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Determining When Extrinsic Evidence Not Attached to or Incorporated by Reference in a Pleading May Be Considered on a Rule 12 Dismissal Motion

Cover Page Footnote

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**DETERMINING WHEN EXTRINSIC EVIDENCE NOT
ATTACHED TO OR INCORPORATED BY REFERENCE IN A
PLEADING MAY BE CONSIDERED ON A RULE 12
DISMISSAL MOTION**

Laurence A. Steckman^{*}
Rita D. Turner^{**}

I. INTRODUCTION

When courts choose to consider evidence outside the pleadings on Rule 12 dismissal applications, the applications are generally converted to motions for summary judgment.¹ However, if the court deems the extrinsic evidence to be part of the pleading, such evidence may be considered without conversion.² Extrinsic evidence may be considered part of a complaint when it is (1) attached to the pleading, (2) incorporated by reference in the pleading, or (3) the court deems the evidence integral to at least one claim in the pleading.³ Under the

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¹ DeLuca v. AccessIT Grp., Inc., 695 F. Supp. 2d 54, 59 (S.D.N.Y. 2010).

² *Id.* (citing Madu, Edozie & Madu, P.C. v. SocketWorks Ltd. Nigeria, 265 F.R.D. 106, 122–23 (S.D.N.Y. 2010)).

³ See Bank of New York Mellon Trust Co. v. Morgan Stanley Mortg. Capital, Inc., No. 11

third prong, evidence is “integral” to the pleading when plaintiff has actual notice of the evidence and the complaint “relies heavily upon its terms and effect” in “framing” the pleading.⁴ Courts, however, have not provided clear guidance as to how courts should determine when a plaintiff has “relied” on extrinsic evidence in “framing” pleading content, an issue that may be particularly complicated where plaintiff cites neither the document at issue nor its content.

This article argues that a “but for” analysis should be used to determine whether a pleading has relied on extrinsic evidence. Part I reviews Second Circuit cases that analyze whether external evidence is “integral” to the complaint. Part II discusses analyses courts have employed in assessing whether plaintiff has “relied” on extrinsic evidence in “framing” the pleading. Part III argues that courts should apply a “but for” test of reliance to determine whether extrinsic evidence has been used to frame a pleading regardless of whether the document or its content is included in the complaint. Restated, if “but for” plaintiff’s knowledge of the extrinsic evidence at issue, the pleading would have been materially different from that which plaintiff filed, then the evidence will be “integral” to the complaint, for motion purposes, and sufficient “reliance” will be deemed present to allow the court to consider the evidence on a dismissal motion, with-

Civ. 0505, 2011 WL 2610661, at *3 (S.D.N.Y. June 27, 2011):

In deciding a motion to dismiss, this Court may consider the full text of documents that are quoted in or attached to the complaint, or documents that the plaintiff either possessed or knew about and relied upon in bringing the suit. “Plaintiffs’ failure to include matters of which as pleaders they had notice and which were integral to their claim—and that they apparently most wanted to avoid—may not serve as a means of forestalling the district court’s decision on the motion.”

Id. (quoting *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 44 (2d Cir. 1991)). See also *I. Meyer Pincus & Assocs. P.C. v. Oppenheimer & Co.*, 936 F.2d 759, 762 (2d Cir. 1991) (“[P]laintiff cannot evade a properly argued motion to dismiss simply because plaintiff has chosen not to attach the [document] to the complaint or to incorporate it by reference.”). See also *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011):

On a 12(c) motion, the court considers 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. A complaint is [also] deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are integral to the complaint.

Id. (internal citations omitted).

⁴ *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002) (quoting *Int’l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995) (*per curiam*)).

out summary judgment conversion.

II. LEADING CASES CONSIDERING WHETHER EXTRINSIC EVIDENCE SHOULD BE CONSIDERED ON RULE 12 DISMISSAL MOTIONS

Cortec Industries, Inc. v. Sum Holding L.P.,⁵ a heavily cited authority on the issues under discussion, held that if plaintiffs had notice of extrinsic evidence and the evidence was “integral” to the complaint, the reviewing court could consider it on a motion to dismiss.⁶ *Cortec* was a securities fraud case involving the purchase of a company.⁷ Plaintiffs were buyers that “allege[d] they would not have entered” the transaction but for defendant’s fraudulent or negligent misrepresentations and omissions regarding the company’s financial condition.⁸ Defendants moved to dismiss, submitting a stock purchase agreement and offering memorandum which contained representations regarding the company’s financial condition.⁹ Plaintiffs objected that the court should not consider the documents because proper inquiry was limited to examination of the four corners of the complaint. Defendants’ submissions were neither attached to nor explicitly referenced in the pleading.¹⁰ The Second Circuit disagreed. Plaintiffs’ failure to include documents of which they “had notice,” and were “integral” to their claim, which they “apparently most wanted to avoid”¹¹ could not forestall dismissal:

[W]hen a plaintiff chooses not to attach to the complaint or incorporate by reference a prospectus upon which it *solely relies and which is integral* to the complaint, the defendant may produce the prospectus when attacking the complaint for its failure to state a claim, because *plaintiff should not so easily be allowed to escape the consequences of its own failure*. . . . Where plaintiff has actual notice of all the infor-

⁵ 949 F.2d 42 (2d Cir. 1991).

⁶ *Id.* at 44.

⁷ *Id.*

⁸ *Id.* at 45.

⁹ *Id.* at 46.

¹⁰ *Cortec*, 949 F.2d at 46-48.

¹¹ *Id.* at 44; see generally *L-7 Designs, Inc.*, 647 F.3d at 422.

mation 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.¹²

The court continued:

Despite the fact that the documents attached to defendant Westinghouse's motion to dismiss were neither public disclosure documents required by law to be filed with the SEC, nor documents actually filed with the SEC, nor attached as exhibits to the complaint or incorporated by reference in it, the district court was entitled to consider them in deciding the motion to dismiss. . . . It did not lack notice of those documents; *these papers were integral to its complaint*. . . . [T]he district court . . . could have viewed them on the motion to dismiss because there was undisputed notice to plaintiffs of their contents and they were integral to plaintiffs' claim.¹³

In that same year, the Second Circuit held in *I. Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co.*,¹⁴ another heavily cited case on the present issues, that plaintiff cannot "evade a properly argued motion to dismiss simply because plaintiff has chosen not to attach the [document] to the complaint or to incorporate it by reference."¹⁵ In *Brass v. Amer. Film Techs, Inc.*,¹⁶ the Second Circuit stated that, on a motion to dismiss, a court may consider documents "either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit."¹⁷ *Brass* was subsequently abrogated by *Chambers v. Time Warner, Inc.*,¹⁸ which held that mere "notice or possession" was not enough and that reliance was "a necessary prerequisite

¹² *Cortec*, 949 F.2d at 47-48 (emphasis added). Although the court stated that the plaintiffs "solely" relied on the documents, it does not provide any reason why reliance on additional materials should preclude a finding that a document is "integral."

¹³ *Id.* at 48 (emphasis added).

¹⁴ 936 F.2d 759 (2d Cir. 1991).

¹⁵ *Id.* at 762; accord *In re J.P. Jeanneret Associates, Inc.*, 769 F. Supp. 2d 340, 354-55 (S.D.N.Y. 2011).

¹⁶ 987 F.2d 142 (2d Cir. 1993).

¹⁷ *Id.* at 150.

¹⁸ 282 F.3d 147, 153 (2d Cir. 2002).

to the court's consideration of [such] document on a dismissal motion."¹⁹

In *International Audiotext Network, Inc. v. American Telephone and Telegraph Co.*,²⁰ the Second Circuit held that if a plaintiff "relies heavily upon [a document's] terms and effect . . . [the document] is 'integral' to the complaint."²¹ *International Audiotext* involved a telecommunications information provider that sued a long-distance carrier, AT&T, alleging Sherman Act violations.²² The claims arose from the carrier's refusal to contract with it regarding international calls.²³ Plaintiff wanted to enter the international market for "audiotext" services, but claimed AT&T had monopoly power and would not deal with plaintiff because it had contracted with a different carrier.²⁴ Plaintiff's proposal was similar to that of the party with whom AT&T had contracted, and it claimed AT&T's refusal to work with plaintiff was an antitrust violation.²⁵ Although the complaint did not incorporate the competitor agreement, the pleading relied heavily on its "terms and effect"—therefore, the court held the agreement was "integral" to the complaint and, for that reason, it could properly "consider its terms in deciding whether . . . [plaintiff] can prove any set of facts that would entitle it to relief."²⁶

In 2002, in *Chambers v. Time Warner, Inc.*, the Second Circuit restricted the liberal approach some courts had taken as to whether extrinsic evidence should be deemed "integral" to a pleading.²⁷ The court began by emphasizing, as prior courts had held, that "[e]ven where a document is not incorporated by reference, the court may nevertheless consider it where the complaint 'relies heavily upon its terms and effect,' which renders the document 'integral' to the complaint."²⁸ However, the court emphasized that mere notice or possession of a document, as suggested in *Brass*, would not be enough to allow such consideration of a document, absent summary

¹⁹ *Id.* at 153.

²⁰ 62 F.3d 69 (2d Cir. 1995).

²¹ *Id.* at 72.

²² *Id.* at 70.

²³ *Id.* at 71.

²⁴ *Id.*

²⁵ *Int'l Audiotext Network, Inc.*, 62 F.3d at 71.

²⁶ *Id.* at 72.

²⁷ *Chambers*, 282 F.3d at 152-54.

²⁸ *Id.* at 153 (quoting *Int'l Audiotext Network, Inc.*, 62 F.3d at 72 (*per curiam*)).

judgment conversion.²⁹ Determining whether certain Codes could be considered on the motion to dismiss, the court held that because the pleading did not refer to the Codes and because it was unclear that the Codes' text was incorporated into the contracts at issue, the Codes could not be considered part of the complaint, even if plaintiff knew of them.³⁰ The defense had not convinced the court that plaintiff relied on the Codes in "framing" the pleading, which was an element the defense had to show before the court would consider the Codes.³¹

In *Berman v. Sugo LLC*,³² counter-plaintiffs relied on a letter of understanding in arguing the parties intended to be bound by an oral operating agreement which stated that it (the agreement) would serve as a precursor to a more formal operating agreement between members.³³ The court noted that because the counter-plaintiffs were relying, in part, on the "terms and effect" of the letter of understanding to set forth their claims, this satisfied the prerequisites for the court's consideration of the letter under *Chambers*.³⁴ Such consideration, the court explained, presented no danger of prejudice to the counter-plaintiffs because one had "actual notice" of the document. Specifically, he not only signed and executed it, but attached it as an exhibit to his affidavit and had relied on it in a different action, establishing, to the court's satisfaction, the "fairness of its consideration" on the instant motion to dismiss.³⁵ Consideration of a document on a motion to dismiss cannot be avoided where the pleader has notice of

²⁹ *Id.* at 153; *see, e.g.*, In re Lyondell Chemical Co., 491 B.R. 41, 50 n.48 (Bankr. S.D.N.Y. 2013) (discussing development of this body of law and noting the argument that *Chambers* had limited the rulings in the 1990s cases (and referring to them as "arguably clashing rulings")). *Chambers* clearly rejected the idea that mere possession of a document should be sufficient to allow consideration. *Chambers*, 282 F.3d at 153. The *Lyondell* court, however, rejected the proposition that *Chambers* overruled the 1990s cases and reiterated that courts need not disregard documents that a plaintiff knows about but intentionally disregards, where they are "integral" to plaintiff's claims, forcing the defense to incur the burden and additional expense of preparing for a summary judgment motion. *Lyondell Chemical Co.*, 491 B.R. at 50.

³⁰ *Chambers*, 282 F.3d at 154.

³¹ *Id.* (The parties also disagreed as to whether and how the Codes related to or affected the contractual relationships at issue—they could have been irrelevant or they could have been intended to modify the recording contracts at issue.).

³² 580 F. Supp. 2d 191 (S.D.N.Y. 2008).

³³ *Id.* at 201.

³⁴ *Id.* (quoting *Chambers*, 282 F.3d at 153, "a plaintiff's reliance on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough").

³⁵ *Id.*

a document integral to its claims.³⁶

Summarizing, if a defendant can show plaintiff knew of the document's existence at the time the pleading was drafted (and thus would not be prejudiced if it were considered on motion) and that plaintiff *relied* on the document (or its "terms and effect") in *framing* complaint allegations, thus rendering the document (and/or its content) *integral* to plaintiff's claim, such a document may be properly considered on a dismissal motion without the necessity of summary judgment conversion.³⁷ However, the courts provide little guidance as to how the highlighted terms should be analyzed, even in difficult cases where such analysis should be expected.³⁸

III. CASES CONSTRUING THE CONCEPT OF "RELIANCE" IN THE CONTEXT OF MOTIONS TO DISMISS BASED ON UNCITED EXTRINSIC EVIDENCE

Although many cases hold that where it is "evident" that plaintiff relied on a document in framing a complaint, it may be considered on a dismissal motion, courts rarely explain exactly what it is

³⁶ *Id.*

³⁷ *But see* Anglo-German Progressive Fund, Ltd., v. Concorde Group, Inc., No. 09 Civ. 8708, 2010 WL 3911490, at *3 (S.D.N.Y. Sept. 14, 2010) (explaining that the rule is subject to three exceptions. First, the court may consider such a document if it is incorporated by reference. Second, it may consider an extrinsic document if it is "integral" to the complaint, i.e., the complaint "relies heavily upon its terms and effect." Third it may consider an extrinsic document if plaintiff knew of or possessed the document "and relied upon [it] in framing the complaint."). In *Anglo-German*, plaintiff had possession of a private placement memorandum and knew its contents when it filed its amended pleading. *Id.* at *4. The memorandum could be considered, the court held, under *Cortec*, but it did not explain exactly how plaintiff "relied" on the document to "frame" the complaint. *Id.* at *3-4.

³⁸ *See generally* Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P., 129 F. Supp. 2d 578, 581 (W.D.N.Y. 2000) (holding that the defendant could rely on certain correspondence between plaintiffs, defendant and government agencies, which plaintiff failed to attach to its complaint). Plaintiff, the court observed, was on notice of the documents' content and, moreover, had *relied* on that correspondence in bringing suit. *Id.* at 581. Citing *Cortec*, the *Bath* court stated "plaintiff should not so easily [by failing to attach documents] be allowed to escape the consequences of his own failure . . . plaintiff should not be permitted to survive a motion to dismiss and put a defendant to the trouble and expense of discovery simply by excluding highly relevant facts and documents . . ." *Id.* The decision did not explain exactly how plaintiff "relied" on these documents to "frame" its pleading nor whether any of the correspondence that defendants submitted was actually referenced in the complaint. *Id.* It did say, however, that defendants should not be put to the "trouble and expense" of litigation by the exclusion of documents or information that was "highly relevant." *Id.*

that makes “reliance” evident.³⁹ The cases contain little discussion of how concepts such as “reliance,” “dependency” and “framing” should be understood when a pleader does not reference a document. Nevertheless, a few cases in which plaintiff omits reference to the evidence for tactical or strategic reasons do provide some guidance as to how to determine if plaintiff “relied” on such evidence.

In *DeLuca v. AccessIT Group, Inc.*,⁴⁰ for example, the court, referring to “extraneous information” and conjoining insights from *Cortec*, *International Audiotext*, and *Chambers*, explained what should be necessary for such information to be counted as “integral” to a complaint:

To be integral to a complaint, the plaintiff must have (1) “actual notice” of the extraneous information and (2) “relied upon th[e] documents in framing the complaint. [M]ere notice or possession is not enough” for a court to treat an extraneous document as integral to a complaint; the complaint must “rel[y] heavily upon [the document’s] terms and effect” for that document to be integral.⁴¹

DeLuca did not actually lay out a test to determine “reliance”—rather, it stated conditions which, if present, would allow a court to conclude the document was relied upon for purposes of determining whether that document could be properly considered on a dismissal motion.

In lieu of a determination of whether a plaintiff “relied” on extrinsic evidence, several courts have held dismissal may not be avoided when a complaint strategically avoids reference to a document for the purpose of avoiding dismissal.⁴² In *In re Lyondell*

³⁹ See, e.g., *Great British Teddy Bear Co. v. McNeil-PPC, Inc.*, No. 12 Civ. 3926, 2013 WL 1286148, at *1 n.1 (S.D.N.Y. Mar. 29, 2013) (Where it was “evident” that plaintiff “relied upon . . . [emails] in framing the complaint,” the court could consider them, citing *Cortec*, but not explaining what made it “evident.”).

⁴⁰ 695 F. Supp. 2d 54 (S.D.N.Y. 2010).

⁴¹ *DeLuca*, 695 F. Supp. 2d at 60 (quoting *Chambers*, 282 F.3d at 153) (emphasis added).

⁴² See, e.g., *Jacquemyns v. Spartan Mullen Et Cie, S.A.*, No. 10 Civ. 1586, 2011 WL 348452, at *4 (S.D.N.Y. Feb. 1, 2011) (“Plaintiffs’ failure to include matters of which as pleaders they had notice and which were integral to their claim—and that they apparently most wanted to avoid—may not serve as a means of forestalling the district court’s decision on the motion.”); *Cortec*, 949 F.2d at 44; see also *I. Meyer Pincus*, 936 F.2d at 762 (“plaintiff [cannot] evade a properly argued motion to dismiss simply because plaintiff has chosen

Chemical Co.,⁴³ the court, synthesizing Second Circuit authorities,⁴⁴ noted an apparent conflict between *Cortec* and *Chambers*, but held *Cortec* remained controlling law:

[T]his Court does not understand the *Chambers* court to have overruled the *Cortec* court's statement that "[p]laintiffs' failure to include matters of which as pleaders they had notice and which were integral to their claim—and that they apparently most wanted to avoid—may not serve as a means of forestalling the district court's decision on the motion." The [*Lyon-dell*] Court synthesizes the arguably clashing rulings in *Chambers*, on the one hand, and *Cortec*, *Brass*, and *International Audiotext*, on the other, to lay out a principle that as a general matter, extrinsic matter should not be considered on a motion to dismiss *But if the plaintiff . . . knows about it and intentionally chooses to disregard it, a moving defendant still may rely on that extrinsic matter in moving to dismiss, and the Court need not subject that defendant, and the Court system, to the additional expense and burden of considering that same matter later on a motion for summary judgment.*⁴⁵

When the language of a complaint is contradicted by the language of an agreement that plaintiff attempts to hide from a court, and the court discovers the agreement and concludes plaintiff tried to create a false impression as to the material facts by secreting a document which would "give the lie" to a specious factual presentation, such documents are properly considered by the court.⁴⁶

not to attach the [document] to the complaint or to incorporate it by reference").

⁴³ 491 B.R. 41 (Bankr. S.D.N.Y. 2013), *aff'd*, 505 B.R. 409 (S.D.N.Y. 2014).

⁴⁴ *Lyondell*, 491 B.R. at 50 n.48 (explaining that, in its view, the Second Circuit, in *Chambers*, had "cut back" on the liberal pleading rule set forth in the 1990s as to what documents could be properly considered on a motion to dismiss. "In its 2002 decision in *Chambers*, the Circuit cut back on earlier, broader, pronouncements in *Cortec*, *Brass*, and *International Audiotext* in the 1990s in which the Circuit had stated, in substance, that trial courts could consider, on motions to dismiss, documents that plaintiffs had in their possession or knew about that would defeat their claims.").

⁴⁵ *Id.* (quoting *Cortec*, 949 F.2d at 44) (emphasis added).

⁴⁶ See, e.g., *Karmilowicz v. Hartford Fin. Servs. Grp.*, No. 11 Civ. 539, 2011 WL 2936013, at *5 (S.D.N.Y. July 14, 2011) (explaining that where complaint failed to attach

This was the case, for example, in *Ginx, Inc. v. Soho Alliance*,⁴⁷ where the court held:

As will be seen, any reference to several important court and administrative documents has been inexplicably and improperly omitted from the Amended Complaint, thereby *creating a demonstrably false impression of certain key facts* When plaintiffs fail to include any reference to documents that they knew of that are integral to their claim, there is no need for the court to convert the motion to a summary judgment motion in order to take them into account. “[P]laintiffs’ failure to include matters of which as pleaders they had notice and *which were integral to their claim—and that they apparently most wanted to avoid*—may not serve as a means of forestalling the district court’s decision on the motion.” . . . [T]he rule just discussed means the Court can consider the text of the April 17, 2007 Reasons for Approval; the second Article 78 petition; and Justice Shafer’s decision on that petition—all critically important documents that Plaintiffs’ counsel has elected not to refer to in the complaint (*I assume because they give the lie to several key allegations of “fact” in the amended pleading*).⁴⁸

certain plans to pleading and none of the specific plan provisions were referenced in complaint allegations, and defendant submitted copies of the documents to the court on motion to dismiss, plans could properly be considered). On appeal, the Second Circuit explained that a plaintiff cannot “evade a properly argued motion to dismiss simply because [the] plaintiff has chosen not to attach [a document on which he relies in bringing suit] to the complaint or to incorporate it by reference.” *Karmilowicz v. Hartford Fin. Servs. Grp., Inc.*, 494 F.App’x 153, 156 (2d Cir. 2012) (quoting *I. Meyer Pincus*, 936 F.2d at 762; *Cortec*, 949 F.2d at 44). “Plaintiffs’ failure to include matters of which as pleaders they had notice and which were integral to their claim—and that they apparently most wanted to avoid—may not serve as a means of forestalling the district court’s decision on the motion.” *Id.* The court in *Karmilowicz* affirmed because plaintiff’s claims were “defeated by the plain language of the compensation plans upon which they purport to rely. Though *Karmilowicz* did not attach these plans (or letters summarizing them) to his Complaint, The Hartford provided them to the court in support of its motion to dismiss, and the court properly consulted them.” *Id.* at 156.

⁴⁷ 720 F. Supp. 2d 342 (S.D.N.Y. 2010).

⁴⁸ *Id.* at 345, 352 (quoting *Cortec*, 949 F.2d at 44; see *I. Meyer Pincus*, 936 F.2d at 762 (refusing “to create a rule permitting a plaintiff to evade a properly argued motion to dismiss

Federal courts outside the Second Circuit have taken a similar position.

In *Parrino v. FHP, Inc.*,⁴⁹ for example, the Ninth Circuit explained that the rules governing when a court may consider extrinsic documents should reflect the policy that plaintiffs should not be permitted to deliberately omit references to documents when three conditions are met: authenticity is not in issue, plaintiff is on notice of document contents, and plaintiff's claim *depends* on the document.⁵⁰ Citing *Parrino*, a California district court, in *Martinez v. Welk Group, Inc.*,⁵¹ noted that plaintiff's claims rested on the contents and terms of an agreement which the complaint referenced, regarding a property interest.⁵² Plaintiff failed to attach the agreement but the defense provided a report, referenced in the agreement, to support its contention that plaintiff had not acquired the property interest at issue.⁵³ Because plaintiff's claim rested on the agreement's contents and terms which the report helped define, the court held that the report was "essential" (read "integral") to the claim and could be properly considered.⁵⁴

In *McNulty v. Reddy Ice Holdings, Inc.*,⁵⁵ a Michigan federal case, plaintiff failed to fully explain the contents of an agreement in a complaint which, the court concluded, had the effect of rendering the complaint "misleading."⁵⁶ By "revealing only those portions that help his case, while hiding those which clearly are relevant and applicable, Plaintiff has put the Release in play."⁵⁷

In each of the above non-New York federal cases, the courts determined they were not required to accept a plaintiff's misleading factual presentation created or bolstered by a tactical or strategic omission of documents that would, if presented to the court, put the lie to plaintiff's representation of the factual basis of the subject

simply because plaintiff has chosen not to attach the [document] to the complaint or to incorporate it by reference").

⁴⁹ 146 F.3d 699 (9th Cir. 1998).

⁵⁰ *Id.* at 705-06.

⁵¹ No. 09 CV. 2883, 2011 WL 90313, at *1, *3 (S.D. Cal. Jan. 11, 2011).

⁵² *Id.* at *3.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ No. 08 CV. 13178, 2009 WL 1508381, at *1 (E.D. Mich. May 29, 2009), *rev'd on other grounds*, 2009 WL 2168231 (E.D. Mich. July 17, 2009).

⁵⁶ *Id.* at 6.

⁵⁷ *Id.*

claims.

Other courts, however, have declined efforts to incorporate by reference extrinsic documents which have only *implicitly* been referenced in a complaint,⁵⁸ particularly when only *limited* reference to such documents is made,⁵⁹ and/or courts conclude plaintiff has not “heavily relied” on the proffered documents’ “terms and effect” in order to “frame” complaint allegations.⁶⁰

When it is patent, however, that the pleader avoided mentioning a document precisely to manipulate and pre-determine the outcome of anticipated dismissal motion practice by creating a false factual presentation, while imposing costs on defendant and wasting judicial resources, they have encountered substantial judicial hostility.

In *Grosz v. Museum of Modern Art*,⁶¹ for example, the son and daughter-in-law of a deceased anti-Nazi artist sued an art museum seeking a declaration of title and replevin of three of the artist’s paintings.⁶² The question was when the statute of limitations began to run on plaintiffs’ claims or, restated, when did the museum actually reject plaintiffs’ request for replevin, which would be the moment of accrual of the limitation period.⁶³ The court rejected plaintiffs’ accrual argument and plaintiffs sought re-consideration and re-argument.⁶⁴ Plaintiffs acknowledged intervening communication between the parties but did not attach copies to the complaint.⁶⁵ The museum moved to dismiss arguing the correspondence was “integral” to the complaint and provided same to the court to support its motion.⁶⁶ The court began by observing that “[p]laintiffs were required to plead compliance with the statute of limitations . . . which necessarily rendered the parties’ correspondence ‘integral’ to the com-

⁵⁸ See *Madu, Edozie & Madu*, 265 F.R.D. at 124.

⁵⁹ See, e.g., *Goldman v. Belden*, 754 F.2d 1059, 1066 (2d Cir. 1985); *Global Network Commc'ns, Inc. v. City of N.Y.*, 458 F.3d 150, 156 (2d Cir. 2006).

⁶⁰ See, e.g., *DeLuca*, 695 F. Supp. 2d at 59-60 (concluding that documents that were not integral to the complaint would not be considered when defense had not shown plaintiff heavily relied on terms of such documents).

⁶¹ 772 F. Supp. 2d 473 (S.D.N.Y. 2010).

⁶² *Id.* at 476, 490.

⁶³ *Id.* at 481-83.

⁶⁴ *Id.* at 491.

⁶⁵ *Grosz*, 772 F. Supp. 2d at 491.

⁶⁶ *Id.* at 496-97.

plaint,”⁶⁷ and, thus “obviated any need to convert the motion to dismiss to a motion for summary judgment.”⁶⁸

Explaining that matters outside the pleading may be properly considered in “adjudicating a motion to dismiss if they are ‘integral’ to a plaintiff’s claims, even [when] the plaintiff fails to append or allude to them in [a] complaint,”⁶⁹ the Court held that plaintiffs could not properly avoid matters “integral” to their claims to forestall dismissal under Rule 12.⁷⁰ Otherwise, the court explained, the pleader could “evade a properly argued motion to dismiss simply because plaintiff has chosen not to attach the [document] to the complaint or to incorporate it by reference.”⁷¹ The court then explained the sense in which plaintiffs could “rely” on documents not attached to the complaint (or referenced in it), and what it means to be “integral”:

Plaintiffs clearly relied on the entire course of correspondence between the parties when they framed their Complaint. By affirmatively pleading that the April 12, 2006 letter was MoMA’s “refusal” of their demand, Plaintiffs necessarily represented that those earlier letters did not convey any “refusal.” This made *the correspondence* between the parties “integral” to Plaintiffs’ claim of conversion, specifically to the contention in their Complaint that they had complied with the statute of limitations. Plaintiffs could not evade MoMA’s statute of limitations argument by ignoring the earlier letter that was unfavorable to their point of view—including especially the July 20, 2005 letter from Lowry to Jentsch that MoMA (and eventually the Court) identified as the Museum’s *actual* refusal of Plaintiffs’ demand for purposes of the demand-and-refusal rule.⁷²

⁶⁷ *Id.*

⁶⁸ *Id.* at 497.

⁶⁹ *Id.*

⁷⁰ *Grosz*, 772 F. Supp. 2d at 497.

⁷¹ *Id.* (quoting *I. Meyer Pincus*, 936 F.2d at 762).

⁷² *Grosz*, 772 F. Supp. 2d at 497 (emphasis added). The court noted that the letter at issue had also been brought to the Court’s attention in another way when plaintiffs chose to call the court’s attention to a different letter, as support for their argument that the statute of limitations should be equitably tolled. The letter which referred to earlier correspondence be-

Because plaintiffs relied on a theory of conversion for which the date of the refusal of plaintiffs' demand would trigger the limitation period, plaintiffs, by characterizing one piece of correspondence within the *course* of correspondence as the "actual refusal," made the entire *course*, not just the individual piece of correspondence that plaintiffs asserted was the accrual trigger, "integral" to plaintiffs' liability theory.⁷³ Stated otherwise, the "terms and effect" of the documents making up the *course* of correspondence would be determinative of the "actual refusal" date. Plaintiffs would not be permitted to cherry-pick favorable pieces of correspondence while hiding unfavorable ones because it was the "course of correspondence"—not individual pieces of correspondence—that would determine the plausibility of plaintiffs' accrual date analysis—a matter the court concluded was "integral" to the complaint's allegations. In fact, the sustainability of the pleading would be determined by that "course."⁷⁴

IV. COURTS SHOULD EMPLOY A "BUT FOR" ANALYSIS TO DETERMINE RELIANCE ON EXTRINSIC EVIDENCE

A. The Traditional Test of "Reliance"

In *List v. Fashion Park, Inc.*,⁷⁵ the Second Circuit set forth what has become the traditional meaning and test of "reliance," in a securities fraud case, based on a strategic omission.⁷⁶ The court ex-

tween the parties, led the court "inexorably back to the letter that proved fatal to Plaintiffs' lawsuit." *Id.* at 497 n.3; *see also L-7 Designs, Inc.*, 647 F.3d at 422 (stating emails were "integral" to the negotiation exchange that plaintiff identified as the basis for its Complaint).

⁷³ *Grosz*, 772 F. Supp. 2d at 497.

⁷⁴ *Id.*

⁷⁵ 340 F.2d 457 (2d Cir. 1965), *cert. denied sub nom. List v. Lerner*, 382 U.S. 811 (1965).

⁷⁶ *Id.*; *see generally* *Gordon v. Burr*, 366 F. Supp. 156, 165 (S.D.N.Y. 1973), *aff'd in part, rev'd in part*, 506 F.2d 1080 (2d Cir. 1974). The concept of reliance finds its classic formulation in *List v. Fashion Park* . . . "The test of 'reliance' is whether 'the misrepresentation is a substantial factor in determining the course of conduct which results in the recipient's loss.'" *Id.* (quoting *List*, 340 F.2d at 462). The court went on to note that "[t]he reason for this requirement . . . is to certify that the conduct of the defendant actually caused the plaintiff's injury." *Id.*; *see generally* Merritt B. Fox, *Securities Class Actions Against Foreign Issuers*, 64 STAN. L. REV. 1173, 1188-89 (2012):

The seminal case defining traditional reliance is the Second Circuit's 1965 opinion in *List v. Fashion Park, Inc.* The district court in *List* found that the plaintiff, with regard to one of his allegations, would have sold his stock even if he had known the true situation. The district court

plained and held:

[W]e do not agree with certain overtones in the opinion of the trial court concerning the meaning of ‘reliance’ in a case of non-disclosure under Rule 10b-5. The opinion intimates that the plaintiff must prove he actively relied on the silence of the defendant, either because he consciously had in mind the negative of the fact concealed, or perhaps because he deliberately put his trust in the advice of the defendant. Such a requirement, however, would unduly dilute the obligation of insiders to inform outsiders of all material facts, regardless of the sophistication or naiveté of the persons with whom they are dealing. . . . *The proper test is whether the plaintiff would have been influenced to act differently than he did act if the defendant had disclosed to him the undisclosed fact.* . . . This test preserves the common law parallel between ‘reliance’ and ‘materiality,’ differing as it does from the definition of ‘materiality’ under Rule 10b-5 solely by substituting the individual plaintiff for the reasonable man. Of course this test is not utterly dissimilar from the one hinted at by the trial court. That the outsider did not have in mind the negative of the fact undisclosed to him, or that he did not put his trust in the advice of the insider, would tend to prove that he would not have been influenced by the undisclosed fact even if the insider had disclosed it to him.⁷⁷

Restated, the reliance element is satisfied if the pleading plaintiff filed would have been materially different, *but for* his or her review of the document in issue.⁷⁸ Reciprocally, reliance will not be satis-

dismissed the claim relating to this allegation and the Second Circuit affirmed. Citing common law authorities, the court found that “the test of reliance” is whether “the misrepresentation is a substantial factor in determining the course of conduct which results in [the recipient’s] loss.” The court stated, “The reason for this requirement . . . is to certify that the conduct of the defendant actually caused the plaintiff’s injury.”

Id. (quoting *List*, 340 F.2d at 462).

⁷⁷ *List*, 340 F.2d at 463-64; *see generally* Fox, *supra* note 77, at 1188-89.

⁷⁸ Fox, *supra* note 77, at 1190; *see generally* Shapiro v. Merrill Lynch, Pierce, Fenner &

fied when it cannot be determined that plaintiff would have acted differently than he actually did.⁷⁹

B. Reliance in Securities Fraud and RICO Cases—*Basic Inc., Halliburton II and Bridge*

Securities fraud and the Racketeer Influenced and Corrupt Organizations Act (“RICO”) cases⁸⁰ often provide thorough analyses of the reliance concept. The question of how reliance is construed is of import in litigation generally, but especially securities litigation where cases, by their nature, often turn on the content of documents. The reliance concept has been front and center in several recent Supreme Court cases. In securities class suits relying on the fraud on the market theory, for example, reliance, since the seminal case of *Basic Inc. v. Levinson*,⁸¹ has been presumed under a so-called “rebuttable presumption of reliance.”⁸² The Court’s recent decision in *Halliburton Co. v. Erica P. John Fund, Inc.*,⁸³ re-examining *Basic*, affirmed the presumption of reliance by a plaintiff class.⁸⁴ In doing so,

Smith, Inc., 353 F. Supp. 264, 275 (S.D.N.Y. 1972) (applying the *List* test of reliance—whether plaintiff would have been influenced to act differently than he did act if defendant had disclosed to him the undisclosed fact); *Astor v. Texas Gulf Sulphur Co.*, 306 F. Supp. 1333, 1341-42 (S.D.N.Y. 1969) (“Reliance and causation are often used interchangeably,” in applying *List* test of reliance and holding: “the question is whether the plaintiffs or any of them would have been influenced to act differently than they did if they had known the material information at the time of sale, and if they would, whether they were damaged by defendants’ conduct.”); *see generally* Fox, *supra* note 77, at 1188-89 (“The seminal case defining traditional reliance is the Second Circuit’s 1965 opinion in *List* [T]he test of reliance” is whether “the misrepresentation is a substantial factor in determining the course of conduct which results in [the recipient’s] loss.” The court stated, “The reason for this requirement . . . is to certify that the conduct of the defendant actually caused the plaintiff’s injury.”); *but see* Fin. Indus. Fund, Inc. v. McDonnell Douglas Corp., No. C-1257, 1971 WL 3973, at *4 (D.Colo. Jan. 28, 1971), *rev’d*, 474 F.2d 514 (10th Cir. 1973) (stating *List* reliance test was actually talking about the causal factor rather than the reliance factor which traditionally existed in the common law action of fraud and deceit, noting Rule 10b-5 does not specify or define any particular type of reliance).

⁷⁹ *See, e.g.*, *Bell v. Cameron Meadows Land Co.*, 669 F.2d 1278, 1283 (9th Cir. 1982) (“A finding of nonreliance implies that plaintiffs would have acted no differently had they known the truth.”).

⁸⁰ 18 U.S.C. § 1961 *et. seq.*

⁸¹ 485 U.S. 224 (1988).

⁸² *Id.* at 248-49 nn.28-29.

⁸³ 134 S. Ct. 2398 (2014).

⁸⁴ *Id.* at 2408-09. *See generally* Laurence A. Steckman, Robert E. Conner and Stuart S. Rosenthal, *Reliance and Loss Causation in Securities Fraud Class Certification Motion Practice After Halliburton II*, PRIVATE SECURITIES LITIGATION REFORM ACT REPORTER, Vol.

it rejected the argument made by the defendant and some of its *amici* that direct reliance, as in common law fraud cases, should be required.⁸⁵

In analyzing a RICO claim,⁸⁶ the Court, in *Bridge v. Phoenix Bond & Indemnity Co.*,⁸⁷ recently resolved a Federal Circuit split as to whether plaintiff must allege first party reliance on a mail or wire communication to state a RICO claim or whether a third-party's reliance could be deemed, in some situations, to satisfy the reliance element for purposes of the claim.⁸⁸ The Court held that if plaintiff can show proximate (loss) causation between his or her injury and a mail or wire communication by defendant, even if that communication were made by defendant to a third party, sufficient "reliance" exists for RICO statutory purposes to impose liability on defendant.⁸⁹

In other words, first party, direct reliance, is not mandated by RICO; rather, third party reliance is all the "reliance" plaintiff needs to plead when a RICO case is based on mail or wire fraud.⁹⁰ Liability may be imposed when the statutory purpose of the legislation would be compromised by a wooden requirement of direct, face-to-face reliance, as understood in common law terms.⁹¹ These cases illustrate the flexibility of the reliance concept, as interpreted by the Court, in securities and RICO contexts.

37, Nos. 3 & 4 at 35, (June-July, 2014) (symposium on the effect of *Halliburton II* in Securities Litigation).

⁸⁵ *Id.*

⁸⁶ 18 U.S.C. § 1961 *et. seq.*

⁸⁷ 553 U.S. 639 (2008) (describing competing positions).

⁸⁸ *Id.* at 646 ("[T]hree other circuits that have considered this question agree . . . that the direct victim may recover through RICO whether or not it is the direct recipient of the false statements." See, e.g., *Mid Atlantic Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260 (4th Cir. 1994); *Systems Management, Inc. v. Loiselle*, 303 F.3d 100 (1st Cir. 2002); *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251 (2nd Cir. 2004). However, two Circuits hold that the plaintiff must show that it in fact relied on the defendant's misrepresentations. See, e.g., *Phoenix Bond & Indem. Co. v. Bridge*, 477 F.3d 928 (7th Cir. 2007); *Sikes v. Teleline, Inc.*, 281 F.3d 1350 (11th Cir. 2002). Compare *Sandwich Chef of Texas, Inc. v. Reliance Nat. Indemnity Ins. Co.*, 319 F.3d 205, 223 (5th Cir. 2003) (recognizing "a narrow exception to the requirement that the plaintiff prove direct reliance on the defendant's fraudulent predicate act . . . when the plaintiff can demonstrate injury as a direct and contemporaneous result of [a] fraud committed against a third party"), with *Appletree Square I, L.P. v. W.R. Grace & Co.*, 29 F.3d 1283, 1286–87 (8th Cir. 1994) (requiring the plaintiff to show that it detrimentally relied on the defendant's misrepresentations).

⁸⁹ See *Bridge*, 553 U.S. at 657.

⁹⁰ *Id.*

⁹¹ *Id.* at 652.

V. CONCLUSION

The traditional test for reliance can and should be used to determine whether extrinsic evidence is “integral” for motion to dismiss purposes. Doing so, however, does not require any alternation of the traditional concept of reliance set forth in *List*: “[t]he proper test is whether the plaintiff would have been influenced to act differently than he did act if the defendant had disclosed to him the undisclosed fact.”⁹² If the filed pleading would have been materially different but for plaintiff’s knowledge of the contents of a document in its possession, sufficient reliance exists for courts to consider such a document on a dismissal motion, without converting that motion to one for summary judgment.

This should be true even if the document was neither attached to a pleading nor mentioned in it, and the document’s actual terms and conditions are not overtly presented to the reviewing court. This rule protects plaintiffs when documents omitted from a pleading are non-material, and protects defendants and the courts from pre-filing manipulation by those who would file claims based on specious factual presentations, hoping Rule 12 pleading limitation rules will let them slip past dismissal. A “but for” analysis of reliance provides courts with a straight-forward means of determining whether extrinsic evidence should be considered on a rule 12 motion, even in cases where neither documents nor the information in them is expressly cited in a pleading.

⁹² *List*, 340 F.2d at 463-64.