

## SOUTHERN DISTRICT CIVIL ROUNDUP

Striking Improper Use  
Of Settlement Communication

By Edward M. Spiro and Christopher B. Harwood

October 17, 2023

**R**ule 12(f) of the Federal Rules of Civil Procedure provides that a court “may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter.” Notwithstanding Rule 12(f)’s language, the U.S. Court of Appeals for the Second Circuit has cautioned that “courts should not tamper with the pleadings unless there is a strong reason for doing so,” and has denied motions to strike pursuant to Rule 12(f) based on assertions that the allegations are “impertinent” or “immaterial”. *Lipsky v. Commonwealth United*, 551 F.2d 887, 893 (2d Cir. 1976).

The Second Circuit also has cautioned that questions of relevancy and admissibility generally “should especially be avoided” at the pleadings stage. Applying the foregoing principles, courts in this circuit nevertheless have granted motions to strike when a party has demonstrated that evidence in support of the allegations could not possibly be admissible at trial.

Although Rule 408 of the Federal Rules of Evidence (which renders inadmissible statements made during settlement negotiations) is an often-invoked rule of admissibility, the Second Circuit has not yet addressed the intersection of Rules 12(f) and 408. Some courts in this circuit, however, have granted



Edward M. Spiro and Christopher B. Harwood

motions to strike portions of complaints that refer to statements made during settlement negotiations.

Southern District Judge Paul G. Gardephe recently addressed this very issue in *My Mavens v. Grubhub*, 2023 WL 5237519 (S.D.N.Y. Aug. 14, 2023), in which he granted a motion to strike allegations premised entirely on information learned during Rule 408 settlement discussions. In granting the motion to strike, Judge Gardephe reasoned that the policy underlying Rule 408 of encouraging settlement discussions constituted a “‘strong reason’ for ‘tamper[ing] with the pleadings’” (quoting *Lipsky*, 551 F.2d at 893).

**‘My Mavens v. Grubhub’**

My Mavens LLC is a food technology company that alleged that Grubhub Inc., an online mobile food-ordering and delivery marketplace, and a former Grubhub software engineer, Wenjun Zhang (collectively, defendants), conspired to misappropriate My

EDWARD M. SPIRO and CHRISTOPHER B. HARWOOD are principals of Morvillo Abramowitz Grand Iason & Anello. Spiro is the co-author of “Civil Practice in the Southern District of New York,” 2d Ed. (Thomson Reuters 2023). Harwood is the former co-chief of the Civil Frauds Unit at the U.S. Attorney’s Office for the Southern District of New York. Emily Smit, an associate at the firm, assisted with the preparation of this article.

Mavens' proprietary "functionalities" in violation of the Defend Trade Secrets Act, 18 U.S.C. § 1836, as well as numerous state laws.

According to My Mavens, during a chance meeting between Zhang and My Mavens' founding principal, Zhang learned of an opportunity to provide coding and software development services to My Mavens in exchange for an equity interest in the company. Zhang allegedly expressed an interest, which prompted My Mavens and Zhang to execute a restrictive nondisclosure agreement (NDA) to ensure that Zhang did not share information about My Mavens' proprietary business concepts with Grubhub.

Thereafter, My Mavens allegedly shared proprietary information with Zhang, including a detailed list of search and promotion capabilities that My Mavens intended to implement. My Mavens alleges that Zhang then shared details of the information with Grubhub, and that Grubhub used the information to develop code to offer some of the same proprietary functionalities on its website.

---

My Mavens allegedly shared proprietary information with Zhang, including a detailed list of search and promotion capabilities that My Mavens intended to implement.

On June 17, 2020, My Mavens filed its initial complaint against Zhang and Grubhub. Shortly thereafter, My Mavens made a settlement demand and in response, Grubhub's attorney sent My Mavens' attorney a letter marked "For Settlement Purposes Only FRE408." The letter denied any wrongdoing on the part of Grubhub, and in particular denied that any discussions had occurred between Zhang and anyone at Grubhub regarding Zhang's interactions with My Mavens.

The letter went on to state that had Zhang disclosed to Grubhub his interactions with My Mavens, Grubhub would not have authorized the interactions. Grubhub's attorney noted that Grubhub's Code of Conduct, which Zhang had signed on Feb. 13, 2017, prohibited such interactions absent prior approval from a Grubhub supervisor, which had not occurred.

A few months later, My Mavens amended its complaint to allege that in accordance with Grubhub's Code of Conduct, Zhang had requested and received permission from Grubhub to work for My Mavens so that Zhang could obtain access to My Mavens' proprietary concepts and Grubhub could then recre-

ate them on its own website. My Mavens' original complaint did not include any reference to Grubhub's Code of Conduct or Grubhub's alleged approval of Zhang's dealings with My Mavens.

In conjunction with a motion to dismiss and motion for partial summary judgment, Defendants moved to strike the amended complaint's allegations regarding Grubhub's Code of Conduct, pursuant to Rule 12(f), arguing that the allegations were based solely on information learned through settlement negotiations conducted pursuant to Rule 408. My Mavens did not dispute that the allegations at issue were based exclusively on information learned during settlement negotiations.

### Relevant Legal Principles

In resolving Grubhub's motion to strike, Judge Gardephe addressed the intersection of Rule 12(f) and Rule 408, noting that the Second Circuit had not yet addressed a Rule 12(f) motion to strike premised on alleged improper use of information learned during Rule 408 settlement discussions.

Judge Gardephe first discussed the *Lipsky* case, in which the Second Circuit addressed a Rule 12(f) motion premised on inadmissibility. There, the complaint contained references to a prior SEC complaint against the defendant that culminated in a consent decree. The consent decree would have been inadmissible at trial. See *Lipsky*, 551 F.2d at 891. The Second Circuit upheld the grant of the motion to strike, but it was careful not to do so because the references to the SEC complaint were "impertinent" or "immaterial" (as the district court had), but rather because the consent decree would have been admissible at trial.

Judge Gardephe then addressed Rule 408(a)(2), which renders "conduct or a statement made during compromise negotiations about the claim . . . [inadmissible] to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." Citing the Advisory Committee's note to and legislative history of the rule, Judge Gardephe observed that Congress placed "great importance" on the rule "because of its ramifications for settlement." 2023 WL 5237519, at \*13.

Judge Gardephe noted that the Second Circuit similarly had cited the "fundamental policy [concerns]" underlying the rule (to promote free communication in settlement discussions) as justification for "exclud[ing] consideration of settlement communications even when the Federal Rules of Evidence do not apply" (citing *Rein v. Socialist People's Libyan Arab Jamahiriya*, 568 F.3d 345 (2d Cir. 2009)).

Judge Gardephe next observed that district courts in this circuit consistently have granted motions to strike portions of complaints that refer to settlement offers or statements made during negotiations, but that some courts have denied such motions when the allegations that were sought to be stricken concerned facts that could be learned through discovery.

---

The latter courts relied on the Advisory Committee's note that Rule 408 does not "protect pre-existing information simply because it was presented to the adversary in compromise negotiations."

In denying the motions, the latter courts relied on the Advisory Committee's note that Rule 408 does not "protect pre-existing information simply because it was presented to the adversary in compromise negotiations" (quoting Fed. R. Evid. 408 Committee Notes on Rules – 2006 Amendment).

#### **Application of Legal Principles to 'My Mavens'**

Against this backdrop, Judge Gardephe concluded that the "fundamental policy" underlying Rule 408 warranted granting Grubhub's motion to strike the amended complaint's references to information that My Mavens learned exclusively through the parties' Rule 408-protected settlement discussions.

As justification for his decision, Judge Gardephe emphasized the purpose of Rule 408—as memorialized in the Advisory Committee Note accompanying Rule 408 and the rule's legislative history—to "protect[] . . . conduct and statements associated with settlement negotiations" and "promot[e] . . . the public policy favoring the compromise and settlement of disputes" (citation omitted). Judge Gardephe further reasoned that the mere fact that evidence could come to light during discovery that supports

the allegations does not justify a party using in a pleading information that it learned solely through settlement discussions.

In addition, Judge Gardephe rejected the suggestion that "a party could evade Rule 408 . . . simply by not disclosing that the information at issue came from a settlement communication," observing that a contrary conclusion would render "Rule 408(a)(2)'s prohibition . . . a dead letter."

Judge Gardephe went on to explain that a Rule 12(f) motion could properly be premised on considerations of admissibility, noting that in *Lipsky*, the Second Circuit affirmed a Rule 12(f) motion based on "an evidentiary analysis more attenuated than the issue here." Judge Gardephe observed that, here, no dispute existed that My Mavens's allegations were premised solely on statements "made during compromise negotiations" (quoting Fed. R. Evid. 408(a)(2)), and that the Second Circuit in *Rein* had emphasized the "fundamental policy" of prohibiting a party's use of such statements (quoting *Rein*, 568 F.3d at 352).

Based on the foregoing decisions, Judge Gardephe concluded that a "strong reason" existed "for tamper[ing] with the pleadings" and granting the motion to strike (quoting *Lipsky*, 551 F.2d at 893).

Finally, Judge Gardephe noted that denying Grubhub's Rule 12(f) motion "would have a chilling effect on settlement." If parties could use statements made during settlement negotiations in a pleading, Judge Gardephe reasoned that parties would be deterred from communicating freely during settlement discussions.

#### **Conclusion**

Although the Second Circuit has not yet addressed the intersection of Rule 12(f) and Rule 408, courts are unlikely to allow parties to base their allegations in a pleading on information they learned during settlement discussions, even if the information could later be obtained through discovery.