

Some Information and Belief about “Information and Belief”

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This article addresses a phrase in very common use by practicing lawyers, particularly litigators: “information and belief.” It (or variations of it) is frequently used both in complaints and answers. The phrase appears in the Private Securities Litigation Reform Act (PSLRA),¹ and various provisions of the Federal Rules of Civil Procedure tangentially refer to the concept.² Courts have developed rules associated with the phrase even where it does not appear in any relevant rule, as with Federal Rule of Civil Procedure 9(b).³

A review of these laws, rules and pronouncements suggests that Courts look askance on assertions in complaints made on “information and belief,” and that, for the most part, plaintiffs’ attorneys should avoid them. Under this traditional view, courts can dismiss cases summarily if they find that the allegations in the complaint too heavily rely on “information and belief.” This article challenges that traditional view.

Unfortunately, and despite its common use, the phrase “information and belief” is a source of confusion. There is no explicit definition, although most uses of the phrase suggest that it is a very broad concept indeed, encompassing everything we “know” from sources other than our own personal observation. Many allegations in litigation—indeed, much of what we “know” in life, including our birthdays, other people’s names, who the President of the United States is (and where he was born), and whether the earth is spherical (for those of us who were not astronauts)—can be described as being based on “information and belief.” If we took purported limitations on the use of such allegations seriously, it would substantially change the way we litigate in federal court.

Further, other than in the PSLRA, there is no unambiguous rule about how to deal with allegations based on information and belief. The Federal Rules mention both “information” and “belief” in different rules, and the courts have created rules about it in Rule 9(b), but the relevant rules do not apply to the same actors. Some rules apply to parties and some apply to attorneys, and often both kinds of rules apply simultaneously. No rule requires that a party or

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1. See Part I, *infra*.
2. See Parts II.A and II.B, *infra*.
3. See Part II.C, *infra*.

an attorney identify allegations that are made on “information and belief” in papers filed in civil actions in federal court, although it is a common practice to do so.

This alone would create confusion enough, but the use of the phrase by the “grantees of the Federal Procedural Establishment”⁴ borders on the incoherent. Despite the lack of any textual support, they have suggested in Committee Notes that there may be an obligation to identify claims based on “information and belief,” although it is altogether unclear *whose* information and belief they are talking about.

I suggest that the phrase “information and belief” serves very little purpose when asserted in civil litigation. Questions regarding obligations that rules of litigation conduct impose on litigants and attorneys are best answered by generally asking whether the persons in question are acting reasonably and, in the case of attorneys, with professional competence and due respect for the court. Categorizing allegations as based on “information and belief” is of little help in that process. The phrase refers only to the source of the contentions being asserted, and it covers a wide variety of sources. Some sources are perfectly reasonable to use; others may not be. Treating all such sources identically makes little sense.

I. Information and Belief: A Brief Overview

The remarkable thing about the phrase “information and belief” is that, prior to the passage of the PSLRA in 1995, no one really discussed very much what it meant. This is not to say that statutes did not occasionally use the phrase. They did.⁵ Nor is it to say that courts did not occasionally provide some general hints as to what information and belief might be (or, more accurately, what it was not). They did, most notably contrasting “information and belief” with personal knowledge.⁶ Occasional analogies were drawn; one court of appeals, for example, suggested that “information and belief” was no more than “rumor and hunch.”⁷ But these were relatively infrequent and less than defining.

4. Charles Alan Wright, *Forward: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1, 2 (1994). I have generally assumed that Professor Wright meant the Standing Committee on Rules and Procedures of the Judicial Conference of the United States and the Advisory Committees that work with that Committee.

5. *E.g.*, 28 U.S.C. § 3006 (permitting any affidavit required of the United States for the collection of federal debts to be made on information and belief); 30 U.S.C. § 24 (permitting an authorized agent of an association of individuals seeking mineral rights of land to assert the citizenship of the members of the association on information and belief); 42 U.S.C. § 247d-6d(e)(4)(B) (permitting particular matters in a complaint alleging willful misconduct by someone taking countermeasures in a declared public health emergency to be verified, if specifically identified, on information and belief).

6. *E.g.*, *Beavers v. Henkel*, 194 U.S. 73, 87 (1904) (“If the officer of the foreign government [seeking extradition] has no personal knowledge of the facts, he may, with entire propriety, make the complaint upon information and belief, stating the sources of his information and the grounds of his belief . . .”) (quoting *Rice v. Ames*, 180 U.S. 371, 375-76 (1901)).

7. *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 683 (7th Cir. 1992). The *Bankers Trust* Court was addressing whether allegations made on information and belief could suffice for the

The PSLRA actually uses the phrase “allegations based on information and belief” in its text, and makes certain pleading obligations dependent on whether allegations are “made” on information and belief.⁸ A court (not the party or attorney making the allegations) determines whether an allegation was so “made.” (That is, a party cannot avoid the obligations by simply omitting the phrase “information and belief” from its pleading.)⁹ Accordingly, courts have been forced to determine what exactly “information and belief” is in order to apply the statute. And while the courts have not been entirely uniform, a consensus has emerged that allegations based upon “information and belief” are *any* allegations not based upon the personal or first-hand knowledge of the plaintiff.¹⁰

particularity requirement of Rule 9(b) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 9(b). See note 73, *infra*.

8. 15 U.S.C. § 78u-4(b)(1) (in private securities fraud actions alleging a misrepresentation or material omission, “the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.”).

9. *E.g.*, *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1097 (10th Cir. 2003) (rejecting plaintiffs’ argument that the “their complaint . . . is ‘based on counsel’s investigation [, which] is *not* the same as a complaint pled upon information and belief.’”) (brackets and emphasis in original); *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 351 (5th Cir. 2002) (rejecting argument that “the complaint’s challenged allegations are not made on information and belief but rather simply state facts” because, *inter alia*, “the allegations in the complaint are not based upon Plaintiffs’ personal knowledge and are therefore necessarily pleaded on ‘information and belief,’ although not labeled as such”). See note 10, *infra*.

10. *E.g.*, *Pirraglia v. Novell, Inc.*, 339 F.3d 1182, 1189 (10th Cir. 2003) (holding that allegations regarding statements made to investors during certain conference calls were made on information and belief because the plaintiffs were not participants in those calls; “According to the standard definition, a statement is made on ‘information and belief’ when it is ‘not based on the firsthand knowledge of the person making the allegation’—that person, here, being the plaintiff—‘but that person nevertheless, in good faith, believes the allegation to be true’”) (quoting Black’s Law Dictionary 779 (6th ed. 1990)); *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 351 (5th Cir. 2002) (holding that “the allegations in the complaint are not based upon Plaintiffs’ personal knowledge and are therefore necessarily pleaded on ‘information and belief’”); *In re Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970, 998 n.21 (9th Cir. 1999) (rejecting plaintiff’s argument that allegations based upon the investigation of counsel, “which included a review of [issuer’s] SEC filings, securities analysts reports and advisories about the [issuer] and discussions with consultants” were not made on information and belief; plaintiff “relies on these sources precisely because she does not have direct personal knowledge of the defendants’ alleged misconduct. Her complaint is therefore pled on information and belief”); *Plumbers and Pipefitters Local Union No. 630 Pension-Annuity Trust Fund v. Allscripts-Misys Healthcare Solutions, Inc.*, 707 F.Supp.2d 774, 783 (N.D. Ill., 2010) (holding that plaintiff’s allegations that software company’s product had serious flaws were made on information and belief because “[i]n its complaint, Plaintiff does not allege that it personally had access to the meetings or documents in which this information was revealed”; “information and belief allegations” are “‘based on secondhand information that the declarant believes to be true’”) (quoting Black’s Law Dictionary 705 (8th ed. 2004)); *In re Initial Public Offering Securities Litigation*, 241 F. Supp. 2d 281, 330 n.51 ((S.D.N.Y. 2003) (“‘Information and belief’ commonly refers to assertions ‘based on secondhand information that the declarant believes to be true.’”) (quoting Black’s Law Dictionary 783 (7th ed. 1999)). *But cf. id.* at 356 n.91 (noting, and

Cases outside the PSLRA, but decided after its enactment, now reach similar conclusions.¹¹

Thus, for example, allegations based on confidential sources have been deemed “information and belief” allegations under the PSLRA.¹² More generally, any allegations based upon the investigation of counsel are deemed to be based upon information and belief.¹³ This is at least in part because the focus of the analysis appears to be the *party’s* knowledge, not the attorney’s.¹⁴ Things outside the party’s personal knowledge constitute “information and belief.”

The requirement that allegations be based upon “personal” and “firsthand” knowledge of a party to avoid the “information and belief” label suggests that “information and belief” contentions include any for which the party would be precluded from testifying under Rule 602 of the Federal Rules of Evidence.¹⁵ Accordingly, allegations based upon information and belief are sometimes analogized to “hearsay.”¹⁶ Indeed, some courts have suggested that allegations based upon

disagreeing with, earlier PSLRA cases that had a narrower interpretation of “information and belief”); *In re Honeywell Int’l Sec. Litig.*, 182 F. Supp. 2d 414, 426 (D.N.J. 2002) (rejecting argument that allegations not made on personal knowledge must be based on information and belief because that would mean “that a plaintiff would have to plead all his evidence in the complaint”).

11. *General Security Indemnity Company of Arizona v. Century Surety Co.*, 2009 WL 2407642, *6 (D. Colo. Aug. 3, 2009) (finding that insurer was not obligated to defend and indemnify insured where allegation against insured in underlying lawsuit was that, “on information and belief,” it knew of problems in the soil of the land on which development was to be built; an “information and belief” allegation is one “‘based on secondhand information that the declarant believes to be true’”) (quoting *Black’s Law Dictionary* 795 (8th ed. 2004)); *SSDD Enterprises, Inc. v. Village of Lansing*, 1996 WL 238931, *13 n.7 (N.D. Ill. May 3, 1996) (finding that allegations in a Section 1983 lawsuit, based upon newspaper articles, were made upon information and belief).

12. *In re Cabletron Systems, Inc.*, 311 F.3d 11, 28 (1st Cir. 2002).

13. *E.g.*, *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1098 (10th Cir. 2003) (“Because the plaintiffs’ complaint refers to the investigation of their counsel as the basis for their allegations, we treat their complaint as having been made on information and belief”); *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 351 n.70 (5th Cir. 2002) (“We also agree with those courts which have held that allegations made on ‘investigation of counsel’ are equivalent to those made on ‘information and belief’ for the purposes of the heightened pleading requirements under [the PSLRA].”); *In re Initial Public Offering Securities Litigation*, 241 F. Supp. 2d 281, 356 n.91 (S.D.N.Y. 2003).

14. *Pirraglia v. Novell, Inc.*, 339 F.3d 1182, 1189 (10th Cir. 2003) (information and belief allegations are those “‘not based on the firsthand knowledge of the person making the allegation’—that person, here, being the plaintiff”) (quoting *Black’s Law Dictionary* 779 (6th ed. 1990)); *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 351 (5th Cir. 2002) (holding that “the allegations in the complaint are not based upon Plaintiffs’ personal knowledge and are therefore necessarily pleaded on ‘information and belief’”); *In re Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970, 998 n.21 (9th Cir. 1999) (plaintiff relies on information and belief “precisely because she does not have direct personal knowledge of the defendants’ alleged misconduct.”).

15. Fed. R. Evid. 602. Rule 602 precludes a witness from testifying to matters not based upon personal knowledge.

16. *Campo v. Sears Holdings Corp.*, 635 F. Supp. 2d 323, 330 (S.D.N.Y. 2009) (information and belief is “‘hearsay, essentially’”) (quoting *Malin v. SL Capital Ltd.*, 499 F. Supp. 2d 117, 136

sources that might be admissible at a trial under an exception to the hearsay rule are *still* “information and belief” allegations.¹⁷

With these definitions, one must conclude that many allegations made in federal court are probably made on information and belief, even if not so identified. Things that a party has read or heard, even if from a very reliable source, are not first hand information about which the party could testify in court. If those things are asserted in a federal court, they are asserted on information and belief.

II. Information and Belief in the Federal Rules of Civil Procedure

Three rules in the Federal Rules of Civil Procedure touch upon the concept of “information and belief,” although none of them uses the phrase as distinctly as the PSLRA.¹⁸ Further, and although the words never appear in the rule, courts have interpreted Civil Procedure Rule 9(b) to restrict the use of “information and belief” allegations for claims subject to the rule.

A. Rule 8(b)(5)

Rule 8(b)(5), in the midst of a series of general rules about pleadings that respond to other pleadings, states that a “party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state.”¹⁹ If a party does so state, “the statement has the effect of a denial.”²⁰ This “denial by ignorance” is one of only three permissible responses in a responsive pleading, the others being an admission or a denial (or some combination of admission and denial).²¹

n.16 (D. Conn. 2007)); *In re Public Offering Securities Litigation*, 241 F. Supp. 2d 281, 356 n.91 (S.D.N.Y. 2003). *Cf.* *SSDD Enterprises v. Village of Lansing*, 1996 WL 238931, *13 n.7 (N.D. Ill. May 3, 1996) (suggesting in a Section 1983 action by the owners of an adult entertainment lounge that newspaper articles are both hearsay and the source of allegations based upon information and belief).

17. For example, some courts have suggested that allegations based upon SEC filings would still be “information and belief” allegations. *In re Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970, 998 n.21 (9th Cir. 1999) (allegations based upon counsel’s investigation of, *inter alia*, SEC filings were based on information and belief); *Malin v. SL Capital Ltd.*, 499 F. Supp. 2d 117, 136 n.16 (D. Conn. 2007) (same). Arguably, such filings are admissible, at least to show what was said, and as an admission of an issuer that filed it. *In re Hoopai*, 2007 WL 2460762, *3 (D. Hawaii August 27, 2007) (taking judicial notice of SEC filing and finding statements admissible as a party admission under Fed. R. Evid. 801(d)(2)).

18. Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 504 (2010) (“pleading ‘on information and belief’ . . . is not mentioned in the Federal Rules of Civil Procedure”); *id.* (“the Rules make no provision for pleading an allegation on information and belief”). Professor Hartnett’s statement is literally true, but, as the discussion of the rules in this section suggest, the rules do seem to authorize such pleading, and they certainly do not prohibit it. *See* note 40 and accompanying text, *infra*.

19. Fed. R. Civ. P. 8(b)(5).

20. *Id.*

21. Fed. R. Civ. P. 8(b)(1)(B), 8(b)(4). *Bond v. U.S. Mfg. Corp.*, 2010 WL 3037942, *2 n.4 (E.D. Mich. July 30, 2010) (holding that “answer . . . failed to properly admit, deny, or assert insufficient knowledge to admit or deny [the] allegations—the only three responses the Federal Rules

A number of features of the rule deserve mention. First, in Rule 8(b)(5), information and belief are separated. “Information” is the underlying data that (along with “knowledge”) helps create a “belief.” Information, it would seem, is the minimum predicate for a “belief,” or at least any belief worth mentioning in a responsive pleading in a civil lawsuit in federal court.²² Second, the rule seems to contemplate a level of data even below the second-hand information sufficient to constitute “information and belief” under the PSLRA. One can have so little information that one simply cannot form a belief as to the truth of an allegation. Conversely, the rule implies that one need not have personal or firsthand knowledge that an allegation is false in order to outright deny it. “Information” that the allegation is false should be sufficient.

Third, like the PSLRA, Rule 8(b)(5) speaks to parties, not attorneys. That is, it is the party who must lack knowledge or information sufficient to form a belief as to an allegation’s truth.²³ But a party’s mere lack of knowledge is insufficient to justify the denial based on ignorance contemplated by Rule 8(b)(5); lack of “information” is also required.²⁴ In distinguishing the two, the courts again seem to equate knowledge with “first-hand” or “personal” knowledge.²⁵ Accordingly,

permit”); *Thompson v. Retirement Plan for Employees of S.C. Johnson & Sons, Inc.*, 2008 WL 5377712, *1 (N.D. Ind. Dec. 22, 2008) (“[T]he rule permits only three possible responses to a complaint: 1) outright admission; 2) outright denial; or 3) a disclaimer statement in compliance with Rule 8(b)’s provision for lack of knowledge or information as the basis for a deemed denial”); *Visco Financial Services, Ltd. v. Siegel*, 2008 WL 4900530, *7 (N.D. Ill. Nov. 13, 2008) (“Rule 8(b) directs defendants to answer the allegations of a complaint in one of three ways: an admission, a denial, or a detailed statement explaining that the party is without sufficient information or knowledge.”); *Gilbert v. Johnston*, 127 F.R.D. 145, 146 (N.D. Ill. 1989) (denying knowledge or information sufficient to form a belief are “the only circumstances under which a pleader can do something other than either admit or deny an allegation”).

22. Whether, in different contexts, other beliefs are permissible with minimal or no “information” at all is a question that lies outside the scope of this article.

23. Fed. R. Civ. P. 8(b)(5) (“A party that lacks knowledge or information sufficient to form a belief . . .”) (emphasis added). *United States v. Quadrini*, 2007 WL 4303213, *5 (E.D. Mich. Dec. 6, 2007) (holding that Rule 8(b) “does not ask whether the attorney knows the answer to facts raised, but rather whether the parties to the suit have ‘information sufficient to form a belief as to the truth of an averment’”) (quoting former Rule 8(b)).

24. *Harris v. Robinson*, 1995 WL 263489, *1 (N.D. Ill. May 3, 1995) (“It takes only a moment’s thought to recognize that a pleader’s disclaimer of two states of mind stated in the conjunctive (the pleader’s lack of ‘knowledge *and* information sufficient to form a belief’) does not satisfy what Rule 8(b) actually specifies: the absence of *both* of these states of mind, as is demanded by the Rule’s disjunctive formulation (the pleader’s lack of ‘knowledge *or* information sufficient to form a belief’).”) (emphasis in original); *Pickett v. Prince*, 1995 WL 88914, *1 (N.D. Ill. March 2, 1995) (“[T]he Answer’s total omission of ‘information’ from the disclaimer significantly lessens what defendant must disavow to get the benefit of a deemed denial. That is simply wrong.”). See also note 25, *infra*.

25. *United States v. 1866.75 Board Feet and 11 Doors And Casings, More or Less of Dipteryx Panamensis Imported from Nicaragua*, 2008 WL 839792, *3 (E.D. Va. March 25, 2008) (“‘A denial of knowledge or information requires that the party not only lack first-hand knowledge of the necessary

“information” appears to refer, as it did in the PSLRA, to hearsay and other inadmissible evidence. Sticklers for adherence to the rule’s demand that a party lack both knowledge and information have stricken any perceived deviation from the rule’s requirement.²⁶

On its face, Rule 8(b)(5) does not require anything but a party’s good-faith assertion that she lacks a belief as to the truth of an allegation due to the absence of information. If, for example, a party truly believes that a source of information, be it a newspaper article or a third party, is an unreliable source, then it ought not to matter what the party’s attorney, the judge, or the world at large thinks of the source of information. Of course, all of those others may very well question a party’s good faith in asserting a lack of information, but if, in good faith, the party truly believes that it lacks information *sufficient* to form a belief as to the truth of an allegation, she should be permitted to say so.²⁷ Adherents of the maxim “believe

facts involved but also that the pleader lack information upon which she reasonably could form a personal belief concerning the truth of the adversary’s allegations.’”) (quoting Wright & Miller, Federal Practice and Procedure, § 1262 (3d ed. 2004)); *Blowers v. United States*, 1997 WL 224986, *1 (N.D. Ill. April 30, 1997) (“It was obvious to the drafters of Rule 8(b), as it should be to everyone, that in light of what it takes for anyone to have real *knowledge* of a fact, it is entirely possible for someone to lack ‘personal knowledge’ but still to have enough *information* to form a belief.”) (emphasis in original).

26. Senior Judge Milton Shadur of the Northern District of Illinois is probably the most prominent of such sticklers. Space constraints preclude a full recitation of Judge Shadur’s various *sua sponte* opinions not only striking various perceived pleading errors, but also bemoaning the state of perceived professional incompetence underlying them (e.g., *Brown v. County of Cook*, 2008 WL 2510185, *1 (N.D. Ill. June 19, 2008) (“Enough is enough—or in this instance, enough is too much”); *Pickett v. Prince*, 1995 WL 88914, *1 (May 2, 1995) (“Sometimes courts have to wonder whether anyone out there is listening.”); *O’Yola v. City of Schiller Park*, 1994 WL 86018, *1 (N.D. Ill. March 9, 1994) (“[T]he number of lawyers who fail to follow the Rule’s unmistakable roadmap is sufficiently large so that this Court has been compelled to issue a published opinion . . . for ease of citation in opinions calling counsel’s attention to such errors.”); *Gilbert v. Johnston*, 127 F.R.D. 145, 146 (N.D. Ill. 1989) (attorney’s “non-compliance with a fundamental principle of pleading [is] a noncompliance that anyone (such as this Court) burdened with the regular reading of responsive pleadings filed in this District must begin to view as endemic to this area”), and precluding attorneys from charging their clients any fees for their errors (e.g., *Brown, supra*; *Pickett, supra*; *O’Yola, supra*). See also note 24, *supra*.

27. Fed. R. Civ. P. 8(b)(5). Of course, the party’s attorney has her own obligation under Rule 11, which will be discussed at length in the next section. How precisely these obligations mesh can be confusing. See text accompanying notes 48–52, *infra*. The point here is that the Rule 8(b)(5) disclaimer is one of the party, not the attorney.

Prior to the 2007 Style Amendments to the Federal Rules of Civil Procedure, Rule 8(b) (which had no numbered subparts then) provided that the pleader controvert all of a pleading’s averments “subject to the obligations set forth in Rule 11.” See Memo from Lee H. Rosenthal to David F. Levi dated June 2, 2006 (revised July 20, 2006), Report of the Civil Rules Advisory Committee (*available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1106/Excerpt_CV_Style.pdf) (“Style Amendments Report”). The reference to Rule 11 was deleted in the 2007 Style Amendments, and the Committee Notes state that the reference was deleted because it was redundant. Fed. R. Civ. P. 8, Advisory Committee Notes to 2007 Amendment, *reprinted in* Federal Civil Judicial Procedure and Rules 83 (West 2010 ed.).

nothing you hear and only half of what you see” ought to, in theory at least, be able to use the denial-by-ignorance of Rule 8(b)(5) consistent with that philosophy.²⁸

Nonetheless, several courts and commentators have tried to impose a reasonableness requirement on the party.²⁹ Since there is no way to say “I think it’s true but I’m not really sure” under Rule 8(b)—essentially, admitting something, but only on “information and belief”—this creates a dilemma for the pleader. If a party has second-hand or hearsay information that a “reasonable person” would think is enough to form a belief that an allegation is true, it would have to admit the allegation, no matter how unreliable the pleader might believe the source. That admission is a judicial admission; if the pleading is not superseded, the party cannot contest the truth of the allegation at trial.³⁰ True, if additional “information” is obtained during the course of the lawsuit that casts doubt about the truth of the allegation, the party can always seek to amend its pleading pursuant to Rule 15 of the Federal Rules of Civil Procedure.³¹ But, even if that motion is successful, the party’s earlier admission, although no longer binding, can still be used against it.³²

B. Rules 11(b) and 26(g)

Rules 11(b) and 26(g) of the Federal Rules impose obligations for various kinds of contentions (first made in papers of some kind) asserted in a civil lawsuit. Under Rule 11, an attorney or unrepresented party that “presents” a pleading, paper, or motion to a court “certifies” that certain things about the presentation are true, “to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances.”³³ Similarly, under Rule 26(g),

28. Answers.com attributes this maxim to Edgar Allen Poe. See <http://www.answers.com/topic/believe-nothing-of-what-you-hear-and-only-half-of-what-you-see>.

29. *E.g.*, United States v. 1866.75 Board Feet and 11 Doors And Casings, More or Less of Dipteryx Panamensis Imported from Nicaragua, 2008 WL 839792, *3 (E.D. Va. March 25, 2008) (“‘A denial of knowledge or information requires that the party not only lack first-hand knowledge of the necessary facts involved but also that the pleader lack information upon which she *reasonably* could form a personal belief concerning the truth of the adversary’s allegations.’”) (emphasis added) (quoting Wright & Miller, Federal Practice and Procedure, § 1262 (3d ed. 2004)). *Cf.* Fed. R. Civ. P. 11, Advisory Committee Notes to 1993 Amendments, *reprinted in* Federal Civil Judicial Procedure and Rules 90 (West 2010 ed.) (“At other times a denial is permissible because, after an appropriate investigation, a party . . . has a *reasonable basis* for doubting the credibility of the only evidence relevant to the matter”) (emphasis added).

30. N.L.R.B. v. Consolidated Bus Transit Co., 577 F.3d 467, 474 (2d Cir. 2009).

31. Fed. R. Civ. P. 15.

32. Huey v. Honeywell, 82 F.3d 327, 333 (9th Cir. 1996) (superseded pleading “still remains as a statement once seriously made by an authorized agent, and as such it is competent evidence of the facts stated, though controvertible . . . If the agent made the admission without adequate information, that goes to its weight, not to its admissibility”) (quoting Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc., 32 F.3d 195, 198 (2d Cir. 1929)).

33. Fed. R. Civ. P. 11(b). An attorney or unrepresented party can “present” a pleading, motion or other paper by various means. The rule mentions “signing, filing, submitting, or later advocating it,” *id.*, but it is not clear that the list is intended to be exclusive.

signing a disclosure or a discovery request, response, or objection constitutes a similar certification by the signer.³⁴ For purposes of this article, we can focus on the following certifications (under both Rule 11(b) and Rule 26(g)): (1) that “the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery,”³⁵ (2) that “the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information,”³⁶ (3) that a disclosure under Rule 26(a)(1) or 26(a)(3) of the Federal Rules³⁷ “is complete and correct as of the time it is made,”³⁸ and (4) that a discovery response is not “unreasonable.”³⁹

Two characteristics of these rules deserve discussion. First, there is no suggestion that one must have both “knowledge” and “information” to support a belief, so both rules suggest that pleading or contending on “information and belief” (although perhaps not the party’s information and belief) is permissible.⁴⁰ Further, the rules do not, on their face, require anyone to identify which assertions are made upon “knowledge” and which are made on “information.” Nor does the certification need to be separately and explicitly made; it is “implied” in the sense that the signature on the document (or the presentation of a contention from a paper) constitutes the certification.

Second, the certifications are made by the “presenter” (for Rule 11 purposes) or the signer (for Rule 26(g) purposes). Thus, unlike the PSLRA and Rule 8(b)(5), it is usually the attorney (or unrepresented party) whose “knowledge” or “information” is relevant.⁴¹

34. Fed. R. Civ. P. 26(g) (“By signing, an attorney or party certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry . . .”). Rule 26(g) uses the locution “formed after a reasonable inquiry” instead of Rule 11’s phrase, “formed after an inquiry reasonable under the circumstances,” but it is not clear that this deviation in language makes any difference.

35. Fed. R. Civ. P. 11(b)(3).

36. Fed. R. Civ. P. 11(b)(4).

37. Fed. R. Civ. P. 26(a)(1) (initial disclosures), 26(a)(3) (pretrial disclosures).

38. Fed. R. Civ. P. 26(g)(1)(A)

39. Fed. R. Civ. P. 26(g)(1)(B)(iii). Rule 11 does not apply to “disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.” Fed. R. Civ. P. 11(d).

40. 5 CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1224 (3d ed. 2004) (“[T]he attorney’s signature indicates that he or she has prepared the pleading on the basis of ‘the best of the person’s knowledge, information, and belief.’ Those words seem to be an implicit recognition of pleading on information and belief . . .”); *id.*, § 1263 (provision in Rule 11 is one of the reasons federal courts permit allegations on information and belief).

41. Prior to the 1993 Amendments to Rule 11, a represented party was included among those whose signatures constituted a certification. *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 542-44 (1991) (upholding sanctions against corporation whose officer signed an affidavit in support of temporary relief that failed to meet Rule 11 standards). The 1993 Amendments changed the language of the rule so as to moot the holding of *Business Guides*, although there is curiously no mention of that fact in the Committee Notes. *In re Collins*, 250 B.R.

Both rules permit a court to impose sanctions if a rule has been violated.⁴² Further, both rules permit the court to impose sanctions on a represented party, even though, as just noted, represented parties usually do not make the certifications that the rules attribute (and sanctions are not limited to the unusual cases where they do). Specifically, Rule 11(c)(1) states that the court may impose sanctions on a “party that violated the rule or is responsible for the violation.”⁴³ Rule 26(g)(3) states that, when a certification violates the rule, the court “must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both.”⁴⁴

This ability to sanction a represented party is, to say the least, odd.⁴⁵ Suppose a client convincingly tells his attorney that he knows that a certain fact is true, and the attorney repeats that fact in the course of the litigation. It turns out the fact was false, and known by the client to be false. (This is, one hopes, the factual scenario

645, 659-60 (Bankr. N.D. Ill. 2000); Fed. R. Civ. P. 11, Advisory Committee Notes to 1993 Amendments, *reprinted in* Federal Civil Judicial Procedure and Rules 89-92 (West 2010 ed.). Rule 26(g), on the other hand, has not been similarly amended. It still states that “[b]y signing, an attorney or party certifies . . .” Rule 26(g); *Business Guides*, 498 U.S. at 541-42 (relying upon similar language in pre-1993 Rule 11 to hold that represented parties make the implied certifications when they sign papers).

Rule 26(g) only applies to disclosures and discovery requests, responses, or objections, and it seems unlikely that a represented party would sign a disclosure or a discovery request or objection. The only discovery responses a represented party is likely to sign are interrogatory responses. Fed. R. Civ. P. 33(b)(5). Accordingly, the discussion in the text will gloss over the relatively unusual situations in which a represented party actually makes a Rule 26(g) implied certification.

42. Fed. R. Civ. P. 11(c)(1) (a court may impose sanctions if it “determines that Rule 11(b) has been violated”); Fed. R. Civ. P. 26(g)(3) (an appropriate sanction must be imposed “[i]f a certification violates this rule”). Unfortunately, the rules do not bother to state what constitutes a “violation” of the rule. Presumably they are referring to a situation where the person presenting (for Rule 11 purposes) or signing (for Rule 26(g) purposes) a paper has made an implied certification about her “knowledge, information, and belief” or the reasonableness of her inquiry that a court has concluded was not true at the time that it was made. My use of “violation” in this article assumes this understanding of the word.

43. Fed. R. Civ. P. 11(c)(1). A “party” here clearly includes a represented party because Rule 11(c)(5) specifically precludes monetary sanctions (but not non-monetary sanctions) against a represented party for a violation of one (but only one) of the attributed certifications (*viz.*, that the claims have a good legal basis). Fed. R. Civ. P. 11(c)(5); CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1336.2 (3d ed. 2004).

44. Fed. R. Civ. P. 26(g)(3). Unlike Rule 11, Rule 26(g) does not permit sanctions to be imposed against a law firm. Fed. R. Civ. P. 11(c)(1); *In re Rimstat, Ltd.*, 229 B.R. 914, 920 n.6 (Bankr. N.D. Ind. 1998).

45. And, we are told by some courts, seldom to be exercised. *Rentz v. Dynasty Apparel Industries, Inc.*, 556 F.3d 389, 400 (6th Cir. 2009) (“Courts have generally declined to impose sanctions on represented parties”) (citing CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1336.2 (3d ed. 2004)). *Cf.* Fed. R. Civ. P. 11, Advisory Committee Notes to 1993 Amendment, *reprinted in* Federal Civil Judicial Procedure and Rules 90 (West 2010 ed.) (“The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations is the person to be sanctioned for a violation.”).

that the authors of the rule were probably trying to get at by permitting sanctions against a represented party.)⁴⁶ The attorney had not just information, but personal knowledge that there was evidentiary support for the claim. If she was reasonable in relying on the client's false representation—*i.e.*, the communication between attorney and client constituted a “reasonable inquiry” without more—then there was no violation of the rule and no sanction can be imposed on anyone (at least not under these rules).⁴⁷ If the attorney was *not* reasonable in relying on the client, and should have made a further inquiry, then there has been a violation. But how precisely is the client responsible for the attorney's failure to make a reasonable inquiry?

As to the attributed certifications, let us first consider the one that seems connected to Rule 8(b)(5), *viz.*, the certification in Rule 11(b)(4) that “the denials of factual contentions are warranted or, if specifically so identified, are reasonably based on belief or a lack of information.”⁴⁸ Here, there are several layers of representations we must parse through. If we assume that the rule is generally talking about a defendant's answer or similar responsive pleading, the attorney must have “knowledge” or “information” about the accuracy of the denials. (This comes from the language *before* the numbered subparagraphs.) Presumably, that means factually accurate denials (they must be “warranted”), and the attorney will almost always have only “information,” and not personal knowledge, about that. It is (and ought to be) the rare attorney who would have personal knowledge (in the Fed. R. Evid. 602 sense) of the facts of a case in which she is representing a client.⁴⁹

From the language appearing in subparagraph 4 itself, the attorney must specifically identify denials that are “reasonably based on belief *or* a lack of information.”⁵⁰ Now, however, the rule cannot be referring anymore to the attorney's belief or lack of information, but rather the client's, since, as we have seen under Rule 8(b), the answer is supposed to reflect the client's knowledge and beliefs about the allegations in the complaint.⁵¹ The attorney nonetheless is making

46. *E.g.*, *McCarty v. Verizon New England*, 731 F.Supp.2d 123, 134 (D. Mass., 2010) (noting that sanctions against clients under Rule 11 “[u]sually . . . has meant factually groundless pleadings where a party has clearly lied or misrepresented facts”).

47. *Souran v. Travelers Ins. Co.*, 982 F.2d 1497, 1507 (11th Cir. 1993) (reversing sanctions against client; “Unless a pleading has been signed in violation of Rule 11, sanctions are improper”); *id.* (“[e]ven if [client] believed that his claim was meritless . . . [attorney's] reasonable inquiry may have revealed that the claim was well grounded in fact and warranted by law. The district court simply does not discuss [the attorney's] perceptions”). A court may nonetheless have inherent power, outside of the Federal Rules of Civil Procedure, to sanction a represented party's conduct, including the award of attorneys' fees. *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991).

48. Fed. R. Civ. P. 11(b)(4).

49. Attorneys with such knowledge would be subject to disqualification from the representation because of the attorney-witness rule. MODEL RULES OF PROF'L CONDUCT R. 3.7.

50. Fed. R. Civ. P. 11(b)(4) (emphasis added).

51. *See* note 23, *supra*.

her own separate representation, *viz.*, that *she* has “information,” based upon a reasonable inquiry, that the client has a “belief” that something is not true or that the client lacks information.

The use of “belief” here is confusing at best.⁵² A “belief” can be based upon anything, from personal knowledge that a contention is wrong to a conviction that it is wrong based on nothing more than a visceral reaction. Even if “belief” in Rule 11(b)(4) was intended only to include those beliefs based on “information,” the requirement that those “information and belief” denials be specifically identified is inconsistent with Rule 8(b), which requires specific identification only where the client *lacks* both knowledge *and* information sufficient to form a belief as to an allegation’s truth. That is, Rule 8(b) does not distinguish between denials based upon a party’s personal knowledge and denials based upon his information.

The implied certifications from Rule 26(g) that disclosures are “complete and correct” and that a discovery response is not “unreasonable”⁵³ will also frequently be based upon an attorney’s “information,” and for the same reason as the certification of Rule 11(b)(4): when we are talking about actual factual contentions relating to the gravamen of the underlying lawsuit set forth in disclosures or discovery responses, the attorney ought not to have personal knowledge.⁵⁴ And for both the 11(b)(4) and 26(g) implied certifications, it is *not* the falsity of a factual assertion (or denial) made in an answer, disclosure or a discovery response that constitutes a violation of the rules; there is only a violation if the statement was false to the best of the attorney’s “knowledge, information, and belief” (assuming a reasonable inquiry).

Finally, consider the certification implicit in Rule 11(b)(3) that an attorney makes, *viz.*, that “the factual contentions have evidentiary support.”⁵⁵ The attorney’s presentation of a contention does not make any implied certification that the contention is true.⁵⁶ Thus, a reasonable investigation by counsel, assuming that the

52. The confusion may stem substantially from the change in wording produced by the Style Amendments in 2007. See Style Amendments Report, *supra* n.27. Prior to those amendments, Rule 11(b)(4) provided that “presenters” were certifying that denials, if specifically identified, were “reasonably based on a lack of information or belief.” The Style Amendments were supposed only to make the rules “more easily understood” and to be “stylistic only.” Fed. R. Civ. P. 11, Advisory Committee Notes to 2007 Amendment, *reprinted in* Federal Civil Judicial Procedure and Rules 92 (West 2010 ed.). This suggests that, in the pre-2007 incarnation, the words “lack of” were not intended to relate to “belief.”

53. Fed. R. Civ. P. 26(g)(1)(A), 26(g)(1)(B)(iii).

54. Of course, for a discovery response to be “not unreasonable,” it might be that it need only have some evidentiary support. Under those circumstances, an attorney might indeed “know” that a response is reasonable since the attorney may have personal knowledge of the existence of evidentiary support, as will be discussed in the next paragraph of text with respect to Rule 11(b)(3).

55. Fed. R. Civ. P. 11(b)(3).

56. *Cf.* Fed. R. Civ. P. 11, Advisory Committee Notes to 1993 Amendments, *reprinted in* Federal Civil Judicial Procedure and Rules 90 (West 2010 ed.) (“The certification is that there is (or likely will be) ‘evidentiary support’ for the allegation, not that the party will prevail with respect to its contention regarding the fact.”).

attorney has spoken to witnesses with personal knowledge and seen admissible documents, would mean that the attorney has *knowledge* that the factual contentions have evidentiary support for purposes of Rule 11(b)(3). And this is so even though the very same allegations would be deemed on “information and belief” for purposes of the PSLRA.⁵⁷

But, of course, the attorney need not *know* that the contentions have evidentiary support under Rule 11(b)(3); she need only have “information” that they have evidentiary support, and accordingly believe that they have such support.⁵⁸ “Information,” we have seen, can be second-hand information. If an attorney’s client tells her that he has seen a document (but cannot obtain it) that supports fact X, then the attorney has “information” that fact X has evidentiary support even though, not having seen the document, he surely does not have “knowledge” that there is such support.⁵⁹

What, then, can we make of the rest of Rule 11(b)(3)? The attorney who “presents” a document must also certify, to “the best of the person’s knowledge, information, and belief,” that “factual contentions . . . if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”⁶⁰ What precisely is the difference between having “information” that a factual contention has evidentiary support and having “information” that a factual contention will likely have evidentiary support after further investigation or discovery? Further investigation or discovery is necessary in both instances: almost by definition a fact for which an attorney only has “information” that it has evidentiary support requires the attorney to do some discovery and/or investigation before he can be reasonably certain that the evidence even exists, much less will be deemed admissible in court. If I am correct that the example in the last paragraph can be characterized as a situation where the attorney has “information” that a factual contention has evidentiary support, then some lower level of information is permitted if allegations are specifically identified as ones that require further investigation. But that example suggested that having only “information” that an allegation has evidentiary support is *already* a pretty low level of assurance. What “lower level” can there be?

57. See note 13, *supra*.

58. The rule does not define “evidentiary support.” One could argue that an attorney who had been told of certain facts of which the client or witness claims personal knowledge does not “know” that those facts have evidentiary support since “evidentiary support” usually requires the trappings of a trial (such as an oath given to witnesses). Cf. Lisa Pondrom, Comment, *Predicting The Unpredictable Under Rule 11(b)(3): When Are Allegations “Likely” To Have Evidentiary Support?*, 43 UCLA L. REV. 1393, 1404 (1996) (“It is reasonable to assume that ‘evidentiary support’ for an allegation consists of evidence admissible in court to prove the allegation, and that evidence not admissible in court does not qualify as ‘evidentiary support’ for an allegation”). This reading, though, would mean that the attorney would almost never “know” that a factual contention has evidentiary support. The rule, then, may be best understood to require a certification that the factual contentions have evidentiary support minus those trappings.

59. See Pondrom, *supra* note 58, at 1411-12.

60. Fed. R. Civ. P. 11(b)(3).

The Advisory Committee notes to the 1993 Amendments to Rule 11 add more confusion than light to this problem. They state:

The certification with respect to allegations and other factual contentions is revised in recognition that sometime a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants *when specifically identified as made on information and belief* does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification.⁶¹

This bizarre “explanation” suggests that *all* factual contentions made on information and belief (perhaps even the *party’s* information and belief⁶²) need to be specifically so identified. The rule itself is quite to the contrary.⁶³ *Every* allegation can be made on information and belief without so identifying it, so long as the attorney making the allegation can certify that, to the best of *her* information and belief after a reasonable inquiry, each allegation has evidentiary support. Nor does the explanation help us understand the level of support needed for those allegations that must be specifically identified, those for which the attorney has only information that the contention likely will have evidentiary support after an opportunity for further investigation or discovery. The Notes state that one should have a “good reason to believe” that an allegation is true before making it; that one must always conduct “an appropriate investigation”; and that one (as we would hope) cannot make an allegation without “any factual basis or justification.” How this discussion helps attorneys distinguish an allegation that requires a specific identification from one that does not is anyone’s guess.

Nor have academics provided much help. Professor Hartnett contends that Rule 11(b)(3) “provide[s] specific instructions for plaintiffs who cannot rely on

61. Fed. R. Civ. P. 11, Advisory Committee Notes to 1993 Amendment, *reprinted in* Federal Civil Judicial Procedure and Rules 89-90 (West 2010 ed.) (emphasis added).

62. It is unclear to whose “information and belief” the notes are referring. It refers to “pleadings by plaintiffs or defendants,” not their attorneys. Normally, a factual contention explicitly made “on information and belief” in a paper indeed would refer to the *party’s* “information and belief,” as we saw with both the PSLRA and the lack of information statement authorized by Rule 8. *See* Hartnett, *supra* n.18, at 503 (“the allegation of conspiracy in *Twombly* was made ‘upon information and belief,’ which is the traditional method used by *plaintiffs* who lack evidentiary support for factual allegations without discovery.”) (emphasis added). But Rule 11 primarily deals with the obligations of attorneys, so it is entirely unclear why the notes suddenly would discuss the party’s knowledge or beliefs.

63. Critics of the rule-making process have noted the Committee’s tendency to try to amend rules through the Committee Notes rather than the rules themselves. Wright, *supra* note 4, at 5 n.18.

their own definite knowledge to support a factual allegation.”⁶⁴ Would that this were so. First, of course, Rule 11(b)(3) does not say much of *anything* to plaintiffs, at least not those represented by attorneys. It speaks primarily to attorneys and unrepresented parties, and tells them what their signatures will be construed to mean.⁶⁵ Nor, when it speaks to attorneys, does it say that they must specifically identify factual allegations that lie outside *their* own knowledge. (Again, presumably the truth of *all* of the allegations in a pleading lie outside the attorneys’ own knowledge.) But even focusing on the correct certification—that the attorney has a basis for believing that there is evidence to support an assertion—does not help Professor Hartnett. By presenting an assertion in a complaint that is not “specifically identified,” the attorney is only certifying that she has “knowledge” *or* “information” that there is “evidence” to support the assertion, and such “information” can plainly come from outside her “own definite knowledge.”⁶⁶

Infusing a sensible meaning into the rule as written may be difficult. Can one have a good reason to believe something is true without having even “information” that there is evidence to support it? Perhaps so. If, for example, a defendant manufacturing widgets has five floors in an office building and three factories nearby, it may be perfectly reasonable to allege that its business affects interstate commerce, as that phrase has been used by the courts. Are the business line, office space, and factories evidentiary support for that contention? Probably not, but it does make it likely to be true. Perhaps this is the kind of contention to which Rule 11(b)(3)’s “will likely have evidentiary support after a reasonable opportunity for further investigation or discovery” language should apply: contentions that would seem obviously true to the average attorney but for which one has no real information or evidence to support it. Or, to put in differently, allegations that the responding party seems likely to admit. But if that is all that part of the rule encompasses, it is hard to understand what good purpose specifically identifying such contentions does.

64. Hartnett, *supra* note 18, at 505.

65. In fairness to Professor Hartnett, this seems to be a common misperception in academia, at least to judge by recent articles. *E.g.*, Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 68 (2010) (“Rule 11 . . . requires a *party* to certify that the allegation will likely have evidentiary support after discovery”) (emphasis added); Suzette M. Malveaux, *Front Loading And Heavy Lifting: How Pre-Dismissal Discovery Can Address The Detrimental Effect of Iqbal On Civil Rights*, 14 LEWIS & CLARK L. REV. 65, 130 (2010) (“*Plaintiffs* are expected to conduct an adequate pre-suit investigation prior to filing suit, in compliance with Rule 11(b)(3). *Plaintiffs* must exercise the requisite due diligence and pre-filing effort required by the rules”) (emphasis added).

66. Professor Hartnett has suggested that the phrase “information and belief” be “retired”. Hartnett, *supra* note 18, at 505. Although he is not entirely clear, I take it that Professor Hartnett is suggesting that the phrase not be used within the Federal Rules of Civil Procedure or the Advisory Committee notes. *Compare id.* at 504 (the phrase “is not mentioned in the Federal Rules of Civil Procedure”) *with id.* at 505 (the phrase “survived the ax that befell the term ‘demurrer’ in 1938, and when a replacement was hired in 1993, the Advisory Committee kept it on board by referring to it in a Note”). As this section would suggest, I heartily would agree that (1) Rule 11(b)(3), as currently written, is very unclear and (2) the Advisory Committee note that tries to explain Rule 11(b)(3) uses the phrase “information and belief” in a way to cause even more confusion.

C. Rule 9(b)

Rule 9(b) of the Federal Rules of Civil Procedure provides that “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud.”⁶⁷ It is generally deemed to require more than the standard pleading requirement, set forth in Rule 8(a), that the pleader should provide “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁶⁸

Rule 9(b) does not require a pleader to identify the source of its more particular allegations and there is nothing to suggest that the implied certification of Rule 11(b)(3) is any different. Nonetheless, despite the absence of any textual basis, courts have devised various rules to limit the use of “information and belief” allegations in a claim for relief subject to Rule 9(b).

Unfortunately, the rules have not been uniformly stated, and certainly not in a way that makes much sense. Courts sometimes start out by some variation of the assertion that allegations based on information and belief are disfavored under Rule 9(b), or that they are not sufficiently particular, but that it is permissible to use “information and belief” allegations if a statement of “facts” supporting the information and belief is provided.⁶⁹ Of course, the source of allegations (first-hand v. secondhand knowledge of the party making them) does not, at first glance, have anything to do with how particular the allegations are. Allegations based on information heard from an outside source can be very detailed, and allegations based on personal knowledge can be frustratingly vague. If the “facts” are just the “information” part of information and belief—what you have heard that leads you

67. Fed. R. Civ. P. 9(b).

68. Fed. R. Civ. P. 8(a). *United States v. McFerrin*, 570 F.3d 672, 676 (5th Cir. 2009) (comparing the two provisions and referring to Rule 8(a)(2) as providing the “more general liberal notice standards”); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009).

69. *Shroyer v. New Cingular Wireless Services, Inc.*, 606 F.3d 658, 665 (9th Cir. 2010) (“Claims made on information and belief are not usually sufficiently particular, unless they accompany a statement of facts on which the belief is founded”); *Drobnak v. Andersen Corp.*, 561 F.3d 778, 783-84 (8th Cir. 2009) (“Allegations pleaded on information and belief usually do not meet Rule 9(b)’s particularity requirement . . . Rule 9(b) is deemed satisfied if the allegations [on information and belief] are accompanied by a statement of facts on which the belief is founded.”); *Uni*Quality, Inc. v. Infotronx Inc.*, 974 F.2d 918, 924 (7th Cir. 1992) (“allegations made upon information and belief are insufficient, even if the facts are inaccessible to the plaintiff, unless the plaintiff states the grounds for his suspicions”); *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1992) (“Despite the generally rigid requirement that fraud be pleaded with particularity, allegations may be based on information and belief when facts are peculiarly within the opposing party’s knowledge . . . Where pleading is permitted on information and belief, a complaint must adduce specific facts supporting a strong inference of fraud or it will not satisfy even a relaxed pleading standard”); *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 379 (2d Cir. 1974) (“While all of the allegations are stated on information and belief, and there are cases holding that allegations of fraud based on information and belief usually do not satisfy the particularity required by Fed. R. Civ. P. 9(b), the particularity requirement may be satisfied if, as here, the allegations are accompanied by a statement of the facts upon which the belief is founded”).

to the belief—the rule says nothing more than information and belief allegations should include the information. And if the rule is just another way of saying that Rule 9(b) requires reasonable particularity, it is not clear why allegations made on information and belief are being singled out. All allegations subject to Rule 9(b) must be stated with reasonable particularity regardless of the source.

Were the courts simply being redundant or obvious, it would hardly be worth mentioning. Unfortunately, courts also add that “information and belief” allegations are usually *prohibited* under Rule 9(b), but that an exception is permitted where the facts are peculiarly within the opposing party’s knowledge.⁷⁰ Frequently, courts use language to suggest that this exception is the *only* exception to the rule prohibiting “information and belief” allegations for claims subject to Rule 9(b).⁷¹ One circuit even has even held that Rule 9(b) requires a pleader to specifically state that the allegations based upon information and belief, because they lie within defendants’ control, do, in fact, lie within defendants’ knowledge.⁷² And Judge Posner is apparently of the view that the use of “information and belief” outside the context of the inaccessible facts exception is a violation of Rule 11⁷³—a rule that, we

70. *Drobnak v. Andersen Corp.*, 561 F.3d 778, 783-84 (8th Cir. 2009) (“Allegations pleaded on information and belief usually do not meet Rule 9(b)’s particularity requirement When the facts constituting the fraud are peculiarly within the opposing party’s knowledge, however, such allegation may be pleaded on information and belief.”); *Dorsey v. Portfolio Equities*, 540 F.3d 333, 339 (5th Cir. 2008) (“‘If the facts pleaded in a complaint are peculiarly within the opposing party’s knowledge, fraud pleadings may be based on information and belief.’”) (quoting *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994)); *Stern v. Leucadia Nat’l Corp.*, 844 F.2d 997, 1003 (2d Cir. 1988) (“[F]raud pleadings generally cannot be based on information and belief On the other hand, fraud allegations may be so pleaded as to facts peculiarly within the opposing party’s knowledge; even then, however, the allegations must be accompanied by a statement of facts upon which the belief is founded.”); *Divittorio v. Equidyne Extractive Industries, Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987) (“Rule 9(b) pleadings cannot be based upon information and belief. There is a recognized exception to this rule, however, that fraud allegations may be so alleged as to facts peculiarly within the opposing party’s knowledge, in which event the allegations must be accompanied by a statement of the facts upon which the belief is based.”).

71. *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 684 (7th Cir. 1992) (“the duty to plead the circumstances constituting fraud with particularity could not be fulfilled by pleading those circumstances on ‘information and belief’ unless they were facts inaccessible to the plaintiff, in which event he had to plead the grounds for his suspicions”); *Craighead v. E.F. Hutton Co.*, 899 F.2d 485, 489 (6th Cir. 1990) (“Because an allegation of churning is an allegation of fraud, it must be pleaded with particularity; . . . It necessarily follows that allegations of churning cannot be based upon ‘information and belief,’ except where the relevant facts lie exclusively within knowledge and control of the opposing party, and even then, the plaintiff must plead a particular statement of facts upon which his belief is based”); *Luce v. Edelstein*, 802 F.2d 49, 54 n.1 (2d Cir. 1986) (“Allegations of fraud cannot ordinarily be based ‘upon information and belief’ except as to ‘matters peculiarly within the opposing party’s knowledge’”) (quoting *Schlick v. Penn-Dixie Cement Corp.*, 307 F.2d 374, 379 (2d Cir. 1974)).

72. *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1279 n.3 (D.C. Cir. 1994).

73. *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d at 684. As noted previously, Judge Posner’s *Banker’s Trust* opinion analogized “information and belief” to “rumor and hunch.” *See*

have seen, (1) applies to attorneys, not parties, and (2) would appear to specifically authorize pleading on information and belief.⁷⁴

Here again, as with the PSLRA, the courts appear to be referring to the party's knowledge in defining those allegations made on "information and belief."⁷⁵ Of course, an utter prohibition of allegations based on "information and belief" outside of allegations within an opposing party's knowledge would make Rule 9(b) far tougher on information and belief allegations than the PSLRA, which has no such restriction.⁷⁶

It is hard to believe that such a restriction really exists. Consider a not atypical "fraud on the market" allegation.⁷⁷ The plaintiff may rely on a quote from an officer of a company in a newspaper article.⁷⁸ The plaintiff assumes that the quote

note 7, *supra*. Subsequently, some lower courts in the Seventh Circuit applied the *Bankers Trust* skepticism towards "information and belief" allegations to allegations not subject to Rule 9(b), others have limited it. *Compare* Multi-M Int'l Inc. v. Paige Medical Supply Co., 142 F.R.D. 150, 152 (N.D. Ill. 1992) (rejecting allegations of citizenship for diversity jurisdiction purposes made on information and belief) and *Gallagher v. Kopera*, 789 F. Supp. 277, 278-79 (N.D. Ill. 1992) (rejecting allegations of municipal failure to train and ratification made on information and belief, and sanctioning plaintiff's attorney under Rule 11) with *Dornhecker v. Ameritech Corp.*, 99 F. Supp. 2d 918, 928 (N.D. Ill. 2000) (finding *Bankers Trust* distinguishable "as it involved allegations of fraud"). See generally *SSDD Enterprises, Inc v. Village of Lansing*, 1996 WL 238931, *13 n.7 (N.D. Ill May 3, 1996) (identifying split and applying the no "information and belief" rule, in a case alleging Section 1983 violations by a municipality, to allegations based upon newspaper articles).

74. See notes 33-40, *supra*, and accompanying text.

75. See note 62, *supra*.

76. 15 U.S.C. § 78u-4(b)(1). Courts sometimes suggest that the PSLRA was intended to further heighten the pleading requirements beyond those of Rule 9(b). *E.g.*, *Dorsey v. Portfolio Equities*, 540 F.3d 333, 339 (5th Cir. 2008) ("The PSLRA enhances the particularity requirements of Rule 9(b)"); *Zack v. Allied Waste Industries, Inc.*, 2005 WL 3501414, *4 (D. Ariz. Dec. 15, 2005) ("[A]n action brought under the Reform Act is subject to heightened pleading standards that are more rigorous than the Rule 9(b) standards."); *Fitzer v. Security Dynamics Technologies, Inc.*, 119 F. Supp. 2d 12, 18 (D. Mass. 2000) ("[T]he PSLRA makes the pleading standard in securities fraud cases even more rigorous than Rule 9(b) traditionally has required.>").

77. "The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. . . ." *Basic, Inc. v. Levinson*, 485 U.S. 225, 241-42 (1988) (quoting *Peil v. Speiser*, 806 F.2d 1154, 1160-61 (3d Cir. 1986)). For our purposes, it is irrelevant that the plaintiff did not rely directly on the misstatements. The same "information and belief" issue can arise in what are sometimes called "third-party fraud" cases, where the plaintiff has, in fact, relied on the defendant's statement, albeit through a third-party conduit. RESTATEMENT (SECOND) TORTS § 553; *Arnold Chevrolet LLC v. Tribune Co.*, 418 F. Supp. 2d 172, 188-89 (S.D.N.Y. 2006) (denying motion to dismiss common-law fraud claim by automobile dealers who alleged that newspaper supplied false circulation figures to auditing company and that they relied on the auditing company's figures).

78. *Levinson*, 485 U.S. at 227 n.4 (noting that one of the public statements alleged in the complaint, and the only one that explicitly denied the existence of ongoing merger negotiations, was a quotation from the issuer's president in a newspaper).

is accurate because the reporter and/or newspaper are generally known to be reliable, but the plaintiff has no firsthand knowledge of what the corporate officer said to the reporter. He is relying on “information and belief” as it has generally been understood, although the information is surely not exclusively in the corporation’s knowledge. The newspaper reporter has the same information (*viz.*, the statements the corporate officer made to her). Further, speaking with the newspaper reporter, and confirming that the quote in the newspaper was accurate, would not solve the problem because the plaintiff still lacks “personal knowledge” of the corporate officer’s statement.

III. “Information and Belief” Reconsidered

Although there is really no basis for it in the text of the Federal Rules of Civil Procedure, courts have seemingly looked askance at allegations based on “information and belief.” This is entirely unwarranted, especially given the rather broad definition that the courts have given that phrase, including all allegations outside of the personal knowledge of the relevant person (a party in most cases, an attorney usually for purposes of Rules 11 and 26). Much of what we think we “know” in this life—when we were born, our parents’ names, other people’s birthdays, other people’s *names*, what yesterday’s baseball score was, who our Senator or Representative is—we “know” because we have read it somewhere or other people have told it to us.⁷⁹ We have no reason to doubt many of these sources, and we do not. It would be intolerably difficult—indeed, most likely impossible—to go around obtaining personal information about everything. If we sign a legal document identifying our birth date, most of us—dare I say, all of us?—would not qualify the assertion by conceding that it is “on information and belief.”

Thus, the notion that courts should disfavor allegations made outside whatever constitutes our direct personal knowledge is one that should be rejected. If Rule 11(b)(3) actually required attorneys to specifically identify those matters outside their clients’ direct knowledge—as the Committee Notes, but not the rule itself, suggest—it would serve no useful purpose (and certainly not the purpose it is *supposed* to serve, *viz.*, regulating the behavior of attorneys in civil litigation). As it is, it is drawing an evanescent line between those contentions that an attorney has “information” that there is evidentiary support from those contentions that an attorney has “information” that there likely will be evidentiary support.

79. 27 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6026 (2d ed. 2007) (“But no witness can remember her own birth, much less her date of birth. This information is usually transmitted to an individual by a parent, a birth certificate, or some other hearsay source.”); *Antelope v. United States*, 185 F.2d 174, 175 (10th Cir. 1950) (“Testimony by one as to his age and the date of his birth is in a sense hearsay, but is an exception to the rule that hearsay testimony may not be received in evidence. Courts generally recognize that one is competent to testify as to his age and the date of his birth although of necessity such facts are based upon hearsay and family history”).

A better focus is the general reasonableness requirement, and the more specific “reasonable inquiry” requirement, of Rules 11(b) and 26(g).⁸⁰ Some allegations may require a further inquiry even after one has obtained evidentiary support for them, even through the direct knowledge of witnesses, if the witnesses’ stories seem implausible in some respect. For some allegations, it is perfectly reasonable to simply accept them based upon secondhand information, especially if they are plausible and it would be difficult to find corroborating information. And, I would think that some allegations can be made based on virtually no information and no inquiry at all and still be reasonable.

So let us keep contentions that we “believe” based on “information.” It would be a difficult world in which to litigate if we did not. But it might be a better litigation world if we spent a bit less time trying to figure which contentions fall in that category or making up rules for those that do.

80. Fed. R. Civ. P. 11(b) and 26(g). Although the Federal Rules do not impose a “reasonable inquiry” requirement on represented parties, the discussion here, relating to factual assertions, is equally applicable to them.