of the term "to use a document for background" is to consider a document to establish merely the fact of its existence, not to establish the truth of the matters asserted therein. *See Kramer v. Time Warner, Inc.,* 937 F.2d 767, 774 (2d Cir. 1991) (considering an extraneous Offer to Purchase and Joint Proxy Statement to establish the presence of what the document stated, not to establish the veracity or truthfulness of the content itself); *Staehr v. Hartford Fin. Servs. Group, Inc.*, 547 F.3d 406, 425 (2d Cir. 2008) (taking judicial notice of the fact that "media reports, state court complaints, and regulatory filings" had been publicly asserted).

De Facto Exception 5: A *Pro Se* Plaintiff's Papers in Response to a Motion to Dismiss to the Extent They Are Consistent with the Factual Allegations of the Complaint

• *Drake v. Delta Air Lines, Inc.,* 147 F.3d 169, 170 n. 1 (2d Cir. 1998) (per curiam); *Gill v. Mooney*, 824 F.2d 192, 195 (2d Cir. 1987).

Three Points to Remember About Conversion to a Motion for Summary Judgment:

Point 1: For conversion to occur, all that is required is that the parties have been given (1) advance notice and (2) a reasonable opportunity to present "all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). As a result, the motion to dismiss need not be labeled as arising also under Fed. R. Civ. P. 12(d) or Fed. R. Civ. P. 56 (for example, as an alternative to arising under Fed. R. Civ. P. 12(b)(6)). *See Fahs Const. Group, Inc. v. Gray*, 10-CV-0129, 2012 WL 2873532, *4 (N.D.N.Y. 2012) (Suddaby, J.) (considering plaintiff's request for conversion despite the fact that the defendant's motion to dismiss was also not labeled under either Rule 12(d) or Rule 56).

Point 2: The absence of formal notice may be excused if (1) the absence is harmless or (2) the parties were otherwise apprised of the conversion or the likelihood of conversion by less formal or direct means and had a sufficient opportunity to present the materials relevant to a summary judgment motion.

See Hernandez v. Coffey, 582 F.3d 303, 307 (2d Cir. 2009) ("Ordinarily, formal notice is not required where a party should reasonably have recognized the possibility that the motion might be converted into one for summary judgment and was neither taken by surprise nor deprived of a reasonable opportunity to meet facts outside the pleadings. . . . In the case of a pro se party, however, notice is

particularly important because the pro se litigant may be unaware of the consequences of his failure to offer evidence bearing on triable issues.") (internal quotation marks and citations omitted); *Reliance Ins. Co. v. Polyvision Corp.*, 474 F.3d 54, 57 (2d Cir. 2007) ("[W]e find no error here because it is clear from the record before us that RIC knew additional factual considerations were being considered and, in fact, responded with its own evidentiary submissions. . . . In addition, RIC did not object to the procedure the district court used. Even if we found error, it must be acknowledged that the error would not disadvantage RIC."); *Gurary v. Winehouse*, 190 F.3d 37, 43 (2d Cir. 1999) ("In this case, it was plaintiff who submitted the affidavit relied upon by the district court and who thus invited Judge Stanton to rely not only on the complaint, but upon the more elaborate explication of plaintiff's grievance contained in his affidavit. He certainly cannot be heard to claim that he was surprised when the district court accepted his invitation."); *Groden v. Random House, Inc.*, 61 F.3d 1045, 1053 (2d Cir.1995) (excusing failure of explicit notice because, in part, "[the non-moving party] had ample opportunity to present evidence outside the pleadings, and in fact he did so.").

Point 3: Either party may trigger conversion. *See, e.g., Guray*, 190 F.3d at 42-43 (holding that the defendant's motion to dismiss should have been converted where the plaintiff adduced an affidavit in opposition to the motion).

Practice Tip: Beware that conversion may also be *sua sponte*. This is because what triggers the conversion is the Court's consideration of matters outside the pleadings in evaluating a challenge to the sufficiency of the pleader's claim. *See* Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."). Indeed, some courts made such a conversion where neither party has introduced extra-pleading material in conjunction with the motion (but the material was already on file with the court). *See, e.g., Restivo v. Conservative Party of the State of New York*, 391 F. Supp. 813, 815 (S.D.N.Y. 1975) (treating motions to dismiss as motions for summary judgment where the motions to dismiss were based in part upon affidavits and in part upon information developed at a hearing on a motion for a preliminary injunction).

QUESTION 4: HAVE THE PLEADINGS CLOSED?

Reminder: Pleadings include an answer to a complaint, an answer to a counterclaim, an answer to a crossclaim, an answer to a third-party complaint, or a reply to an answer (if the court orders one). Fed. R. Civ. P. 7(a)(2),(3),(4),(6),(7).

Hypothetical 7: You represent the defendant. After filing your answer, you look again at it and notice all the facts you were able to admit without weakening your client's case; you realize that a strong ground exists on which to move to dismiss the plaintiff's complaint for

failure to state a claim. Should you file a motion under Fed. R. Civ. P. 12(b)(6)?

Answer: No, but you can file a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c).

Rule: "The standard for granting a Rule 12(c) motion for judgment on the pleadings [filed after the pleadings are closed] is identical to that of a Rule 12(b)(6) motion for failure to state a claim." *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001) (collecting cases); *accord, Cleveland v. Caplaw Enters.*, 448 F.3d 518, 521 (2d Cir. 2006). The only difference between the two motions is that, on a motion for judgment on the pleadings, in addition to considering the documents described above in Question 3 of this Outline, the Court also considers the responsive pleading. *See Roberts v. Babkiewicz*, 582 F.3d 418, 419 (2d Cir. 2009) ("Because this matter comes to us on appeal from a judgment on the pleadings, we rely on the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case.").

Note: Although a grant of a motion for judgment on the pleadings in its entirety is a final judgment on the merits for purposes of Fed. R. Civ. P. 54(b), a grant of a partial judgment on the pleadings is interlocutory, requiring certification under Fed. R. Civ. P. 54(b) for an appeal. *See Shrader v. Granninger*, 870 F.2d 874, 878-80 (2d Cir. 1989) (dismissing an appeal on the ground that the district court's certification was an abuse of discretion after the district court granted partial judgment on the pleadings and certified it for immediate appeal under Rule 54(b)).

Practice Tip: Generally, a party can raise this defense not only after the filing of an answer but *at trial*. *See* Fed. R. Civ. P. 12(h)(2) ("Failure to state a claim upon which relief can be granted . . . may be raised: (A) in any pleading allowed or ordered under Rule 7(a); (B) by a motion under Rule 12(c); or (C) at trial."). However, in this District, Pretrial Scheduling Orders routinely set deadlines for dispositive motions in advance of trial. Furthermore, district courts may enforce such pretrial orders in a way that effectively creates an exception to Fed. R. Civ. P. 12(h)(2)(C). *See, e.g., Xcoal Energy & Resources v. Bluestone Energy Sales Corp.*, 18-CV-0819, 2021 WL 1170374, at *28-30 (D. Del. March 29, 2021); *Contreras v. City of Los Angeles*, 11-CV-1480, 2012 WL 12886488, at *2-3 (C.D. Cal. June 22, 2012).

Hypothetical 8: Same facts as in Hypothetical 7 but you realize that you can make an alternative argument in your motion for judgment on the pleadings if you cite a factual allegation in your own answer. You can do that, right?

Answer: No.

Rule: On a motion for judgment on the pleadings, the defendant generally may not use its own answer (e.g., to "pull himself up by his own bootstraps"). Rather, the defendant's

answer may be used by a plaintiff requesting judgment on his or her claim(s) based on the admissions in the answer (construing all factual allegations and inferences in favor of the non-movant).

Hypothetical 9: You represent the defendant. The plaintiff is suing for breach of an employment contract. In your answer, you assert a counterclaim for tortious interference with prospective economic advantage, and support that counterclaim with an attachment of emails. The emails were never attached to the plaintiff's complaint, referenced in that complaint, or heavily relied on in that complaint. However, you realize that, if considered with regard to the plaintiff's claim for breach of contract, the emails should result in a judgment for you on that claim. Can you rely on your own attachment to your answer in a motion for judgment on the pleadings?

Answer: Yes (surprisingly).

Rule: "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes. Fed. R. Civ. P. 10(c). An attachment to an answer may be considered on a defendant's motion for judgment on the pleadings with regard to the plaintiff's complaint even if the attachment was submitted merely to support the defendant's counterclaim. *See L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) ("There is no question that the email exhibits were 'attached' to Old Navy's Answer, even if they were only 'part of' Old Navy's Counterclaims.").

Hypothetical 10: You represent the plaintiff and decide that one of the defenses in the answer is insufficient. You would like to challenge it. You can do that by way of Fed. R. Civ. P. 12(c), right?

Answer: No.

Rule: If you are a plaintiff who is challenging the sufficiency of a defense in an answer, don't proceed by way of Fed. R. Civ. P. 12(c) but by way of Fed. R. Civ. P. 12(f) ("The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act: (1) on its own; or (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.").

QUESTION 5: DO THE DEFECTS IN THE PLEADING REGARD THE CLAIM'S PLEADING SUFFICIENCY OR ITS LEGAL COGNIZABILITY?

Hypothetical 11: You represent the defendant, a state actor, against whom the plaintiff has asserted a claim under 42 U.S.C. § 1983 ("Every person who, under color of any statute . . . of any State . . . , subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . "). You realize that the complaint alleges merely a violation of New York State's Freedom of Information Law ("FOIL"). Nowhere in the

complaint does the plaintiff allege a violation of "the Constitution [or] laws" of the United States! You can move to dismiss for lack of fair notice under Fed. R. Civ. P. 12(b)(6), right?

Answer: Yes and no. You can move to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). However, the defect in a Section 1983 claim that is based on a violation of state law goes to the legal cognizability of the claim under Fed. R. Civ. P. 12(b)(6), not lack of fair notice under Fed. R. Civ. P. 8(a)(2) (which challenge is properly brought under Fed. R. Civ. P. 12(b)(6)).

• *See, e.g., Pollnow v. Glennon*, 757 F.2d 496, 501 (2d Cir.1985) ("[A] violation of state law is not cognizable under § 1983."); *Fusco v. Cnty. of Nassau*, 492 F. Supp. 3d 71, 80 (E.D.N.Y. 2020) ("Plaintiff's § 1983 claim is dismissed to the extent it is premised on violations of state law because state law claims are not cognizable under § 1983."); *Reed v. Medford Fire Dep't, Inc.*, 806 F. Supp. 2d 594, 607 (E.D.N.Y. 2011) ("[T]he Second Circuit has held that a plaintiff cannot maintain a cause of action under Section 1983 when the alleged deprivation of due process is based on the violation of state law. . . . Indeed, it is well-settled in New York that section 1983 is not a proper vehicle for bringing a FOIL claim.") (internal quotation marks omitted).

Rule: A dismissal for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6) can be based on one or both of two grounds:

(1) a challenge to the "sufficiency of the pleading" under Fed. R. Civ. P. 8(a)(2) ("A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."), which is properly brought by a motion under Fed. R. Civ. P. 12(b)(6); or

(2) a challenge to the legal cognizability of the claim under Fed. R. Civ. P. 12(b)(6), which "a lineal descendent of the common law [response of a] general demurrer," pursuant to which "[t]he party who demurred admitted all the well pleaded facts in his opponent's pleading and challenged the plaintiff's right to any recovery on the basis of those facts . . . ," *see* Wright & Miller, Fed. Prac. & Proc. § 1355 (3d ed. 2021).

• This distinction is real. *See Kittay v. Kornstein*, 230 F.3d 531, 541 (2d Cir. 2000) (distinguishing between a failure to meet Rule 12[b][6]'s requirement of stating a cognizable claim and Rule 8[a]'s requirement of disclosing sufficient information to put defendant on fair notice), *accord*, *Wynder v. McMahon*, 360 F.3d 73, 80 (2d Cir.2004) ("There is a critical distinction between the notice requirements of Rule 8(a) and the requirement, under Rule 12(b)(6), that a plaintiff state a claim upon which relief can be granted."); *cf. Phelps v. Kapnolas*, 308 F.3d 180, 187 (2d Cir. 2002) ("Of course, none of this is to say that a court should hesitate to dismiss a complaint when the plaintiff's allegation . . . fails as a matter of law.") (citation omitted).

Why This Matters:

(1) Because observing the distinction helps you find and cite factually analogous cases.

claim! /30 FOIL /30 cogniz! /30 1983 = 12 cases; *Reed* ("[I]t is well-settled in New York that section 1983 is not a proper vehicle for bringing a FOIL claim.") is fifth one.

claim! /30 FOIL /30 "fair notice" /30 1983 = 0 cases

claim! /30 FOIL /30 "state a claim" /30 1983 = 22 cases; *Reed* is tenth one

(2) Because, if defect is substantive, leave to amend may not be appropriate. *Pauk v. Kearns*, 21-CV-0622, 2021 WL 1985884, at *3 (W.D.N.Y. May 18, 2021).

Practice Tip: If the defect relates to legal cognizabilility, then consider arguing that fact as a threshold matter (and then arguing the lack of fair notice in the alternative).

Examples of Defects Based on the Legal Cognizability of the Claim:

• A claim for monetary relief against an individual in his or her *individual* capacity under Title VII of the Americans with Disabilities Act or Section 504 of the Rehabilitation Act. *Patterson v. Cnty. of Oneida*, 375 F.3d 206, 221 (2d Cir.2004); *Garcia v. S.U.N.Y. Health Sci. Ctr. of Brooklyn*, 280 F.3d 98, 107 (2d Cir. 2001).

• A discrimination claim against a labor union as an employer under Title VII that has fewer than 15 employees. *Yerdon v. Henry*, 91 F.3d 370, 375 (2d Cir. 1996).

• A section 1983 claim based on a violation of the Ninth Amendment. *In re State Police Litig.*, 888 F. Supp. 1235, 1258 (D.Conn. 1995).

• A private cause of action under a statute that does not permit one:

The Health Insurance Portability and Accountability Act. *Meadows v. United Serv., Inc.*, 963 F3d 240, 244 (2d Cir. 2020).

A federal criminal statute. *Sheehy v. Brown*, 335 F. App'x 102, 104 (2d Cir. 2009).

Title IX of the Education Amendments of 1972 to the extent the claim is based on the alleged disparate impact of a policy. *Xiaolu Peter Yu v. Vassar College*, 97 F. Supp.3d 448, 461 (S.D.N.Y. 2015).

Relationship Between This Rule and Three Other Federal Rules of Civil Procedure:

(1) If your challenge is the lack of particularity of a claim of fraud or mistake, then you can also rely on Fed. R. Civ. P. **9(b)** in your motion to dismiss under Fed. R. Civ. P. 12(b)(6).

(2) If your challenge is the lack of compliance with Fed. R. Civ. P. 10 (requiring caption, naming of parties, and numbered paragraphs each limited to a single set of circumstances), then you can move for a more-definite statement under Fed. R. Civ. P. **12(e)**. Of course, if you are arguing that the defects under Fed. R. Civ. P. 10 deprive you of fair notice under Fed. R. Civ. P. 8(a)(2), then you can make that argument in your motion to dismiss under Fed. R. Civ. P. 12(b)(6).

(3) If your challenge is that some of the allegations are repetitious, unnecessary or irrelevant, then you can (and probably should) instead move to strike under Fed. R. Civ. P. **12(f)** ("The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter"); however, be prepared to show prejudice.

QUESTION 6: ARE YOU CHALLENGING THE LACK OF SPECIFICITY RATHER THAN THE LACK OF FACTUAL ALLEGATIONS PLAUSIBLY SUGGESTING A CLAIM?

Hypothetical 12: You represent a defendant corporation. The plaintiff claims she was denied overtime compensation in violation of the Fair Labor Standards Act ("FLSA"). The complaint alleges the plaintiff's employment positions and dates of employment, that a dozen times her supervisors told her to omit any overtime hours from her weekly timesheets, and that (as a result) she understated the hours she worked in those pay periods. However, the plaintiff does not allege the approximate number of uncompensated overtime hours or provide a log of all hours worked. You want to base your motion to dismiss on this omission, calling it a fatal lack of specifics necessary to provide fair notice. Time well spent?

Answer: No. The plaintiff must only recall sufficient facts based on her memory and experience to give plausibility to her general allegation that she was regularly denied overtime compensation, and she has done so. *Brown v. Hearst Corp.*,14-CV-1220, 2015 WL 5010551, at *3 (D. Conn. Aug. 24, 2015).

Note: This decision is not saying that enough specifics were provided, but that the issue isn't specifics but plausibility (based on facts alleged). In other words, could a jury rationally render a verdict for the plaintiff based on these facts if they were proved beyond a preponderance of the evidence at trial? (The relationship between plausibility and reasonableness will be explained in Question 7.)

Rule: "Details" or "specifics" are not required. All that is required is enough fact to render the claim plausible.

See Bell Atlantic v. Twombly, 550 U.S. 544, 545, 570 (2007) (Souter, J.) ("[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need ***detailed*** factual allegations . . . . Here, the Court is not requiring heightened fact pleading of ***specifics***, but only enough facts to state a claim to relief that is plausible on its face.") (emphasis added), *accord, In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir.2007) ("While *Twombly* does not require heightened fact pleading of ***specifics***, it does require enough facts to 'nudge [plaintiffs'] claims across the line from conceivable to plausible.'") (quoting *Twombly*, 550 U.S. at 570; emphasis added).

Tension Inherent in Rule 8(a)(2):

• Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a pleading contain "a ***short and plain*** statement of the claim ***showing*** that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) (emphasis added).

• This tension between requiring only a "short and plain statement" but then requiring that the statement "show[]" an entitlement to relief is at the heart of disagreements that occur regarding the pleading standard established by Fed. R. Civ. P. 8(a)(2). *Cf. Twombly*, 550 U.S. at 545 ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.") (internal quotation marks omitted).

• The Supreme Court has held that, by requiring the above-described "showing," the pleading standard under Fed. R. Civ. P. 8(a)(2) requires that the pleading contain a statement that "give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Jackson v. Onondaga Cnty.*, 549 F. Supp. 2d 204, 212, n.17 (N.D.N.Y. 2008) (McAvoy, J.) (citing Supreme Court cases).

• The Supreme Court has explained that such fair notice has the important purpose of "enabl[ing] the adverse party to answer and prepare for trial" and "facilitat[ing] a proper decision on the merits" by the court. *Jackson*, 549 F. Supp. 2d at 212, n.18 (citing Supreme Court cases).

Practice Tip: Do not cite *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."), ***or its progeny*** (i.e., any case issued before May 21, 2007, or any case that relies on the language "appears beyond doubt" or "no set of facts").

Reason for "Retirement" of the *Conley* Standard:

• Justice Souter's expressed reason for "retir[ing]" this standard is that "[t]he phrase is best forgotten as an incomplete, ***negative gloss*** on an

accepted pleading standard." *Twombly*, 550 U.S. at 563 ("[A]fter puzzling the profession for 50 years, this famous observation has earned its retirement.") (emphasis added).

• The reason it is a "negative gloss," explained Justice Souter, is that, rather than sticking to the then-accepted pleading standard (requiring "a reasonably founded hope" that the plaintiff would be able to make a case), it focused on the circumstances in which a motion to dismiss may *not* be granted, and then it too-narrowly characterized those circumstances (describing the "breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival"). *Id.* at 563 & n.8 (citing Supreme Court cases going back to 1961).

Hypothetical 13: You represent one of the defendants, a group of national magazine publishers. The plaintiff is a bankrupt national magazine wholesaler alleging that the defendants engaged in antitrust conspiracy in violation of Sherman Act to drive it out of business. You conclude that, based on the complaint's own factual allegations, there is a more plausible explanation for the events than the defendant's liability: the fact that (especially because a publisher has no financial interest in eliminating a distributor) each of the defendants rationally and *unilaterally* stopped shipping magazines to the plaintiff rather than pay the plaintiff's distribution surcharge of $.07 for each magazine copy that the plaintiff received and distributed, regardless of whether the retailer sold the copy. You want to base your motion to dismiss on this fact. Is that okay?

Answer: No, the mere fact that there is a more plausible explanation for the events does not mean there has been a failure to state a claim. *See Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012) ("The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion. . . . A court ruling on such a motion may not properly dismiss a complaint that states a plausible version of events merely because the court finds a different version more plausible.").

Complication: As a factor in determining plausibility, a court may consider the fact that there is "an obvious alternative explanation," other than the defendant's liability, for the events alleged. *Twombly*, 550 U.S. at 567.

How Do Dictionaries Define "Plausibility"?

• Color code: green is good, purple is problematic, red is bad

• *Webster's New College Dictionary* at 865 (Houghton Mifflin Harcourt 3d ed. 2008) ("[Lat. *Plausibilis*, deserving applause. <*plaudere*, to applaud.] 1. Seemingly or apparently valid, likely, or acceptable <a *plausible* motive> 2. Giving a deceptive impression of truth, acceptability or reliability: SPECIOUS. 3. Disingenuously smooth: fast talking.") (emphasis in original)

Note: Validity + Truth = Soundness

• *Webster's Ninth New Collegiate Dictionary* at 902 (Merriam-Webster 1991) ("[L *Plausibilis*, worthy of applause, fr. *plausus* pp. of *plaudere*] (1565) 1: superficially fair, reasonable, or valuable but often specious <a ~ pretext> 2: superficially pleasing or persuasive <a swindler . . . then a quack, then a smooth, ~ gentlemen – R. W. Emerson> 3: appearing worthy of belief <his argument was both powerful and ~>") (emphasis in original).

• *Oxford American Dictionary* at 510 (Oxford Univ. Press 1980) ("1. (of a statement) seeming to be reasonable or probable but not proved. 2 (of a person) persuasive but deceptive.").

• *Cambridge Dictionary* (https://dictionary.cambridge.org/us/dictionary/english/plausible) (last visited Oct. 14, 2021) ("seeming likely to be true, or able to be believed: *a plausible explanation/excuse*") (emphasis in original)

• *Collins Dictionary* (https://www.collinsdictionary.com/us/dictionary/english/plausible) ("An explanation or statement that is plausible seems likely to be true or valid. *A more plausible explanation would seem to be that people are fed up with the administration*. Synonyms: believable, possible, likely, reasonable.") (emphasis in original)

How Does the Supreme Court Define "Plausibility"?

• Plausible > Possible or Speculative. *See Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the ***speculative*** level . . . .") (emphasis added).

• Plausible < Probable or Likely. *See Twombly*, 550 U.S. at 556 ("Asking for plausible grounds to infer an agreement does not impose a ***probability*** requirement at the pleading stage . . . .") (emphasis added).

• Plausible = Reasonable. *See Twombly*, 550 U.S. at 556 ("Asking for plausibly grounds . . . simply calls for enough fact to raise a ***reasonable*** expectation that discovery will reveal evidence of illegal agreement.") (emphasis added); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the ***reasonable*** inference that the defendant is liable for the misconduct alleged.") (emphasis added).

Proof Required to Show Something		Whether Something Happened
Beyond a Reasonable Doubt (98-99%)		
↑		
Clear and Convincing Evidence (75-90%)		
↑		
Preponderance of the Evidence (50%)	≠	Probable / Likely
		↑
		(it matters but is not dispositive if there are two theories here, even if one is more plausible than the plaintiff's theory)
		↑
		Possible / Speculative

Practice Tip: Generally, the following terms are synonymous in a motion to dismiss for failure to state a claim: "facts," "allegations," "factual allegations," "material facts," "material allegations," "well-pleaded facts," "well-pleaded allegations," and "well-pleaded factual allegations." However, the term "factual allegations" might be the most preferable, because it concisely invokes the crux of the legal standard and doesn't risk wandering into the world of evidence.

QUESTION 7: IF YOU ARE ALTERNATIVELY MOVING FOR SUMMARY JUDGMENT, HAVE YOU CLEARLY DIFFERENTIATED THE GROUNDS FOR EACH MOTION?

Hypothetical 14: You represent the defendant. During discovery, you realize that grounds exist for both a motion to dismiss for failure to state a claim and a motion for summary judgment with regard to some of the plaintiff's claims. You decide it would to be too cumbersome to constantly distinguish between the two grounds. You recall this CLE and the point made about the failure to "show" an entitlement to relief under Fed. R. Civ. P. 8(a)(2) ("A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."), which may asserted by way of Fed. R. Civ. P. 12(b)(6). That word is also often used in motions for summary judgment (e.g., "the record evidence doesn't show . . ."). So you decide to simply use the phrase "Plaintiff has not shown." Well said, right?

Answer: No, because the distinction is still blurry. (E.g., What about when the defect does not go to a claim's pleading sufficiency but its cognizability?) This may seem like a trivial problem but remember that a motion must "state with particularity" the grounds for seeking the order, and "specify" the rule(s) on which it is based. *See* Fed. R. Civ. P. 7(b)(1)

("A request for a court order must be made by motion. The motion must: (A) be in writing unless made during a hearing or trial; (B) state with particularity the grounds for seeking the order; and (C) state the relief sought."); N.D.N.Y. L.R. 7.1("When a moving party makes a motion based upon a rule or statute, the moving party must specify in its moving papers the rule or statute upon which it bases its motion.").

> Practice Tip: When asserting argument based on Fed. R. Civ. P. 12(b) and alternatively on Fed. R. Civ. P. 56, one suggestion is to use the phrase, "Plaintiff neither alleges facts plausibly suggesting, nor adduces admissible record evidence establishing, that . . . ." (Be wary of substituting "showing" for "establishing," because of the ambiguity in the word "showing." For example, the reader might remember the phrase "showing that the pleader is entitled to relief" in Fed. R. Civ. P. 8(a)(2).)

Certain Similarity Between Standards:

• The two standards are generally regarded as distinct; however, they are sometimes analogized. *See, e.g., Fletcher v. Goord*, 07-CV-0707, 2008 WL 4426763, at *14 (N.D.N.Y. Sept. 25, 2008) (Lowe, M.J.) ("District courts in the Second Circuit have also dismissed similar Eighth Amendment sentence-miscalculation claims asserted by prisoners where the undisputed record facts of the case (on a motion for summary judgment) were analogous to the factual allegations of Plaintiff's Complaint in this action, which are assumed to be true for purposes of Defendants' motion to dismiss.").

• Common denominator is reasonableness. *Compare Twombly*, 550 U.S. at 556 ("Asking for plausibly grounds . . . simply calls for enough fact to raise a ***reasonable*** expectation that discovery will reveal evidence of illegal agreement.") (emphasis added) *and Iqbal*, 129 S. Ct. at 1949 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the ***reasonable*** inference that the defendant is liable for the misconduct alleged.") (emphasis added) *with Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986) (explaining that a dispute of material fact is "genuine" if "the [record] evidence is such that a ***reasonable*** jury could return a verdict for the [non-movant].") (emphasis added).

Type of Motion	**Motion to Dismiss**	**Motion for Summ. Judg.**
Facts Considered	Alleged facts assumed to be true	Material facts shown to be undisputed
Issue	Is a claim ***plausible***?	Would a judgment on that claim be ***rational***?

Hypothetical 15: You represent the plaintiff. Recently, on a defendant's motion for summary judgment, the Court dismissed some of the plaintiff's claims for failure to state a claim under Fed. R. Civ. P. 12(b)(6). You think about it: the defendant never labeled its motion as alternatively being one for summary judgment, and never cited Fed. R. Civ. P. 56. You're tempted to file a motion for reconsideration based on that ground. Time well spent?

Answer: No. You can always move for reconsideration, but this ground is without merit.

Rule: Conversion from a motion for summary judgment to a motion to dismiss for failure to state a claim is possible to the extent that the motion for summary judgment is based exclusively on the factual allegations of the opponent's pleading.

• *See Schwartz v. Compagnise General Transatlantique*, 405 F.2d 270, 273-74 (2d Cir. 1968) ("Where appropriate, a trial judge may dismiss for failure to state a cause of action upon motion for summary judgment."); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 250 (2d Cir.1985) ("Although Judge Weinstein relied on the affidavits submitted in support of the Rule 56 motion, and thus granted summary judgment, we believe it would have been equally proper to dismiss the civil rights count for failure to state a claim, pursuant to Rule 12(b)(6)."), *cert. denied*, 484 U.S. 918 (1987).

• *But see Rios-Campbell v. U.S. Department of Commerce*, 927 F.3d 21, 25 (**1st Cir.** 2019) ("Although a motion to dismiss for failure to state a claim sometimes may be converted into a motion for summary judgment, we know of no authority that allows for the reverse conversion of a summary judgment motion into a motion to dismiss for failure to state a claim.").

• In such a circumstance, the Court need not give prior notice to the party whose pleading is being analyzed. *Katz v. Molic*, 128 F.R.D. 35, 37-38 (S.D.N.Y. 1989).

• Conversion is also possible *sua sponte* without prior notice–if the opposing party is proceeding *in forma pauperis*. *See* 28 U.S.C. § 1915(e)(2)(B)(ii) ("Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim on which relief may be granted . . . .").

QUESTION 8: HAVE YOU REQUESTED DISMISSAL WITH OR WITHOUT PREJUDICE AND EXPLAINED WHY? WHAT ABOUT LEAVE TO AMEND (OR LEAVE TO MOVE TO AMEND)?

• Why does it matter?

Hypothetical 16: You represent the plaintiff. One of the claims that your client would like to bring was previously dismissed from another action "with prejudice." However, that

dismissal was pursuant to Fed. R. Civ. P. 12(b)(6), and was not based on any record evidence. You say to yourself, wait, if there was no record evidence, how could the dismissal have been "on the merits" for purposes of the doctrine of res judicata? If the doctrine doesn't apply, that means the plaintiff isn't precluded from asserting a cleaned-up version of the claim, despite the court's use of the words "with prejudice," right?

Reminder: (1) a final judgment on merits, (2) by a court of competent jurisdiction, (3) in a case involving the same parties or their privies, and (4) in a case involving the same cause of action.

Answer: No, the doctrine may apply.

Rule: A dismissal under Rule 12(b)(6) may result in res judicata, because such a dismissal is viewed as an adjudication "on the merits."

• *See, e.g., Exchange Nat'l Bank of Chicago v. Touche Ross & Co.,* 544 F.2d 1126, 1130-31 (2d Cir. 1976) ("[J]udgments under Rule 12(b)(6) are on the merits, with res judicata effects, whereas judgments under Rule 12(b)(1) are not."); *W.E. Hedger Transp. Corp. v. Ira S. Bushey & Sons, Inc.*, 186 F.2d 236, 237 (2d Cir. 1951) (treating as res judicata a prior decision dismissing a complaint before an answer had been filed based on defects in the allegations pleaded, which were treated as established); *Ramirez v. Brooklyn Aids Task Force*, 175 F.R.D. 423, 426 (E.D.N.Y. 1999) ("For res judicata purposes, a Rule 12(b)(6) dismissal is deemed to be a judgment on the merits . . . ."), *aff'd*, 164 F.3d 619 (2d Cir. 1998); *Mennella v. Office of Ct. Admin.*, 938 F. Supp. 128, 132 (E.D.N.Y. 1996) ("For purposes of res judicata, a dismissal pursuant to Rule 12(b)(6) is an adjudication on the merits."), *aff'd*, 164 F.3d 618 (2d Cir. 1998).

• *See, e.g., Federated Dept. Stores, Inc. v. Moitie*, 101 S. Ct. 2424, 2428, n.3 (1981) ("The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a judgment on the merits.") (internal quotation marks omitted; citing Supreme Court cases); *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996) ("[A] dismissal under Rule 12(b)(6) is a dismissal on the merits of the action–a determination that the facts alleged in the complaint fail to state a claim upon which relief can be granted."), *accord*, *Civic Ctr. Motors, Ltd. v. Mason St. Import Cars, Ltd.*, 387 F. Supp.2d 378, 380 (S.D.N.Y. 2005); *Nexans Wires S.A. v. Sark-USA, Inc.*, 319 F. Supp.2d 468, 470 (S.D.N.Y. 2004); *Martens v. Smith Barney, Inc.*, 190 F.R.D. 134, 137 (S.D.N.Y. 1999).

Practice Tip: Don't confuse the nature of the dismissal (on the merits) and the subject of analysis (not the merits). *See Hunt v. Mobil Oil Corp*., 410 F. Supp. 10, 14 (S.D.N.Y. 1975) ("The movants, however, in somewhat discursive fashion, have directed part of their argument to the merits of plaintiff's claims. This makes it necessary to state, what ordinarily is

accepted as hornbook law, that the merits of the claims set forth in the complaint are not at issue [on a motion to dismiss for failure to state a claim]; that the allegations of the complaint are assumed to be true for the purposes of this motion . . . .") (emphasis added), *aff'd*, 550 F.2d 68 (2d Cir. 1977).

• Whether to dismiss an action with prejudice or without prejudice for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is a discretionary decision.

See, e.g., Spain v. Ball, 928 F.2d 61, 62 (2d Cir. 1991) ("In his complaint, Spain alleged that he was denied his commission because he is a white male. Observing that the complaint did not allege facts supporting a claim of race or gender discrimination, the district court dismissed Spain's Title VII claim but granted him leave to replead. We believe the Title VII claim should have been dismissed with prejudice. . . . Accordingly, the dismissal of Spain's complaint is affirmed, and the judgment modified only insofar as it granted Spain leave to replead his Title VII claim."); *Shockley v. Vermont State Colleges*, 793 F.2d 478, 480-81 (2d Cir. 1986) ("Appellant's pendent state contract claims were dismissed without prejudice while appellant's cause of action under Section 1983 was dismissed for failure to state a claim."); *Winters v. Alza Corp.*, 690 F. Supp.2d 350, 357 (S.D.N.Y. 2010) ("A dismissal pursuant to Rule 12(b)(6) is, of course, a dismissal with prejudice."); *Martens*, 190 F.R.D. at 137 ("Granting a motion under 12(b)(6) would dismiss a claim with preclusive effect . . . .").

• Generally, this discretion to dismiss with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) is properly exercised when (a) the defects in the plaintiff's claims are substantive and not merely formal such that he or she is unable to correct the defects, or (b) when the plaintiff has already been afforded one or more opportunities to state such a claim in an amended complaint and has failed to do so.

See, e.g., Ruffolo v. Oppenheimer & Co., 987 F.2d 129, 131 (2d Cir.1993) ("Where it appears that granting leave to amend is unlikely to be productive, . . . it is not an abuse of discretion to deny leave to amend."), *accord, Brown v. Peters*, 95-CV-1641, 1997 WL 599355, at *1 (N.D.N.Y. Sept. 22, 1997) (Pooler, J.) ("[T]he court need not grant leave to amend where it appears that amendment would prove to be unproductive or futile.") (citation omitted); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) (denial not abuse of discretion where amendment would be futile); *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) ("The problem with Cuoco's causes of action is substantive; better pleading will not cure it. Repleading would thus be futile. Such a futile request to replead should be denied.") (citation omitted); *Cortec Indus., Inc. v. Sum Holding L.P*., 949 F.2d 42, 48 (2d Cir. 1991) ("Of course, where a plaintiff is unable to allege any fact sufficient to support its claim, a complaint should be dismissed with

prejudice.") (citation omitted); *Health-Chem Corp. v. Baker*, 915 F.2d 805, 810 (2d Cir.1990) ("[W]here . . . there is no merit in the proposed amendments, leave to amend should be denied").

See, *e.g.*, *Dyson v. N.Y. Health Care, Inc.*, 353 F. App'x 502, 503-04 (2d Cir. 2009) ("[T]he district court did not abuse its discretion by dismissing Dyson's third amended complaint with prejudice. . . . [T]he district court afforded Dyson three opportunities to file an amended complaint so as to comply with Rule 8(a)(2), and, despite these, she did not plead any facts sufficient to show that she was plausibly entitled to any relief."); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) ("Of course, where a plaintiff is unable to allege any fact sufficient to support its claim [i.e., despite having been given leave to replead its claim], a complaint should be dismissed with prejudice.").

• This rule applies even when the plaintiff is proceeding *pro se*.

See, e.g., Cuoco v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000) ("The problem with [*pro se* plaintiff's] Cuoco's causes of action [in her original complaint] is substantive; better pleading will not cure it. Repleading would thus be futile. Such a futile request to replead should be denied."); *Spain v. Ball*, 928 F.2d 61, 62 (2d Cir. 1991) ("Observing that the [*pro se* plaintiff's original] complaint did not allege facts supporting a claim of race or gender discrimination, the district court dismissed Spain's Title VII claim but granted him leave to replead. . . . [Spain] cannot allege any facts sufficient to support a Title VII claim against the Medical Service Corps, and his claim should therefore have been dismissed with prejudice."); *Black v. Vitello*, No. 20-1520-cv, 841 F. App'x 334, 336 (2d Cir. March 29, 2021) ("Amendment to the [original *pro se*] complaint would thus be futile, and so we find that the district court did not abuse its discretion in dismissing the case with prejudice."); *Powell v. Lab Corp.,* No. 19-215, 789 F. App'x 237, 239-40 (2d Cir. Oct. 4, 2019) (affirming district court dismissal with prejudice of original *pro se* complaint because of untimeliness and failure to allege element of a statutory claim); *Pugh-Perry v. N.Y.C. Human Resources Admin*., No. 09-2860, 402 F. App'x 588, 589 (2d Cir. Nov. 30, 2010) (affirming district court dismissal with prejudice of original *pro se* complaint because of untimeliness); *cf. Brown v. Peters*, 95-CV-1641, 1997 WL 599355, at *1 (N.D.N.Y. Sept. 22, 1997) (Pooler, J.) ("[T]he court need not grant [*pro se* plaintiff Brown] leave to [again] amend where it appears that amendment would prove to be unproductive or futile.").

Cf. McNeil v. U.S., 508 U.S. 106, 113 (1993) ("While we have insisted that the pleadings prepared by prisoners who do not have access to counsel be liberally construed . . . we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by

those who proceed without counsel."); *Faretta v. California*, 422 U.S. 806, 834, n. 46 (1975) ("The right of self-representation is not a license . . . not to comply with relevant rules of procedural and substantive law."); *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 477 (2d Cir.2006) (explaining that *pro se* status "does not exempt a party from compliance with relevant rules of procedural and substantive law") (citation omitted), *accord, Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir.1983).

Hypothetical 17: Same facts as in Hypothetical 16. However, the order of dismissal was silent on the with-or-without-prejudice issue (never using the words "with prejudice" or "without prejudice"). As a result, there is no longer an issue with regard to the plaintiff's right to assert a better-articulated version of the claim again, right?

Answer: No, there is still a res judicata issue.

Rule: "Unless the dismissal order states otherwise, . . . any dismissal not under this [Rule 41]--except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19--operates as an adjudication on the merits." Fed. R. Civ. P. 41(b); *see also Kern v. Hettinger*, 303 F.2d 333 (2d Cir. 1962) ("[I]n the view of the unequivocal language of Rule 41(b), and the absence of the words 'without prejudice' [in the order of dismissal on defendants' motion for summary judgment], we must and do decide that [a] dismissal [that is silent as to whether it is with or without prejudice is] on the merits and that it [is] intended to be on the merits.").

• The Second Circuit has at least twice expressly found that a Rule 12(b)(6) dismissal is "with prejudice" even when the district court does not use those words. *See Shockley v. Vermont State Colleges*, 793 F.2d 478, 488-81 (2d Cir. 1986) (observing that "Appellant's pendent state contract claims were dismissed without prejudice while appellant's cause of action under Section 1983 was dismissed for failure to state a claim," and then relying on a Sixth Circuit case for the point of law that a "court may presume an adjudication on the merits where district court fails to specify otherwise [even where the plaintiff is *pro se*]."); *Stern v. Gen. Elec. Co.*, 942 F.2d 472, 477, n.7 (2d Cir. 1991) (noting that, "[b]ecause the district court did not state that the dismissal was without prejudice, we assume that a dismissal with prejudice was intended," and then relying on a Fourth Circuit case for the point of law that "A district court's dismissal under rule 12(b)(6) is, of course, with prejudice unless it specifically orders dismissal without prejudice.").

• District courts in our Circuit regularly apply this point of law, even when doing so is based on other authority. *See, e.g., Carthaginian Fin. Corp. v. Skinner, Inc*., 05-CV-0003, 2005 WL 1388689, at *3 (D. Vt. June 3, 2005) ("It is well-settled in the Second Circuit that the dismissal of a complaint for failure to state a claim upon which relief can be granted is presumed to be on the merits, unless the record states otherwise . . . .") (citing three other Second Circuit cases); *Winters v. Alza Corp*., 690 F.Supp.2d 350, 357 (S.D.N.Y. 2010) ("There is an obvious logic to this result:

if, in analyzing [an] . . . issue, a federal court concludes that there is no legal possibility for a plaintiff to state a particular claim against a defendant, it would make little sense and would result in a waste of judicial resources to permit the plaintiff to try again . . . .").

Hypothetical 18: You represent the plaintiff. In preparing your opposition to the defendant's motion to dismiss for failure to state a claim, you acknowledge the validity of the defendant's arguments but believe the pleading defects are formal in nature, such that they may be cured through amendment. Because of time, you aren't able at the moment to cross-move for leave to amend under Local Rule 7.1(c). But you could definitely do so within 30 days. As a result, you decide to request that any dismissal be "with leave to move to amend within 30 days." Any problems?

Answer: Yes, two: (1) possible confusion of the ultimate grounds for dismissal, and (2) possible loss of subject-matter jurisdiction over the action before amendment.

See Wilmer v. Albany Cty. Police, 19-CV-1416, 2020 WL 137240, at *1-2 & n.2 (N.D.N.Y. Jan. 13, 2020) (Suddaby, C.J.) ("[T]he Court has difficulty understanding how, if it were to dismiss the Complaint now, it could properly be said to retain jurisdiction over the action so as to enable Plaintiff to file an Amended Complaint. After all, federal district courts possess subject-matter jurisdiction over actions, which is generally lost after the dismissal of the operative complaints in those actions, except with regard to ancillary jurisdiction over certain collateral matters (such as the award of attorney's fees and costs, the imposition of Rule 11 sanctions, and the enforcement of compliance with the terms of a settlement agreement that has been made part of the order of dismissal). The filing of a new operative pleading does not appear to be a collateral matter: rather, it appears to be what does or does not confer federal jurisdiction on the district court. Furthermore, the Court respectfully believes that acting as though it retains non-ancillary jurisdiction over a complaint-free action is not only unnecessary but confusing (e.g., often misleading a litigant or even a district court into believing that an action was dismissed pursuant to Fed. R. Civ. P. 41[b] and not Fed. R. Civ. P. 12[b][6] for purposes of 28 U.S.C. § 1915[g] after a plaintiff failed to comply with a court order to file an amended complaint correcting the pleading defects in an original complaint).") (citing cases).

See Logan v. Town of Windsor, 18-CV-0593, 2018 WL 3853996, at *1 & n.3 (N.D.N.Y. Aug. 14, 2018) (Suddaby, C.J.) ("[W]hile the Court recognizes it may be in the minority in this regard, it has some difficulty understanding how, if it were to dismiss the Complaint now, it could properly be said to retain jurisdiction over the action so as to enable Plaintiff to file an Amended Complaint. This is especially true if the dismissal were due to the lack of subject-matter jurisdiction. . . . After all, courts have jurisdiction over actions, and actions require pending complaints in the sense that the actions are commenced by the filing of those complaints and are generally (i.e., except with regard to certain ancillary matters) terminated by the

dismissal of those complaints. The Court respectfully believes that acting as though it retains jurisdiction over a complaint-free action is both unnecessary and confusing (e.g., leading courts to disagree regarding whether an action has been dismissed pursuant to Fed. R. Civ. P. 12[b][6] or Fed. R. Civ. P. 41[a] where a litigant has failed to comply with a Court order to file an actionable amended complaint following the dismissal of the original complaint for failure to state a claim).").

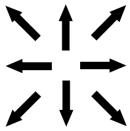
Note: If the request does not state a time period (e.g., 30 days), then the request poses a third problem: does it ever expire? If so, when? If not, doesn't that leave conflict with the dismissal of the action (and the fact that an "amendment" of a pleading is properly construed as requiring the existence of an original pleading pending in the action).

Note: The same three problems posed by a request (in an opposition to a motion to dismiss) for leave to amend are posed by a request (in such an opposition) for leave to *move to* amend.

QUESTION 9: HAVE YOU ORGANIZED YOUR CHALLENGES BY CLAIM, DEFENDANT OR DEFENSE (OR A COMBINATION THEREOF), AND HAVE YOU CHALLENGED ALL OF THE CLAIMS?

Hypothetical 19: You represent Defendants A, B and C. Generally, the plaintiff's complaint asserts Claims 1, 2 and 3, based on events occurring during Time Periods D, E and F, at Locations P, Q and R, to which Defendants have Defenses X, Y and Z. More specifically, some of the claims are not asserted against all three Defendants, some of the events did not occur in all three time periods, some of the events did not occur at all three Locations, and some of the defenses are not to all three defendants and claims. You decide to file a motion to dismiss for failure to state a claim. How do you organize the arguments in your memorandum of law—by claim, defendant, time period, location, or defense?

Defendants A, B and C Claims 1, 2 and 3 Time Periods D, E and F



Locations P, Q and R Defenses X, Y and Z

Answer: By claim. Possibly by defendant or defense. But not by time period or location (unless doing so coincides perfectly with an organization by claim, defendant or defense).

Two Reasons:

(1) It's clearer to the judge, who must rearrange your thoughts by claim in order to decide whether to dismiss the claims. (Remember the analogy of the purpose of tossing a coin into the bucket at an old-fashioned toll booth.)

(2) It's shorter because it results in fewer concepts (whether they be expressed in clauses, sentences, paragraphs or sections). Example: 10 versus 14 versus 16.

Claim 1 → Defendants A and B ← Defenses X and Y

(2 x 2 = 4) X1A, X1B, Y1A, Y1B

Claim 2 → Defendant C ← Defenses X and Y

(2 x 1 = 2) X2C, Y2C

Claim 3 → Defendants A and C ← Defenses X and Z

(2 x 2 = 4) X3A, X3C, Z3A, Z3C

Defendant A ← Claims 1 and 3 ← Defenses X, Y and Z

(3 x 2 = 6) X1A, X3A, Y1A, Y3A, Z1A, Z3A

Defendant B ← Claim 1 ← Defenses X and Y

(2 x 1 = 2) X1B, Y1B

Defendant C ← Claims 2 and 3 ← Defenses X, Y and Z

(3 x 2 = 6) X2C, X3C, Y2C, Y3C, Z2C, Z3C

Defense X → Claims 1, 2 and 3 → Defendants A, B and C

(3 x 3 = 9) X1A, X1B, X1C, X2A, X2B, X2C, X3A, X3B, X3C

Defense Y → Claims 1 and 2 → Defendants A, B and C

(3 x 2 = 6) Y1A, Y1B, Y1C, Y2A, Y2B, Y2C

Defense Z → Claim 3 → Defendant C

(1 x 1 = 1) Z3C

Time Period D – ? Location P – ?

Time Period E – ? Location D – ?

Time Period F – ? Location Q – ?

Practice Tip: A court does not "dismiss" defendants. It dismisses *claims* against defendants, losing jurisdiction over them (and thus releasing them of the obligation to appear and defend themselves).

QUESTION 10: DOES YOUR MEMORANDUM OF LAW COMPLY WITH THE PAGE LIMITATION AND CONTAIN A TABLE OF CONTENTS THAT IS BOTH PRECISE AND PARALLEL?

Hypothetical 20: In preparing your memorandum of law, you bump up against the Local Rules' page limit. You still have your best argument unwritten. You decide to omit the table of contents. Smart move, right?

Answer: No, for two reasons:

(1) A table of contents does not count toward the page limit.

• *See Cao-Bossa v. New York State Dep't of Labor*, 18-CV-0509, 2021 WL 3674745, at *12 (N.D.N.Y. Aug. 19, 2021) (Suddaby, C.J.) ("Non-substantive matter such as cover page, table of contents, and signature block do not count toward the substantive page limit*."); Moore v. Syracuse City Sch. Dist.*, 05-CV-0005, 2009 WL 890576, at *2 n.8 (N.D.N.Y. Mar. 31, 2009) (Scullin, J.) (noting that it repaginated plaintiff's memorandum by starting page one following the Table of Contents and Authorities); *In re Marina Dev., Inc.*, 05-CV-1349, 2007 WL 9752855, at *1-2 (N.D.N.Y. Jan. 11, 2007) (Hurd, J.) (noting that the Local Rules applied to brief format in bankruptcy cases, and concluding that the appellees' briefs should therefore not exceed 25 pages, "exclusive of pages containing the table of contents, table of citations or similar material").

(2) In any event, a table of contents is required by District's Local Rules of Practice.

• A memorandum of law is required for all motions except those specifically listed (which exceptions do not include a motion to dismiss for failure to state a claim). N.D.N.Y. L.R. 7.1(b)(1).

• All memoranda of law shall contain a table of contents. N.D.N.Y. L.R. 7.1(b)(1).

Note: Unlike the Southern District's Local Rules, the Northern District's Local Rules do not create an exception to this

table-of-contents requirement for memoranda of law shorter than 10 pages.

Practice Tip: Just file a timely letter-brief requesting a page enlargement, providing the reason(s) for the request, and stating whether opposing counsel consents to the enlargement. *See* N.D.N.Y. L.R. 7.1(b)(1) ("No party shall file or serve a memorandum of law that exceeds twenty-five (25) pages in length, ***unless that party obtains leave of the judge hearing the motion prior to filing***.") (emphasis added).

Practice Tip: No "briefadavits" or "affirandums"! A memorandum of law, which is supposed to contain legal argument and cites to legal authorities, differs from evidence such as affidavit testimony. Confusing the two risks violating rules regarding (1) notice of one's arguments to the Court, and (2) page limitations.

- *See* New York State Unified Court System, *Appeals to the Appellate Division* at Part II.C.2.a. ("Memoranda of law and oral argument on motions constitute legal argument and generally are not included in the record on appeal.").

- *See* N.D.N.Y. 7.1(b)(2) ("An affidavit must not contain legal arguments but must contain factual and procedural background that is relevant to the motion the affidavit supports.").

- *See Topliff v. Wal-Mart Stores East LP*, 04-CV-0297, 2007 WL 911891, at *23 (N.D.N.Y. March 22, 2007) (Lowe, M.J.) ("[T]o the extent that Plaintiff's counsel is attempting to present arguments in refutation of the arguments advanced by Defendant . . . , the place for those arguments is in Plaintiff's opposition memorandum of law. . . . The Court does not have the duty to search through the numerous documents filed by Plaintiff in search of Plaintiff's legal argument.").

Practice Tip: An affidavit is not required for a motion for failure to state a claim upon which relief can be granted. N.D.N.Y. L.R. 7.1(a)(2). However, it might be appropriate to introduce documents referenced in, but not attached to, the complaint, or documents integral to, but not attached to, the complaint.

Hypothetical 21: You realize there is no need for a background section in your memorandum of law and only one argument in the analysis section (i.e., that the plaintiff doesn't allege facts plausibly suggesting any of the elements of a retaliation claim). Surely there is no need for a table of contents here, right?

Answer: Yes and no. Setting aside how you could possibly characterize the IRAC (or IRA or CRAC or CREAC or CRRACC) methodology as constituting "one argument," if you think there is only one argument in your memorandum of law, look again: you're probably

mistaken. For example, a retaliation claim has three distinct elements (protected speech, adverse action, and a causal relationship between the speech and the action). Even if you are addressing only the causation element, you may well have multiple arguments regarding that element (e.g., one about the lack of temporal proximity, one about accompanying words showing retaliatory motive, one about knowledge of protective speech, one about the grounds to take adverse action anyway). If you concede this fact and still maintain no need for a table of contents, then remember the toll booth analogy.

Hypothetical 22: Below is your table of contents. Okay with the Judge's snippety law clerk?

I. INTRODUCTION
II. BACKGROUND
  A. Procedural History
  B. The Complaint
III. LEGAL STANDARDS
  A. Standard of Review Governing Motion to Dismiss
  B. Substantive Legal Standards
IV. ANALYSIS
  A. The Statute of Limitations Bars Claims 1 and 3
  B. The Inapplicability of the Continuing Violation Doctrine
  C. The Doctrine of Equitable Tolling
  D. Plaintiff Does Not Allege Protected Speech or Show Causation in the Remaining Claim
  E. In Any Event, There Is Insufficient Temporal Proximity to Allege Causation
V. CONCLUSION

Answer: No. Consider the below revision.

I. BACKGROUND
  A. Relevant Procedural History
  B. Summary of Complaint
II. LEGAL STANDARDS
  A. Procedural Legal Standard
  B. Substantive Legal Standards
III. ANALYSIS
  A. The Statute of Limitations Bars Claims 1 and 3
    1. More Than Three Years Passed Between Accrual and Filing
    2. The Continuing Violation Doctrine Does Not Apply
    3. The Equitable Tolling Doctrine Does Not Apply
  B. The Complaint Does Not Allege Facts Plausibly Suggesting Claim 2
    1. The Complaint Does Not Allege Protected Speech
    2. The Complaint Does Not Allege Causation
      a. Based on the Complaint's Own Factual Allegations, Defendant Did Not Even Know of Plaintiff's Protected

Rule: A table of contents should be both precise and parallel.

• *Cf. Danford v. City of Syracuse*, No. 09-CV-0307, 2012 WL 4006240, at *4 & n.9 (N.D.N.Y. Sept. 12, 2012) (Suddaby, J.) ("The requirement that a memorandum of law contain a table of contents is an important one warranting enforcement, because it requires a party to separate and label its legal arguments, and enables the Court to identify and evaluate those legal arguments.") (collecting cases).

• *See* William Strunk Jr. & E.B. White, *Elements of Style* at 26 (Macmillan 4th ed. 2000) (setting forth Rule 19 of Elementary Principles of Composition: "Express coordinate ideas in similar form."); C. Edward Good, *Mightier Than the Sword: Powerful Writing in the Legal Profession* at 32-33 (Blue Jeans Press 1989) ("Whenever you say a series of things in a sentence, each part of the series must appear in the same grammatical structure. . . . [T]his rule of parallel construction . . . is not a rule of style. Rather, it is one of the cardinal rules of grammar."); Mary Bernard Ray & Barbara J. Cox, *Beyond the Basics: A Text for Advanced Legal Writing* at 64 (West Publishing 1991) ("[L]ook at the items in the list and make sure they are all needed, logically parallel, and written in parallel form."); Barbara Child, *Drafting Legal Documents: Principles and Practices* at 376 (West Publishing 1992) ("Parallel ideas belong in parallel structures whenever possible."); Tom Goldstein & Jethro K. Lieberman, *The Lawyer's Guide to Writing Well* at 155 (Univ. of Cal. Press 1989) ("Parallelism is a principle requiring equivalent elements of a sentence to be constructed in an equivalent way.").

• *See* H.W. Fowler & F.G. Fowler, *The King's English* at 184-90 (Oxford Univ. Press 3d ed. 1973) (advising to avoid "elegant variation" or the "substitution[] of one word for another for the sake of variety"); Mary Bernard Ray & Barbara J. Cox, *Beyond the Basics: A Text for Advanced Legal Writing* at 41 (West Publishing 1991) ("[D]o not vary your word choice by using several different words to refer to the same thing."); Richard C. Wydick, *Plain English for Lawyers* at 66 (Carolina Academic Press 3d ed. 1994) ("Avoid Elegant Variation.").

> Example: Sir Charles, Chuck, the Leaning Tower of Pizza, the Round Mound of Rebound, the Pillsbury Dough Boy, the Crisco Kid, and the Weight Watcher.

• Again, remember the toll booth analogy.

Hypothetical 23: You have reached the end of your memorandum of law and it exceeds the page limit (even excluding the table of contents). You notice that one of your arguments essentially says the same thing as a co-defendant's memorandum of law. You decide to comply with the Local Rule by trimming that argument and simply incorporating by reference the argument from the other memorandum of law. Problem solved?

Answer: No.

Rule: In a memorandum of law, don't try to incorporate by reference arguments from another memorandum of law. That practice (1) almost surely violates the District's rule on page limitations, (2) risks causing the opposing party to inadvertently overlook the attempted incorporation, and (3) risks confusing the Court as to which "incorporated" arguments are actually being relied upon.

• *See Topliff v. Wal-Mart Stores East LP*, No. 04-CV-0297, 2007 WL 911891, at *9 n.65 (N.D.N.Y. Mar. 22, 2007) (Lowe, M.J.) ("A party may not articulate a legal argument simply by 'incorporating by reference' the argument presented in another document. Such a practice violates the Local Rule on page limitations."), *accord, Douglas v. New York State Adirondack Park Agency*, No. 10-CV-0299, 2012 WL 3999763, at *26 & n.32 (N.D.N.Y. Sept. 11, 2012) (Suddaby, J.).

• *Nissan Motor Acceptance Corp. v. Dealmaker Nissan, LLC*, No. 09-CV-0196, 2012 WL 2522651, at *2 (N.D.N.Y. June 27, 2012) (Suddaby, J.) ("Setting aside the risk that such reference could cause the referring document to violate the District's rule on page limitations (once it is incorporated into the referred document), such a practice also risks causing the opposing party to inadvertently overlook the attempted incorporation, and risks confusing the Court as to which "incorporated" arguments are actually being relied upon.").

Practice Tip: Revise your memorandum of law using Strunk & White's Rule 17 ("Omit needless words."), Rule 14 ("Use the active voice.") and Rule 15 ("Put statements in positive form.") of the Elementary Principles of Composition, and Rule 4 of An Approach to Style ("Write with nouns and verbs.").

Practice Tip: If still constrained by the page limit, and you represent multiple parties, then either (1) consider filing one motion per party or (2) explain why you are not doing that (i.e., to avoid redundancy) in a letter-motion requesting enlargement.

QUESTION 11: DO YOU HAVE A GOOD REASON FOR REQUESTING ORAL ARGUMENT?

Hypothetical 24: You're a partner who is editing a memorandum of law that was researched and drafted by one of your firm's young associates, and you're surprised she hasn't asked for oral argument. In your day, oral argument was standard practice (even if it has fallen

out of favor now), and you feel you have established a good relationship with this particular judge. Whether it be from going to law school with the judge, practicing law with him/her or socializing with him/her at FCBA functions, you feel you have established credibility with the judge, who has commented on your eloquence, truth be told. You decide to request oral argument. Wise move?

Answer: Yes and no. You're always free to ask, but be aware that most judges in this District have (for multiple reasons) adopted a policy of not holding oral argument on motions except in special circumstances (see below chart). None of those circumstances is credibility or eloquence (sarcasm intended). In fact, as you'll recall, on a motion to dismiss for failure to state a claim (like a motion for summary judgment), a judge is precluded from making credibility determinations. To the extent you mean "credibility" with regard to what the cases say or what the complaint says, remember that opposing counsel is also an officer of the court who is bound by Fed. R. Civ. P. 11, and the Court is fully capable of checking case cites and record cites. To the extent you mean "credibility" with regard to the case's equitable factors, remember that the issues presented by a motion to dismiss for failure to state a claim are not equitable in nature. Finally, to the extent you rely on your own eloquence, remember that, if your associate's name is on the papers (along with yours), the judge and law clerk probably think (correctly or incorrectly) that the associate did the bulk of the research and drafting. As a result, it's your associate, not you, who should be arguing the motion and answering the judge's questions. You're actually more likely to get the response wrong.

Rule: Pursuant to the 2021 amendment to our District's Local Rules of Practice, motions are decided without oral argument unless otherwise directed, and any requests for oral argument should be supported by "the ground(s) for the request." *See* N.D.N.Y. L.R. 7.1(a) ("Motions are decided without oral argument unless scheduled by the Court. Parties may make a written request for oral argument, which is subject to the discretion of the presiding judge. In any such requests for oral argument, the parties should specify the ground(s) for the request . . . ."). Indeed, the grounds arguably *must* be so supported, pursuant to Fed. R. Civ. P. 7(b)(1) and Local Rule 7.1.

Examples of Possible Grounds in Local Rule 7.1:

(1) "the need to respond to arguments presented in the last-filed brief" (and a showing of why another brief will not suffice),

(2) "the need to advise the Court of recently occurring events or arguments regarding new controlling or persuasive case law" (and a showing of why a letter-brief will not suffice),

(3) "the need to re-familiarize the Court with the complicated facts and/or procedural history of the case given the length of time that has passed since the Court last reviewed the case" (and a showing of why re-reading the motion papers will not suffice), and

(4) "the need of an inexperienced lawyer to gain experience in the courtroom" (e.g., probably an associate, not a partner).

Other Examples of Possible Grounds:

(5) the need to refresh the judge's familiarity with the facts and/or legal issues of the case or motion given the fact that the case was recently transferred from another judge, and

(6) the need to answer the judge's almost-certain questions about the motion's extremely complex subject matter (e.g., patents).

Practice Tip: Make the request in writing, state whether opposing counsel agrees, and adduce a supporting declaration if appropriate (using 28 U.S.C. § 1746).

Current Standing Orders / Rules of Practice of Judges:

Judge D'Agostino

• Most motions (criminal and civil) decided without oral argument unless otherwise directed.

Historical Policies of Judges (Before 2021 Change to Local Rules):

Judge Scullin

• All criminal motions decided with oral argument.

• All civil motions decided without oral argument unless otherwise directed.

• Any request for oral argument must be submitted to the Court, in writing, no later than 14 days before the motion return date.

Judges McAvoy, Hurd, and Peebles

• All motions (criminal and civil) decided with oral argument unless otherwise directed.

Judge Kahn

• All motions (criminal and civil) decided without oral argument unless otherwise directed.

• Any request for oral argument must be submitted to the Court, in writing,

no later than 10 days before the motion return date.

Judges Mordue, Suddaby, Baxter, and Dancks

• All motions (criminal and civil) decided without oral argument unless otherwise directed.

Judge Sharpe

• All motions (criminal and civil) decided without oral argument.

10 QUESTIONS FOR THE NON-MOVANT

QUESTION 12: HAS THE MOVANT MOVED UNDER THE CORRECT RULE?

• *See* Questions 2, 3, 4 and 7.

Other Possible Rules: Fed. R. Civ. P. 8(a)(2), 9(b), 10(a), 10(b), 12(b)(1), 12(c), 12(e), 12(f) or 56.

Practice Tip: If arguing that the act of moving under the incorrect rule warrants the denial of the motion, remember to (1) cite the rules requiring the correct reliance (see below), and (2) focus on the unfair prejudice to you (e.g., confusion, the lack of time to request a page enlargement, the need to gamble on the correct interpretation of the motion, etc.).

• *See* N.D.N.Y. L.R. 7.1("When a moving party makes a motion based upon a rule or statute, the moving party must ***specify*** in its moving papers ***the rule or statute*** upon which it bases its motion."); cf. Fed. R. Civ. P. 7(b)(1) ("A request for a court order must be made by motion. The motion must: (A) be in writing unless made during a hearing or trial; (B) ***state with particularity the grounds*** for seeking the order; and (C) state the relief sought.") (emphasis added).

Practice Tip: Also remember to argue in the alternative (e.g., "Even if the motion does arise under Fed. R. Civ. P. 12(b)(6), it should be denied because . . .").

QUESTION 13: HAS THE MOVANT RELIED ON ANY IMPERMISSIBLE DOCUMENTS?

• *See* Question 3.

Four Questions to Ask Regarding Each Document Relied on:

(1) Attached to the Complaint or Answer?

(2) Referenced in the Complaint or Answer?

(3) Integral to the Complaint or Answer?

(4) Authentic and accurate copy?

Practice Tip: Challenge the reliance but (again) always argue in the alternative (e.g., "Even if the documents are part of the compliant, the documents do not plausibly suggest that . . .").

Practice Tip: If you are resisting conversion to summary judgment, remember to rely on the lack of formal notice to you and the unfair prejudice to you, citing both Fed. R. Civ. P. 12(d) and Fed. R. Civ. P. 56(d). *See* Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. ***All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion***.") (emphasis added); Fed. R. Civ. P. 56(d) ("If a nonmovant shows by affidavit or declaration that, for specified reasons, it ***cannot present facts essential to justify its opposition***, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.").

Note: When a nonmovant opposes summary judgment on the grounds that additional discovery is needed, the Second Circuit has established a four-part test. *See Gurary v. Winehouse*, 190 F.3d 37, 43 (2d Cir.1999); *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1138 (2d Cir.1994). Under that test, the non-movant must submit affidavits that establish "(1) what facts are sought [to resist the motion] and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts." *Gurary*, 190 F.3d at 43.

QUESTION 14: HAS THE MOVANT MISCONSTRUED OR MISSED ANY OF YOUR CLAIMS?

• *See* Question 1.

Practice Tip: In arguing that the "motion to dismiss the Complaint" is actually a "motion to dismiss part of the Complaint" because the missed claims do indeed exist, cite Fed. R. Civ. P. 8(e) ("Pleadings must be construed so as to do justice.")

and *Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001) ("In making this assessment [of the pleading sufficiency of a complaint filed by a plaintiff represented by counsel], we must . . . construe the complaint liberally.") (internal quotation marks omitted).

Practice Tip: In addition to arguing for the denial of the motion with regard to any missed claims, remember to alternatively request leave to file a sur-reply if the movant addresses the missed claims in its reply memorandum of law.

QUESTION 15: HAS THE MOVANT CHALLENGED MERELY A LACK OF SPECIFICITY?

• *See* Question 6.

Practice Tip: In your response, expressly turn the conversation from "specific facts" to "facts showing" or "facts plausibly suggesting." (I.e., Don't keep repeating the movant's error.)

QUESTION 16: CAN YOU CORRECT THE PLEADING DEFECTS BY FILING AN AMENDED PLEADING AS A MATTER OF RIGHT?

• *See* Fed. R. Civ. P. 15(a)(1) ("A party may amend its pleading once as a matter of course ***within***: (A) ***21 days after serving it***, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or ***21 days after service of a motion under Rule 12(b)***, (e), or (f), whichever is earlier.") (emphasis added).

Note: Under the District's General Order 22, service of a motion on a represented party is complete when that party receives "a Notice of Electronic Filing (NEF), which is sent automatically by email from the Court." N.D.N.Y. General Order 22 at § 5.2 ("Transmission of the NEF constitutes service upon all Filing and Receiving Users who are listed as recipients of notice by electronic mail.").

Tangential Note: Some dispute exists regarding whether service of a pleading is a pre-requisite of the 21-day grace period. The majority view is that "within . . . 21 days after serving it" means "any time between filing of the complaint and 21 days after serving it." The minority view is that this means only "any time between service and 21 days after service."

> *Compare Morris v. New York State Gaming Comm'n*, 18-CV-0384, 2019 WL 2423716, at *4 (W.D.N.Y. March 14, 2019) ("Because Plaintiff never served the original Complaint, the 21-day time limit to file an amended complaint under Rule 15(a)(1)(A) ***never commenced***.") (emphasis added) *with Henderson v. Wells Fargo Bank, NA*, 13-CV-0378, 2015 WL 630438, at *2 (D. Conn. Feb. 13, 2015) ("Fed. R. Civ. P. 15(a) provides that a 'party may amend its pleading once as a matter of course within . . . 21 days after

serving it.' Because Plaintiff has not yet served Defendant with the complaint, her motion is granted although unnecessary because leave of the Court is not required.").

Hypothetical 25: You represent the plaintiff. A defendant has filed a motion to dismiss your original complaint for failure to state a claim. Within 21 days of the filing of the motion to dismiss, you file an amended complaint. You feel your changes are more than adequate to rectify the (perceived) defects in your original complaint. As a result, rather than file an accompanying opposition memorandum of law, you wait to see what the Court will do. Efficient motion practice?

Answer: No, don't simply file an Amended Complaint and neglect to respond to the pending motion to dismiss. Instead, also file an opposition memorandum of law (or letter-brief) containing three things:

(1) a detailed explanation of the extent to which the Amended Complaint cures the pleading defects asserted by the movant (perhaps attaching a redline/strikeout version of the Amended Complaint for the convenience of everyone) and/or the extent to which no amendment is necessary;

(2) a request (in the alternative) that the movant in its reply memorandum of law (or letter-brief) advise the Court (and you) of the extent to which the movant argues that the Amended Complaint does not cure the pleading defects asserted by the movant and why; and

(3) a request (again in the alternative) for leave to file a sur-reply memorandum of law (or letter-brief), in the event the movant argues that the Amended Complaint does not cure the pleading defects asserted by the movant.

QUESTION 17: IF NOT, ARE YOU REQUESTING THAT ANY DISMISSAL BE WITHOUT PREJUDICE (OR THAT YOU SHOULD BE ENTITLED TO LEAVE TO AMEND BEFORE DISMISSAL)?

• *See* Question 8.

Practice Tip: If you are alternatively requesting leave to amend before dismissal of your original pleading, then do four things:

(1) label your opposition memorandum of law also as a "cross-motion to amend" under Local Rule 7.1(c);

(2) attach a proposed amended pleading that both is unsigned and tracks the changes in the original pleading using the redline/strikeout method in compliance with Local Rule 15.1(a);

(3) show cause for the amendment under the governing four-part test. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (explaining that permissible grounds upon which to base the denial of a motion for leave to file an amended complaint include "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc."); and

(4) show good cause for an amendment of the relevant motion deadline in the Pretrial Scheduling Order if that deadline has expired.

> *See* Fed. R. Civ. P. 16(b)(4), (f)(C) ("A schedule may be modified only for good cause and with the judge's consent. . . . On motion or its own, the court may issue any just orders . . . if a party or its attorney . . . fails to obey a scheduling or other pretrial order."); *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir.2000) ("[D]espite the lenient standard of Rule 15(a), a district court does not abuse its discretion in denying leave to amend the pleadings after the deadline set in the scheduling order where the moving party has failed to establish good cause.").

Practice Tip: If instead you are requesting merely *a brief time period in which to move for* leave to amend, then do two things:

(1) label your opposition memorandum of law also as a "cross-motion for leave to move to amend" under Local Rule 7.1(g); and

(2) specify the amount of time needed and show good cause for an amendment of the relevant motion deadline in the Pretrial Scheduling Order if that deadline has expired.

Caution: If you do neither of the above two things (but merely offhandedly request leave to amend), the Court may (mistakenly) deny your request based on non-compliance with Local Rule 15.1(a) and/or the Pretrial Scheduling Order.

> *See Cresci v. Mohawk Valley Community College*, 693 F. App'x 21, 25 (2d Cir. 2017) ("The proper time for a plaintiff to move to amend the complaint is when the plaintiff learns from the District Court in what respect the complaint is deficient. Before learning from the court what are its deficiencies, the plaintiff cannot know whether he is capable of amending the complaint efficaciously.").

Practice Tip: Ask yourself whether the proposed pleading is an amended one or a supplemental one. For the difference, see Fed. R. Civ. P. 15(d) ("Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a

party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.").

QUESTION 18: HAVE YOU RESPONDED TO ALL OF THE MOVANT'S ARGUMENTS?

Practice Tip: Be sure to respond to all of the movant's arguments in your opposition memorandum of law. Otherwise, the movant's burden with regard to each neglected legal argument will be lightened such that, in order to succeed on it, the movant need show only the facial merit of it.

> *See* N.D.N.Y. L.R. 7.1(b)(3) ("Where a properly filed motion is unopposed and the Court determines that the moving party has met its burden to demonstrate entitlement to the relief requested therein, the non-moving party's failure to file or serve any papers as this Rule requires shall be deemed as consent to the granting or denial of the motion, as the case may be, unless good cause is shown. . . . ."); *see, e.g., Beers v. GMC*, No. 97-CV-0482, 1999 U.S. Dist. LEXIS 12285, at *27-31 (N.D.N.Y. Mar. 17, 1999) (McCurn, J.); *Niles v. Nelson*, 72 F. Supp. 2d 13, 22 (N.D.N.Y.1999) (McAvoy, C.J.); *Frink Am., Inc. v. Champion Road Machinery, Ltd.*, 48 F. Supp. 2d 198, 209 (N.D.N.Y.1999) (McAvoy, C.J.); *Di Giovanna v. Beth Isr. Med. Ctr.*, No. 08-CV-2750, 2009 WL 2870880, at *10 n.108 (S.D.N.Y. Sept. 8, 2009).

Practice Tip: Be wary of the tactic of not responding to argument because you want to give the impression that "it's not worth a response."

Practice Tip: To the extent you vary from the structure of arguments in the table of contents of the movant's memorandum of law-in chief, do so consciously and conspicuously.

QUESTION 19: DOES THE MOVANT'S MEMORANDUM OF LAW COMPLY WITH THE PAGE LIMITATION AND CONTAIN A TABLE OF CONTENTS?

• *See* Question 10.

Practice Tip: If the movant's memorandum of law exceeds the page limit, rather than ask that all of the memorandum of law be stricken, ask that only those pages beyond the page limit be stricken.

> *See Cao-Bossa v. New York State Dep't of Labor*, 18-CV-0509, 2021 WL 3674745, at *12 (N.D.N.Y. Aug. 19, 2021) (Suddaby, C.J.) ("Even if the conclusion were considered to be substantive, the proper course of action in this case would be to merely not consider any pages beyond the allowed

amount, not to strike the entire motion as Plaintiff requests."); *Helen Cross v. Colvin*, 16-CV-0111, 2016 WL 7011477, at *4 n.3 (N.D.N.Y. Dec. 1, 2016) (Suddaby, C.J.) (noting that, "[b]ecause Plaintiff has exceeded the page limit, the Court will not consider the arguments contained in pages eleven through fifteen of her counsel's reply affidavit").

QUESTION 20: DOES YOUR OPPOSITION MEMORANDUM OF LAW COMPLY WITH THE PAGE LIMITATION AND CONTAIN A TABLE OF CONTENTS THAT IS BOTH PRECISE AND PARALLEL?

• *See* Question 10.

• No opposition memorandum of law shall exceed 25 pages unless the party obtains leave of the court prior to filing the motion. N.D.N.Y. L.R. (a)(1).

QUESTION 21: DO YOU HAVE A GOOD REASON FOR REQUESTING ORAL ARGUMENT?

• *See* Question 11.

8 MORE QUESTIONS FOR THE MOVANT
(on Its Reply)

QUESTION 22: HAS THE NON-MOVANT FILED AN AMENDED PLEADING AS A MATTER OF RIGHT?

• *See* Question 16.

• An amended pleading might moot some or all of a motion to dismiss for failure to state a claim. *See Pettaway v. National Recovery Solutions, LLC*, No. 19-1453, 2020 WL 1777113 (2d Cir. Apr. 9, 2020) (holding that, when a plaintiff properly amends a complaint after a defendant has filed a motion to dismiss that is still pending, the district court can either deny the pending motion as moot or consider the merits of the motion in light of the facts alleged in the amended complaint)

Hypothetical 26: You represent the defendant. You have filed a motion to dismiss the plaintiff's original complaint for failure to state a claim. Within 21 days of the filing of your motion to dismiss, the plaintiff files an amended complaint. It would take some time to figure out exactly what defects in the original complaint have and haven't been cured, and you're busy. You decide not to file a reply or even a letter-request. Instead, you'll just let the Court figure it out and let you know what to do. Light touch?

Answer: No, don't gamble here. Instead, do one of two things:

> (1) advise the Court in writing what portions, if any, of your motion survive the amendment; or
>
> (2) withdraw your motion while reserving the right to refile it (and show good cause for an amendment of the relevant motion deadline in the Pretrial Scheduling Order if necessary).
>
> Note: Otherwise you risk the denial of your motion as moot (or, worse, with prejudice), if the Court doesn't inquire what portions, if any, of your motion survive the amendment.

• An amended complaint might moot a plaintiff's motion to dismiss ***an affirmative defense*** in an answer (because an answer to the amended complaint will need to be filed, and it might supersede in all respects the original answer). *See* Fed. R. Civ. P. 12(b) ("Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required.").

> *See* N.D.N.Y. L.R. 7.1(a)(4) ("[T]he proposed amended pleading . . . will supersede the pleading sought to be amended in all respects."); *Int'lControls Corp. v. Vesco*, 556 F.2d 665, 668 (2d Cir. 1977) ("It is well established that an amended complaint ordinarily supersedes the original, and renders it of no legal effect."); 6 C. Wright & A. Miller, *Federal Practice & Procedure* § 1476, at 556-57 (2d ed. 1990) ("A pleading that has been amended under Rule 15(a) supersedes the pleading it modifies and remains in effect throughout the action unless it subsequently is modified.").
>
> > Note: Some authority exists for the contrary point of law, i.e., that, where an amended complaint is not substantially different from an original complaint, the answer to the original complaint (and presumably the affirmative defenses in that answer) may be construed as an answer to the amended complaint. *See, e.g., White Plains Hous. Auth. V. BP Prod. N. Am. Inc.,* 482 F. Supp.3d 95, 104 (S.D.N.Y. 2020).

• An amended complaint might also moot a plaintiff's motion to dismiss a defendant's ***counterclaim*** in an answer (because an answer to the amended complaint will need to be filed, and it will supersede in all respects the original answer, which may arguably include the defendant's counterclaim).

> Note: Authority also exists for the contrary point of law (i.e., that a defendant's counterclaims in an answer can survive the subsequent filing of an amended complaint, which supersedes the original complaint in all respects). *See, e.g., Comprehensive Mfg. Assocs., LLC v. SupplyCore Inc.,* 15-CV-0835, 2017 WL 2693508, at *3 (N.D.N.Y. May 24, 2017) (Peebles, M.J.) ("[T]he courts have not

been uniform in their approach to whether counterclaims, once stated, must be reasserted in subsequent answers to amended complaints.") (collecting cases); *Yahui Zhang v. Akami Inc.,* 15-CV-4946, 2017 4329723, at *9 (S.D.N.Y. Sept. 26, 2017), *accord, Head v. Ebert,* 14-CV-6546, 2019 WL 1316978, at *8 (W.D.N.Y. March 22, 2019).

QUESTION 23: ALTERNATIVELY, HAS THE NON-MOVANT REQUESTED LEAVE TO AMEND (OR LEAVE TO MOVE TO AMEND)?

• *See* Question 17.

Practice Tip: If so, re-visit Local Rule 15.1(a) to see if the non-movant has fulfilled each of the procedural requirements of a motion to amend.

Practice Tip: Even if the non-movant has fulfilled each of the procedural requirements of a motion to amend, alternatively apply the four-factor test set forth in *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Practice Tip: If the non-movant is asking for merely a brief time period in which to move for leave to amend, then oppose its attempt to show good cause for an amendment of the Pretrial Scheduling Order.

QUESTION 24: HAS THE NON-MOVANT FAILED TO RESPOND TO ANY OF YOUR ARGUMENTS?

• *See* Question 18.

Practice Tip: If so, remind the Court of the non-movant's failure, which lightens your burden on the neglected arguments such that, in order to succeed with regard to them, the you need show only the arguments' facial merit.

> *See* N.D.N.Y. L.R. 7.1(b)(3) ("Where a properly filed motion is unopposed and the Court determines that the moving party has met its burden to demonstrate entitlement to the relief requested therein, the non-moving party's failure to file or serve any papers as this Rule requires shall be deemed as consent to the granting or denial of the motion, as the case may be, unless good cause is shown.").

QUESTION 25: IN ITS OPPOSITION MEMORANDUM OF LAW, HAS THE NON-MOVANT EITHER ASSERTED OR DISCUSSED A CLAIM THAT IS NOT FAIRLY ASSERTED IN ITS PLEADING?

• *See* Question 14.

Practice Tip: If so, consider arguing in the alternative that, if the Court decides to consider the claim at issue, good cause has been shown to extend the relevant motion deadline in the Court's Pretrial Scheduling Order so as to permit you to later move to dismiss that claim.

QUESTION 26: IN YOUR REPLY MEMORANDUM OF LAW, HAVE YOU REPLIED TO ALL OF THE ARGUMENTS IN THE NON-MOVANT'S OPPOSITION MEMORANDUM OF LAW?

• *See* Question 18.

• The failure to do so is not covered by Local Rule 7.1(b)(3) (which regards failures to responds to motions, not oppositions to motions). But the principle is the same: remember the 2,700-year-old Latin maxim *Qui tacet, consentire videtur* ("One who keeps silent is understood to consent.").

QUESTION 27: DOES THE NON-MOVANT'S OPPOSITION MEMORANDUM OF LAW COMPLY WITH THE PAGE LIMITATION AND CONTAIN A TABLE OF CONTENTS?

• *See* Questions 10 and 19.

Practice Tip: If the non-movant's opposition memorandum of law exceeds the page limit, rather than ask that all of it be stricken, ask that only those pages beyond the page limit be stricken.

QUESTION 28: DOES YOUR REPLY MEMORANDUM OF LAW COMPLY WITH THE PAGE LIMITATION AND CONTAIN A TABLE OF CONTENTS THAT IS BOTH PRECISE AND PARALLEL?

• *See* Questions 10 and 20.

• Reply memoranda of law shall not exceed 10 pages, unless the party obtains leave of the court prior to filing the motion. N.D.N.Y. 7.1(b)(1).

• On dispositive motions, replies are permitted without prior leave. N.D.N.Y. L.R. 7.1(b)(1).

• Sur-replies are never permitted without prior leave. N.D.N.Y. L.R. 7.1(b)(1).

QUESTION 29: IN YOUR REPLY MEMORANDUM OF LAW, HAVE YOU ASSERTED ANY NEW ARGUMENTS (I.E., ONES NOT ASSERTED IN YOUR MEMORANDUM OF LAW-IN CHIEF AND NOT DIRECTLY RESPONSIVE TO THE NON-MOVANT'S ARGUMENTS)?

Hypothetical 27: When researching and drafting your reply, you stumble on a new argument for dismissal. The more you think about it, the more you realize it's your best argument. (You can't believe you never saw it before!) You decide to insert it at the very end of your reply, preferring to always save your best argument for last. The benefits of deep thinking, right?

Answer: No.

Rule: The Court has the discretion to consider or reject an argument raised for the first time in a reply memorandum of law. A reply should be limited to a discussion of the issues raised in the opposition (and neither rehash the arguments raised in the memorandum-in-chief nor spring new issues on non-movant). For example, if a new argument presented in reply is actually a new ground for dismissal, the Court may disregard it, because the non-movant never had a chance to respond to it.

> *See Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 252 (2d Cir. 2005) ("[S]he argues that the issue was first raised in Defendants' summary-judgment reply papers. . . . Assuming that is so, the district court had discretion to consider it."); *Bayway Ref. v. Oxygenated Mktg. & Trading*, 215 F.3d 219, 226 (2d Cir. 2000) (reviewing for abuse of discretion district court's decision to rely on evidence submitted with moving party's reply papers); *Playboy Enter., Inc. v. Dumas*, 960 F. Supp. 710, 720 n.7 (S.D.N.Y.1997) ("Arguments made for the first time in a reply brief need not be considered by a court.") (collecting cases).
>
> Practice Tip: In such a case, either omit the argument or explain why it may be fairly considered without permitting a sur-sur reply from the non-movant (or simply consent to the filing of a sur-sur reply).

BIOGRAPHY

Michael G. Langan serves as the career law clerk to Chief U.S. District Judge Glenn T. Suddaby in Syracuse, NY. Before coming to work for Judge Suddaby in 2008, Mike served as a career law clerk to U.S. Magistrate Judge George H. Lowe from 2004 to 2008. Before becoming a law clerk, Mike worked as an associate in the trial department of Bond, Schoeneck & King, PLLC, in Syracuse from 2001 to 2004, and the white collar criminal defense group of Piper Rudnick in Washington, D.C., from 1998 to 2001. He received his B.A. *cum laude* from Colgate University in 1991, his M.F.A. in creative writing from George Mason University in 1995, and his J.D. from George Mason University in 1998, where was an Associate Justice of the George Mason Moot Court Board and Notes Editor of the *George Mason Law Review*. He has taught college courses in consumer law, American Literature, freshman composition and advanced composition, published four law review articles, and prepared the materials for and/or taught 18 CLEs on federal practice and procedure.

Michael G. Langan has been the career law clerk to a federal court judge in the Northern District of New York for more than sixteen years (first to U.S. Magistrate Judge George H. Lowe and currently to Chief U.S. District Judge Glenn T. Suddaby). Before that, he practiced federal litigation in Washington, D.C., and Syracuse, N.Y., for six years (first at Piper Rudnick LLP, and then at Bond Schoeneck & King PLLC). He received his J.D. in 1998 from George Mason University School of Law, where he was the Notes Editor of the *George Mason Law Review*. He received his M.F.A. in Creative Writing in 1995 from George Mason University, where he was a graduate fellow and co-manager of the Writing Center. He received his B.A. in philosophy in 1991 from Colgate University, from which he graduated *cum laude*. He has taught more than a dozen continuing legal education courses, and a half-dozen college courses in law and writing.