

1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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3 MARK K. JONES, Individually, et al.,
4 Plaintiffs,

5 v. 10 Civ. 3864 AKH

6 PFIZER, INC., et al.,
7 Defendants.

8 -----x

9

10 July 7, 2014
11 4:00 p.m.

12

13 Before:

14 HON. ALVIN K. HELLERSTEIN,
15 District Judge

16

17 APPEARANCES

18

19 ROBBINS GELLER RUDMAN & DOWD, LLP
Attorneys for plaintiff Jones
20 BY: HENRY ROSEN, Esq.
WILLOW RADCLIFFE, Esq.
21 Of counsel

22 WILLIAMS & CONNOLLY, LLP
Attorneys for defendant Pfizer, Inc.
23 BY: STEVEN FARINA, Esq.
AMANDA M. MacDONALD, Esq.
24 Of counsel

25

1 (In open court)

2 (Case called)

3 THE COURT: Good afternoon, everybody.

4 I called you here because a letter of June 27th
5 identified some of the experts that I thought the lawyers were
6 going to try a case that was different from the one I imagined
7 was before me. Plaintiffs said they have 10 expert witnesses
8 and defendants have designated 14 expert witnesses. It sounds
9 excessive to me. It seems to me the transaction costs are
10 zooming much more than they should be. I want to see if I can
11 stop this.

12 Mr. Rosen, why do you need 10 experts?

13 MR. ROSEN: Should I stand at the podium, your Honor?

14 THE COURT: Wherever you want to stand.

15 MR. ROSEN: When we were here in February, we were
16 asked to provide a schedule for designating experts. We
17 complied and designated our 10 experts in March.

18 THE COURT: Why do you need 10 experts?

19 MR. ROSEN: The reason we need 10 experts, we bear the
20 burden of proof.

21 THE COURT: Yes.

22 MR. ROSEN: This case involves four different drugs.
23 This case involves very complicated issues regarding the
24 science and whether marketing of those drugs was permissible.
25 We need various experts to cover the drugs, which I can go into

1 in more detail. We have accounting allegations in the case.
2 We need an accounting expert. We have a damage expert who is
3 also the loss causation expert.

4 THE COURT: Let me understand. This is a disclosure
5 case, failing to disclose. There were SEC or DOJ or FDC
6 examinations of Pfizer resulting in certain allegation
7 outcomes, as I remember, a failure to disclose what was going
8 on and marketing practices that were not consistent with
9 promises made by Pfizer. That's my memory of the case.

10 MR. ROSEN: That's correct. May I break that into two
11 parts. There is the disclosure issue which you started with
12 and there were marketing practices which were not consistent
13 with what Pfizer promised was going on. Those are separate
14 statements in the case.

15 THE COURT: Those are fact issues?

16 MR. ROSEN: Those are fact issues.

17 THE COURT: Why do we need experts?

18 MR. ROSEN: I will break those into two parts. The
19 expert required to deal with disclosure issues are the
20 accounting expert who is going to opine on whether the
21 litigation preceding disclosures were accurate.

22 Additional experts besides the drug experts which I
23 will come back to in a minute which are necessary in this case
24 are because the defendants have asserted a reliance on counsel
25 and reliance on their auditors defenses in the case.

1 The reliance on counsel defense is also bolstered by
2 their designation of trial witnesses which they were ordered to
3 do last spring in 2013, and they have designated Dennis Block,
4 their outside SEC lawyer and their in-house lawyers.

5 THE COURT: What is he going to testify?

6 MR. ROSEN: Dennis Block is going to testify their SEC
7 disclosures were adequate.

8 THE COURT: It is not his job. It is my job, the
9 jury's job.

10 MR. ROSEN: It is their witness. Mr. Farina --

11 THE COURT: Tell me about your witnesses. Let them
12 worry about Dennis. When they tell me about Dennis Block, you
13 have to answer. Mr. Block is a fine expert, but not for this
14 case.

15 MR. ROSEN: The experts that we have designated in
16 response are Mr. Ed Buthusiem.

17 THE COURT: You don't have to designate experts in
18 response, only on issues you have to carry. Why do you need 10
19 experts?

20 MR. ROSEN: I would be happy to go through the list of
21 experts for you.

22 THE COURT: Do it. Do it.

23 MR. ROSEN: So professor Jerry Avorn is a Harvard
24 professor who has spent 35 years of his career devoted to
25 figuring out why physicians prescribe drugs. He has devoted

1 his career to analyzing what impact pharmaceutical companies
2 have on marketing practices, their practices regarding advisory
3 boards, their practices regarding other types of continuing
4 medical education programs and what impact those types of
5 programs have on physicians' prescribing behavior.

6 In this case, Pfizer's witnesses have testified
7 despite the guilty plea, despite the fact that Pfizer paid the
8 \$2.3 billion fine, the promotional activities in the case were
9 not promotional.

10 For example, Gayle Clauw will will testify that
11 advisory boards where they hired experts to come in and talk
12 about off-label uses was not a, quote, promotional activity. I
13 could go on for 15 minutes describing her testimony and how she
14 denied each and every allegation in the information to which
15 they pled guilty.

16 Professor Avorn's area of expertise is figuring out
17 which activities are, in fact, promotional. He is a nationally
18 if not a world recognized expert in this area, and he has
19 written a report that describes the off-label promotion of all
20 four of the drugs at issue.

21 THE COURT: All right. Mr. Farina, are you going to
22 object to Avorn?

23 MR. FARINA: We believe this was a three-to-five
24 expert case. This is a securities case.

25 THE COURT: Are you going to object to Avorn?

1 MR. FARINA: Yes, we are, your Honor. We intend to
2 move to exclude him as well as all of the medical experts. We
3 think this is a securities case. It is a securities case. We
4 think there should be three to five experts per side.

5 THE COURT: You're going to bring on people who say
6 that marketing to advisory counsels is not really marketing
7 because doctors are not selling drugs, they only prescribe
8 drugs?

9 MR. FARINA: That issue has nothing to do with this
10 case. We didn't offer Gayle Clauw as a trial witness. They
11 sought her deposition and asked her questions, and she answered
12 them.

13 THE COURT: If Avorn is out, which of the 14 do you
14 want out, Mr. Rosen?

15 MR. ROSEN: Which of the 14 of defendant's experts are
16 out, your Honor?

17 THE COURT: Right.

18 MR. ROSEN: Maybe over half of them. They designated
19 six or seven.

20 THE COURT: On the same issue of marketing?

21 MR. ROSEN: Your Honor, this is the first time counsel
22 for defendants has objected to any of our experts. I feel this
23 prejudices us more than them. We have already completed our
24 expert reports. I could go through each and every one of the
25 experts and why they're necessary.

1 THE COURT: Maybe you could have done this before, but
2 I don't want to have this trial lengthened like this. It is a
3 jury trial, right?

4 MR. ROSEN: Yes.

5 THE COURT: You know the many jurors after the second
6 week, they don't get paid. If they work for a bank or if they
7 work for a hospital, they don't get paid. How long a trial do
8 you think we're going to have?

9 MR. ROSEN: My guess would be six to eight weeks.

10 THE COURT: My guess it is going to be two to three.
11 We are not going to have a six-to-eight week trial. We are not
12 going to have experts that have nothing to contribute. This is
13 a disclosure case.

14 MR. ROSEN: This case also involves statements that we
15 complied with all health care laws. We are marketing our
16 products in compliance with off-label marketing regulations.
17 There are four drugs at issue. We offered to stipulate to the
18 underlying off-label marketing facts of the case. They
19 refused.

20 THE COURT: These are fact issues.

21 MR. ROSEN: But he is an expert that will assist the
22 jury in understanding what on and off-label means, whether this
23 activity is or isn't off-label.

24 Counsel for the other side is not being jenuous when
25 he says that we didn't designate Gayle Clauw as a witness.

1 Does that mean even when we deposed her --

2 THE COURT: Is Jewel your witness?

3 MR. ROSEN: Yes.

4 THE COURT: What is he or she going to testify?

5 MR. ROSEN: Professor Jewel is an internationally
6 recognized biostatistician. He is a designated expert on
7 Zyvox. Zyvox is a drug in the summer of 2005, the defendants
8 were told by the FDA stop making a superiority claim over
9 vancomycin. For three years undeterred they continue to make
10 that superiority claim and they did so on the basis of
11 scientific studies that Professor Jewel analyzes with his
12 biostatistical background and concludes none of those studies
13 supports the superiority claim they continue to make.

14 THE COURT: Why would I go into the merits of a drug
15 if the issue is whether they violated their promise not to
16 market that drug?

17 MR. ROSEN: Because our anticipation is that they're
18 going to defend and say we stopped making the superiority claim
19 and these studies supported the statements that were being made
20 in the marketing materials even though they withdrew them and
21 even they they admitted in the civil settlement --

22 THE COURT: These are fact issues; they're not expert
23 issues.

24 MR. ROSEN: They admitted in the civil settlement they
25 continued to make unauthorized --

1 THE COURT: Tell me about O'Brien.

2 MR. ROSEN: O'Brien is a man who has 25 years'
3 experience looking at the pharmaceutical industry and
4 specifically at the internal controls that the pharmaceutical
5 industry has.

6 In this case, the company was plagued with internal
7 control issues throughout the class period which diminished
8 their ability to monitor and control off-label marketing per
9 their promises prior to the class period to the Office of
10 Investigator General.

11 They were under a corporate integrity agreement that
12 required them to monitor and control the off-label marketing,
13 and he has analyzed the internal control audits that were done
14 by the company.

15 THE COURT: Rosenheck?

16 MR. ROSEN: Rosenheck is a nationally recognized
17 clinical psychiatrist who was one of the authors of and on the
18 committee of the KB trial, which is a trial of the largest test
19 of second generation antipsychotics. It is a trial that Pfizer
20 used throughout the class period to tout the efficaciousness of
21 the drug Geodon.

22 His testimony is limited solely to whether they were
23 properly interpreting the results of the KD trial. There are
24 statements throughout the class period alleged in our
25 complaint, in Paragraphs 84, 85 and Exhibit B to the complaint

1 where it talks about the KD study.

2 Paul Regan is the CPA retained by plaintiffs in the
3 case to talk about whether Pfizer was required to make fast
4 five disclosures and take reserves which are tied specifically
5 to the disclosure issues in the case.

6 THE COURT: What about -- who is he?

7 MR. ROSEN: Buthusiem is the gentleman who has 20
8 years of experience working in-house at Galaxo SmithKline,
9 another massive pharmaceutical company that was under intense
10 FDA scrutiny for off-label marketing activities. He was
11 responsible in part during his tenure for forming the
12 disclosures at issue in this case.

13 THE COURT: For Galaxo?

14 MR. ROSEN: Galaxo is one of Pfizer's biggest
15 competitors. We believe that is at issue in the case because
16 one of the standards people must look at when they're
17 developing their disclosures is what competitors are doing.

18 (Continued on next page)

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1 MR. ROSEN: Professor Feinstein.

2 THE COURT: So how does this help you?

3 MR. ROSEN: Because in his opinion, the process that
4 Pfizer employed, and specifically the people that they put in
5 place who were in charge of analyzing the disclosures and the
6 process that they used to develop the disclosures, are at odds
7 with his expertise and his experience.

8 They have asserted that they are going to rely on this
9 process that was described by an in-house lawyer, Larry Fox, in
10 consultation with Dennis Block. So he was designated in
11 response to their assertion that they were going to rely on
12 this process.

13 THE COURT: Clauw?

14 MR. ROSEN: Clauw is defendant's expert, your Honor.

15 Professor Feinstein is our damages expert, who is
16 going to testify as to damages in the case, including loss
17 causation. We anticipate that, on summary judgment and on the
18 merits, the defendants will attack that there is no loss
19 causation in the case. I think that even if we couldn't agree
20 on many things, I think that the other side would agree that
21 Professor Feinstein's an essential witness in the case.

22 And, lastly, I'd like to talk about Meredith
23 Rosenthal, who's a professor at Harvard School of Public Health
24 and Professor Chris Baum, who works hand in hand with her.
25 Professor Rosenthal has withstood Daubert challenges by Pfizer

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1 itself on issues relating to calculating how much profit is
2 derived from off-label marketing. She relies on the
3 econometric model employed by Professor Baum.

4 THE COURT: What is off-label marketing?

5 MR. ROSEN: If a drug, such as Bextra, is approved for
6 two types of arthritis treatment and, one, the treatment of
7 primary dysmenorrhea, the company is not allowed to market the
8 drug for general acute pain.

9 In this case, as alleged by the government and further
10 alleged by us, despite not receiving the acute pain indication,
11 they continue to market it for acute pain. So the general
12 definition of off-label marketing is marketing it for any use,
13 any age group or any dose which was not specifically approved
14 by the FDA.

15 THE COURT: Okay. What's Rosenthal going to say?

16 MR. ROSEN: Rosenthal has examined the evidence
17 regarding off-label marketing and then, with the assistance of
18 Baum, has created a model which calculates how much of the
19 company's overall revenue for each one of the four drugs and
20 profit is derived from the off-label marketing activities.

21 THE COURT: Why do you need both of them?

22 MR. ROSEN: Well, Baum is really just the econometric
23 expert who runs the model. She is the one with the expertise
24 in examining off-label issues. She's been certified as an
25 expert on this issue, as I mentioned, even in the face of

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1 challenges by Pfizer in other cases.

2 THE COURT: Mr. Farina, tell me about yours.

3 MR. FARINA: Again, we think this is a three- to
4 five-expert case. It's a securities case. It's not a
5 derivative case. We're not re-litigating the government
6 investigation, which is what Mr. Rosen seems to want to do.
7 This is about the company's disclosures and the company's
8 accounting. There should be a disclosure expert, an accounting
9 expert and a damages expert. That's what we thought this case
10 was about when we put in place the schedule, that we'd have
11 discovery completed by August 29th. We thought it was a three-
12 to five-expert case.

13 They decided they wanted to try a different case
14 because we had asserted a defense of counsel, advice of
15 counsel. Mr. Block stood behind the disclosure, said they were
16 adequate, said that he told us that they were adequate;
17 therefore, it defeats scienter. They're trying to try a
18 different case, a derivative case with the underlying
19 investigation. It's not appropriate.

20 They don't belong as experts in the case. We intend
21 to move to exclude them. Frankly, we intended to do it after
22 we deposed them and after we got their reports. But if they
23 didn't have their medical people, we would not have our medical
24 people. Since I can't predict how your Honor is going to rule
25 on a motion to exclude their witnesses, I have to have

E77PJONC2.

1 witnesses available to testify to rebut their expert's
2 testimony if you allow their expert testimony to get to a jury.

3 But this is a much narrower case that I agree can be
4 tried in three weeks. It's about the disclosures and it's
5 about the accounting. So all of our doctors, all of our
6 medical people are in response to their medical people, and
7 then there's an econometrics person, which has nothing to do
8 with this case. Ms. Rosenthal --

9 THE COURT: Take me by individual.

10 MR. FARINA: Yes, your Honor.

11 THE COURT: Who's your first one on this list? I'm
12 looking at the letter.

13 MR. FARINA: All right.

14 MR. ROSEN: Your Honor, if it would be helpful, I do
15 have the disclosures for each side's experts.

16 MR. FARINA: So do I.

17 MR. ROSEN: And I'm sure you do, too, if you'd like a
18 copy, your Honor.

19 THE COURT: No.

20 MR. FARINA: So Clauw after -- we had designated these
21 folks before we had their experts' reports. We've gone back
22 through their list. We actually have cut some witnesses we
23 don't think we need in light of their expert report; so we
24 actually have paired down our list. So Clauw is a doctor; he
25 would be responding to Avorn, but we think that his subject

E77PJONC2.

1 matter can be covered by other witnesses; so we're going to cut
2 him.

3 THE COURT: So we can cross off Clauw?

4 MR. FARINA: Yes, we can cross off Clauw. All of the
5 others on this first page are the plaintiff's experts.

6 Beale is one that's their expert. He didn't address
7 Beale. Beale is supposed to testify as to respondeat superior,
8 which is a legal issue, which we don't think has any business
9 being the subject of expert testimony.

10 THE COURT: So may I cross off Beale?

11 MR. ROSEN: Yes, your Honor.

12 MR. FARINA: McEvoy is another author of the CADDY
13 study. He's there solely to respond to their expert,
14 Rosenheck. If we didn't have Rosenheck, we wouldn't need
15 McEvoy.

16 Panchal is another doctor. He's responding to their
17 medical experts Avorn and others. He also responds to
18 Rosenthal. Rosenthal is not a doctor, but her econometric
19 model is predicated on certain assumptions about how doctors
20 prescribes drugs. He is going to opine that her assumptions
21 are fatally flawed, and he is, therefore, responding to her and
22 their other medical people.

23 THE COURT: Rosenthal and Baum. What about McEvoy?

24 MR. FARINA: McEvoy is the other author of the study.
25 He responds to Rosenheck.

E77PJONC2.

1 THE COURT: So then McEvoy is responding to whom?

2 MR. FARINA: Rosenheck.

3 THE COURT: To Rosenheck.

4 MR. FARINA: Scharfstein is responding to --

5 THE COURT: Wait, hold on.

6 MR. FARINA: Sorry.

7 THE COURT: What's Rosenheck doing again, Mr. Rosen?

8 MR. ROSEN: Both Rosenheck and McEvoy were involved
9 with the advisory board of the CADDY study, which is a study
10 that Pfizer used to promote Geodon.

11 THE COURT: So if they're on the advisory board, what
12 are they going to tell me?

13 MR. ROSEN: Rosenheck's opinion provides that they
14 made false and misleading statements about several aspects of
15 what the results of the CADDY study were.

16 THE COURT: To the advisory board?

17 MR. ROSEN: No, to the public.

18 MR. FARINA: Your Honor, these guys they were on the
19 study.

20 THE COURT: Wait a minute, please.

21 MR. FARINA: I'm sorry.

22 THE COURT: So you want me to try whether what Pfizer
23 told the public in a non-relevant setting about other drugs not
24 an issue?

25 MR. ROSEN: No, your Honor. Geodon is one of the four

E77PJONC2.

1 drugs at issue, and the areas in which he examined statements
2 include statements made to investors during conference calls,
3 in the company's form 10-Qs and 10-Ks, and in core marketing
4 messages.

5 THE COURT: How could the issue of falsity or truth be
6 tried by an expert?

7 MR. ROSEN: He is not being provided as an expert to
8 make the ultimate decision about falsity, your Honor.

9 THE COURT: What is he --

10 MR. ROSEN: He's being provided as an expert to assist
11 the jury in examining whether the company's claims about the
12 drugs at all levels, from investors, all the way down to core
13 marketing messages that were given to sales reps to market the
14 drug to the doctors were accurate.

15 THE COURT: I didn't think this was a case of puffing
16 the drugs. I think this is a case of marketing drugs
17 inconsistently with what had been promised.

18 MR. ROSEN: Inconsistent with their label, your Honor.

19 THE COURT: So what do we need an expert, except one
20 that says it's not right to do that? I don't know why
21 Rosenheck is in the case.

22 MR. ROSEN: Well, your Honor --

23 THE COURT: Why do you want to complicate your case?

24 MR. ROSEN: If they'll withdraw McEvoy, we'll
25 withdraw --

E77PJONC2.

1 THE COURT: If you withdraw Rosenheck, they'll
2 withdraw McEvoy.

3 MR. ROSEN: Okay.

4 THE COURT: Okay. Rosenheck is out and McEvoy is out.

5 MR. ROSEN: Okay. So that's two of our experts, your
6 Honor. We're down to eight.

7 MR. FARINA: Your Honor, Jewell, again, has no
8 business in the case, and we would withdraw Scharfstein if they
9 withdraw Jewell.

10 THE COURT: How about that?

11 MR. ROSEN: No, we're not withdrawing Jewell, your
12 Honor.

13 THE COURT: All right. So let me go over these.
14 Jewell is a biostatistician? How do you say it.

15 MR. ROSEN: That's exactly right, your Honor,
16 biostatistician.

17 THE COURT: Biostatistician. And he's going to tell
18 us what?

19 MR. ROSEN: He's going to tell us that the studies
20 that they used, after they were told by the FDA to stop making
21 the superiority claim over vancomycin, that they used to
22 continue to make those claims did not support a superiority
23 claim. He is uniquely qualified to do that. He's a nationally
24 recognized expert in by biostatistics and he has examined the
25 studies at issue.

E77PJONC2.

1 THE COURT: That's very important to you?

2 MR. ROSEN: That's the case about Zyvox. You can't
3 make the superiority claim.

4 THE COURT: Okay. Got it. Got it. Panchal.

5 MR. FARINA: Your Honor, with respect to that study
6 that he's going to criticize, the FDA said we could use the
7 study; so he's taking issue with the FDA.

8 THE COURT: So he'll fail. You don't mind that.

9 MR. ROSEN: He examines like 12 studies. It's not one
10 20.

11 THE COURT: Panchal.

12 MR. FARINA: Panchal is an important expert. He's
13 going to address their doctor expert. He's going to address
14 Avorn. He's specifically going to speak to Bextra. One of the
15 reason why we were able to drop Clauw is we were going to
16 have Panchal cover the territory he was going to cover.

17 THE COURT: Tanselle.

18 MR. FARINA: Tanselle is a compliance expert. He's
19 addressing O'Brien.

20 MR. ROSEN: I'm sorry, which one, Tanselle?

21 MR. FARINA: Yes.

22 THE COURT: He's addressing O'Brien?

23 MR. FARINA: Yes.

24 THE COURT: About internal controls?

25 MR. FARINA: Well, O'Brien is addressing the

E77PJONC2.

1 compliance programs of the company. Tanselle is addressing the
2 compliance programs of the company.

3 THE COURT: I don't know why I have to get involved
4 with the compliance programs of the company.

5 MR. FARINA: I don't know why you have to either.

6 MR. ROSEN: I know we've had this fight over and over
7 again, your Honor. I'm sorry to sound like a broken record.
8 In addition to disclosure statements in the case, the initial
9 false statements alleged in the complaint are that we have
10 these robust compliance procedures. We just settled with the
11 OIG. We have this 2004 --

12 THE COURT: That's puffing.

13 MR. ROSEN: Well, the statements were upheld on the
14 motion to dismiss, your Honor, and I would strongly beg to
15 differ that statements like "we compete lawfully and ethically
16 this the marketplace, we promote our products honestly, we
17 comply with all healthcare obligations with general respect to
18 regulatory requirements, we do not off-label market our drugs."
19 When they announced a settlement with another case, they said
20 that was a legacy product that we acquired.

21 THE COURT: You can prove it by proving they do the
22 things they say they don't do, not by talking about their
23 internal controls. We covered --

24 MR. ROSEN: But we believe that O'Brien will assist
25 the trier of facts in examining those internal controls.

E77PJONC2.

1 THE COURT: Theodorou.

2 MR. FARINA: Your Honor, I'm happy to answer all those
3 questions. If I can, can I propose an alternative to this?

4 THE COURT: Yes.

5 MR. FARINA: Mr. Rosen has said that Feinstein, we'd
6 all agree, should be an expert. I do agree with that.
7 Causation and damages are a critical case dispositive issue
8 here. Particularly in light of the Halliburton decision by the
9 U.S. Supreme Court two weeks ago, we believe that that provides
10 a basis to decertify the class. It's all about loss causation.

11 We think we have a summary judgment motion that we
12 intend to file. That motion also is a basis to decertify the
13 class. Now, under Halliburton, with that new ruling, instead
14 of doing 15 experts that may never see the light of day, one
15 proposal would be that we address the issue of loss causation,
16 do that upfront, that would require two experts, one from each
17 side, Feinstein and Lehn.

18 THE COURT: I'm not splitting the case. What about
19 these other fellows? We'll go from the bottom, Lehn.

20 MR. FARINA: Ken Lehn is our causation and damages
21 expert; so he responds to Feinstein.

22 THE COURT: Okay. Feigal?

23 MR. FARINA: Feigal? Feigal is addressing Avorn. If
24 they didn't have Avorn, we wouldn't have Feigal.

25 MR. ROSEN: But you said Panchal was addressing Avorn.

E77PJONC2.

1 MR. FARINA: Well, a number of them are addressing
2 Avorn. Avorn doesn't actually prescribe these drugs; so we
3 brought in people who are practitioners who actually prescribe
4 these drugs who will say Mr. Avorn doesn't know what he's
5 talking about. So we've tried to cover as much ground as we
6 can with as few doctors as possible.

7 THE COURT: But they're not experts; they are fact
8 witnesses.

9 MR. FARINA: They are absolutely experts. They are
10 nationally recognized experts in the prescribing of these drugs
11 and the practice --

12 THE COURT: Are they practicing doctors?

13 MR. FARINA: Yes, your Honor.

14 THE COURT: So they prescribe the drugs. That means
15 that they rebut an expert that says the drug shouldn't be
16 prescribed.

17 MR. FARINA: Your Honor, they can speak to the issue
18 of promotion and prescription. Off-label promotion is not
19 appropriate, but doctors under FDA regulations are free to
20 prescribe drugs for any ailment that they believe the drug will
21 help the patient.

22 THE COURT: So you get an expert to say that?

23 MR. FARINA: Yes, your Honor. These are the experts
24 I'm going to have say that. If they didn't have their
25 off-label promotion expert, we wouldn't have ours.

E77PJONC2.

1 THE COURT: So get one expert.

2 MR. FARINA: Well, we have -- we tried to cover the
3 gamut. We can get rid of McEvoy. We can get rid of Clauw, but
4 we have Panchal that will cover two drugs, and then the Zyvox
5 issue is a separate issue.

6 THE COURT: It's a general issue. I don't see having
7 so many experts.

8 MR. FARINA: Your Honor, Avorn doesn't even prescribe
9 these drugs. Avorn is just a professional expert who goes
10 around criticizing pharmaceutical companies. Avorn is a
11 linchpin. If they got rid of Avorn, we would drop most of our
12 doctor experts.

13 THE COURT: Nicholson.

14 MR. FARINA: Nicholson responds to Rosenthal and Baum.
15 We don't believe Rosenthal and Baum belong in the case. If
16 they are not in the case, Nicholson will not be in the case.

17 THE COURT: Pelliccioni.

18 MR. FARINA: Pelliccioni we've decided we can drop.

19 THE COURT: Coates.

20 MR. FARINA: Coates is -- he's a private professor.
21 He's an expert on disclosures. He's opining on the central
22 issue in the case, which is the adequacy of the disclosures and
23 whether we reasonably believed they were adequate.

24 THE COURT: Why is an expert opining on that issue?
25 That's my issue to decide. The jury's issue to decide.

E77PJONC2.

1 MR. FARINA: There is a legal component to it. There
2 is a jury component to it, but he is also an expert on
3 disclosures, disclosures of other companies. He can opine on
4 what the appropriate standards were at the time.

5 THE COURT: I don't think he's going to be able to
6 testify.

7 MR. FARINA: If they drop Buthusiem, then we would
8 drop him. We have a world renowned expert on securities
9 disclosures, Dennis Block, who is going to testify.

10 THE COURT: Dennis Block is a litigator. What's
11 Buthusiem going to say?

12 MR. ROSEN: Buthusiem is -- Mr. Farina described
13 exactly why Mr. Buthusiem in the case. They designated, as a
14 trial witness, their outside counsel, very prominent, respected
15 member of the securities bar in New York, and we felt that the
16 trier of fact needs to hear from someone who can assist them to
17 evaluate that testimony and evaluate the process.

18 They have said that they are going to rely on their
19 robust internal disclosure process. He describes in his report
20 why he thinks that process isn't firm and why reliance on it
21 was not valid.

22 THE COURT: So Block is going to say you don't have to
23 disclose. And this is relevant on what issue?

24 MR. FARINA: Block is going to say --

25 THE COURT: Intent?

E77PJONC2.

1 MR. FARINA: Yes, your Honor. It's a fraud case.
2 They have to prove scienter. The fact that we had
3 distinguished counsel review the disclosures, approve them, he
4 issued a formal opinion every single quarter, a written
5 opinion, saying the disclosures were adequate, the company
6 relied on that.

7 THE COURT: Of course, that very much depends on what
8 Block learns.

9 MR. FARINA: Fine. Then they can cross-examine
10 Mr. Block.

11 THE COURT: Did he investigate?

12 MR. FARINA: They cross-examined Mr. Block at his
13 deposition.

14 THE COURT: Did Block investigate the facts?

15 MR. FARINA: Yes, he had regular calls with inside
16 counsel to make sure that he was familiar with the government
17 investigations and their status. He testified in deposition in
18 this case. He testified that, notwithstanding everything that
19 they threw at him, that he still believed that the disclosures
20 were adequate and that nothing that they offered him changes
21 his opinion it.

22 MR. ROSEN: Your Honor, if I may.

23 THE COURT: So therefore, you want to get Buthusiem to
24 say he doesn't know what he's talking about.

25 MR. ROSEN: Exactly. And as to Dennis Block, your

E77PJONC2.

1 Honor, they did not let us ask him questions about the
2 investigation.

3 THE COURT: That's enough with Block. If they blocked
4 you, you're not going to be able to use him either.

5 MR. ROSEN: Block or the fact witness?

6 THE COURT: If you prevented questioning of Block, you
7 may have to deal with the consequence to that.

8 MR. FARINA: We've already executed a waiver of the
9 privilege. So they had all of the information that went to
10 Mr. Block, and they've had the ability to cross-examine him on
11 that.

12 THE COURT: So what do you want now, Mr. Rosen? You
13 want to enlarge the time to take the expert depositions to how
14 long?

15 MR. ROSEN: Well, we jointly sought --

16 THE COURT: Until October 24?

17 MR. ROSEN: -- until October 24th.

18 THE COURT: You have no chance of gaining that.

19 MR. ROSEN: Well, we sought that together, your Honor.
20 That wasn't a plaintiff request.

21 THE COURT: Neither of you have a chance. Have I set
22 a trial date here?

23 MR. ROSEN: No.

24 MR. FARINA: No, your Honor. We do have summary
25 judgment motions that we intend to file.

E77PJONC2.

1 THE COURT: So you'll file them.

2 MR. ROSEN: We have given counsel for the other side
3 dates within the August 29th date for all ten of our experts.
4 If we chop that down to eight, I'm pretty confident we can
5 finish those. There's one scheduling issue regarding Professor
6 Feinstein, who is going to be out of the country in August.

7 Some additional time I know would be appreciated by
8 both sides, if we cut down -- even if we cut down the experts a
9 bit.

10 MR. FARINA: Your Honor, this was a joint request, and
11 we have worked -- believe it or not, we have worked
12 cooperatively in this. It's been extraordinarily difficult.

13 THE COURT: You have too many experts. I can't cut
14 them down.

15 MR. FARINA: Well, we've cut down some, your Honor.
16 Your Honor, these folks are not available. The problem is some
17 of them have no availability in the summertime, some of them
18 have extraordinarily limited availability. They're all over
19 the country.

20 THE COURT: Maybe they're not going to be experts
21 then. When would you be ready to try the case?

22 MR. FARINA: Your Honor, we --

23 MR. ROSEN: Well, I believe that if we finished
24 experts this fall and we briefed summary judgment by the end of
25 the year --

E77PJONC2.

1 THE COURT: Forget about summary judgment.

2 MR. ROSEN: Okay.

3 THE COURT: I need a trial date.

4 MR. ROSEN: We'd be ready to go to trial in January,
5 February, March, your Honor.

6 THE COURT: How about December 1?

7 MR. FARINA: Your Honor, we have --

8 MR. ROSEN: Okay.

9 MR. FARINA: We have motions for summary judgment --

10 THE COURT: Make it whenever.

11 MR. FARINA: -- on dispositive issues that require --

12 THE COURT: Make it whenever you want, Mr. Farina.

13 MR. FARINA: Your Honor, we can't make them until the
14 experts have been deposed. We also intend to make --

15 THE COURT: If you're going to rely on experts, you're
16 not going to make it. You're not going to win.

17 MR. FARINA: I'm not going to rely on experts. The
18 other side is going to rely on experts in opposition to my
19 summary judgment motion.

20 THE COURT: If you can persuade me under 56(f) or (g)
21 that I should keep the record open --

22 MR. FARINA: Your Honor, we also intend to move to
23 exclude most of the experts that we've spent the last 45
24 minutes walking through because they don't belong in this case,
25 and we need the opportunity to brief that.

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1 You know, we can try the case in the first quarter,
2 but we -- in all fairness, we need an opportunity to file our
3 motions.

4 THE COURT: All right. I'll give you a trial date,
5 January 26th. That's a fixed trial date. There will be no
6 adjournments. Is there a jury in this case, Mr. Rosen?

7 MR. ROSEN: Yes, your Honor.

8 THE COURT: January 6th at 2:30 we'll have a final
9 pretrial conference. The pretrial order should be in the day
10 before, on the 5th, all exhibits marked. I'll deal with all
11 pretrial motions in limine, on the 6th, and tell how we'll go
12 ahead with the jury.

13 I'll also fix a definite span of trial and give you a
14 definite time that you will divide 50/50 in presenting your
15 trial. So you need to have a clear head as to how long it's
16 going to take you to try the case. If there are motions
17 against experts, other than Daubert motions, I'll hear them on
18 the 6th as well.

19 MR. FARINA: Your Honor, there are going to be at
20 least one Daubert motion that goes to the Halliburton issue and
21 the loss causation expert issue that goes to Feinstein. Our
22 intention was to file that when we filed the motion to
23 decertify and the motion for summary judgment.

24 THE COURT: What's the Halliburton motion going to be
25 based on?

E77PJONC2.

1 MR. FARINA: Halliburton -- in Halliburton, your
2 Honor, the Supreme Court said that the defendants have the
3 right to show the absence of price impact and if there's an
4 absence of price impact, there can be no fraud on the market
5 presumption and the class needs to be decertified.

6 THE COURT: How would you do that?

7 MR. FARINA: We'd show that through loss causation.
8 It's basically the same way they're going to show it in
9 Halliburton.

10 THE COURT: How would you do that?

11 MR. FARINA: Your Honor, there's a so-called
12 corrective disclosure on January 26th. The stock goes down.
13 That disclosure occurred on the same day that Pfizer cut its
14 dividend, for reasons having nothing to do with this case.
15 Pfizer announced a \$68 billion merger, for reasons having
16 nothing to do with this case, and then Pfizer announced very
17 disappointing earnings guidance for the next year for reasons
18 having nothing to do with this case.

19 There's no evidence that the stock went down by virtue
20 of the revelation of any false disclosure. In fact, all of the
21 analysts that covered the stock did not mention the settlement.
22 No one cared about the settlement. In fact, the plaintiffs
23 didn't file a lawsuit for another 14 months. Because no one
24 cared about the settlement, there's no loss causation that
25 plaintiffs can establish because the stock did not go down by

E77PJONC2.

1 virtue of the disclosure of the settlement.

2 THE COURT: How can you prove, in a mixed causation
3 case, that nothing focused on the settlement?

4 MR. FARINA: On loss causation, it's actually
5 plaintiff's burden to disaggregate. That's clear Second
6 Circuit law. We think that the methodology that their expert
7 has chosen is demonstrably flawed. If it is demonstrably
8 flawed and it's kicked out, they cannot meet their burden, and
9 we would be entitled to summary judgment.

10 THE COURT: The settlement deals with the integrity of
11 the company, integrity of management. One of the most
12 important investor considerations has to do with the integrity
13 of management, and if management is corrupt, in one way or
14 another, or thought to be, that has an impact on price.

15 MR. FARINA: Your Honor, in the actual world, there
16 were 197 analyst reports that were issued from the time they
17 announced the settlement to the time where they actually
18 finalized the settlement and there's only like two that
19 actually mentioned the settlement. No one cared about it.
20 There's no evidence that anyone believed that this reflected
21 poorly on management.

22 THE COURT: You make your motion, but I don't know how
23 a judge can decide, as a matter of law, that one thing, that
24 the settlement didn't have any impact on price.

25 MR. FARINA: Because it is their burden, your Honor,

E77PJONC2.

1 under established Second Circuit law to show loss causation.
2 If their expert methodology is flawed, then they can't meet
3 their burden. That's how were going to do it.

4 THE COURT: Do you have a case?

5 MR. FARINA: Yes, your Honor.

6 THE COURT: What?

7 MR. FARINA: The Omnicare case from the Second
8 Circuit.

9 THE COURT: Okay.

10 MR. FARINA: Omnicon, excuse me.

11 THE COURT: Om- -- tell me.

12 MR. FARINA: Omnicon.

13 THE COURT: Stand up and tell me.

14 MS. MAC DONALD: It's the Omnicon case, your Honor. I
15 don't have the cite, but I'm happy to --

16 MR. FARINA: Your Honor, there's quite a developed
17 body of law on loss causation including --

18 THE COURT: Call up Joanna and give her the case.

19 MS. MAC DONALD: Will do.

20 THE COURT: Give it to Mr. Rosen.

21 MR. FARINA: I think he's aware of the case.

22 THE COURT: Are you aware?

23 MR. ROSEN: I'm aware of the case, your Honor. Do you
24 want me to respond or --

25 THE COURT: No.

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1 MR. ROSEN: Okay.

2 THE COURT: Okay. So you do what you want to do, but
3 these dates will not change unless the reason for the trial
4 changes.

5 Mr. Rosen, work very hard to get a concise trial. The
6 longer the trial, the less chance you have to win. A shortened
7 trial can make an impact. You've got to eliminate your
8 experts. You're not going with the experts. You've got to
9 focus on the facts as they come out.

10 MR. ROSEN: Okay.

11 THE COURT: And then you'll have a chance.

12 MR. FARINA: Your Honor, how many weeks are you going
13 to set aside for the trial, or do we not know yet.

14 THE COURT: I'll know when we start, when we get
15 together, but I'm thinking of a three-week trial.

16 MR. FARINA: Okay. To be divided evenly?

17 THE COURT: Yes.

18 MR. FARINA: Thank you.

19 THE COURT: That means four days a week.

20 MR. ROSEN: So the expert cutoff, your Honor --

21 MR. FARINA: It's up to us? Just get them --

22 THE COURT: September 30. September 30.

23 MR. FARINA: Okay. Thank you, your Honor.

24 MS. MAC DONALD: Three-zero?

25 THE COURT: One minute. I'll give you a 30-day

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1 enlargement.

2 MR. FARINA: Thank you, your Honor.

3 MR. ROSEN: Thank you, your Honor.

4 THE COURT: Which is September 30th. Off the record.

5 (Discussion off the record)

6 THE COURT: On the record. All expert discovery of
7 any kind must be concluded by October 15th. There will be no
8 enlargements. Okay.

9 MR. ROSEN: Thank you, your Honor.

10 MR. FARINA: Thank you, your Honor.

11 THE COURT: The experts that have been crossed out are
12 crossed out.

13 MR. ROSEN: Correct, your Honor. We cut two.

14 THE COURT: I'll tell you who's cut out. Stay on the
15 record for a minute. Rosenheck, Clauw, Beale, McEvoy and
16 Pelliccioni.

17 MR. FARINA: I'm sorry, can you give me that?

18 THE COURT: Rosenheck, Clauw, Beale, McEvoy and
19 Pelliccioni.

20 MR. FARINA: We're also dropping Grabowski.

21 THE COURT: And Grabowski.

22 MR. FARINA: Thank you, your Honor. Your Honor, we
23 had previously had a hearing scheduled in September. Is that
24 off?

25 THE COURT: What was it for?

E77PJONC2.

1 MR. FARINA: It was just to get back with us after we
2 finished expert discovery.

3 THE COURT: Yes, it's off.

4 MR. FARINA: Okay. Great. If we need you, we know
5 where to find you.

6 (Adjourned)

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