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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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3 MARY K. JONES, Individually
and on behalf of All Others
4 similarly situated,

5 Plaintiff,

6 v. 10 Civ. 3864 (AKH)

7 PFIZER, INC., ET AL.,
8 Defendants.

9 -----x

New York, N.Y.
January 6, 2015
2:30 p.m.

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Before:

HON. ALVIN K. HELLERSTEIN,
District Judge

1 APPEARANCES

2 ROBBINS GELLER
Attorneys for Plaintiffs
3 BY: MICHAEL DOWD
HENRY ROSEN
4 TRIG SMITH
JASON FORGE
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Attorneys for Defendant Pfizer
8 BY: STEVEN FARINA
JOSEPH PETROSINELLI
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Attorneys for Defendant Levin
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Attorneys for Defendant D'Amelio
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Attorneys for Defendant McKinnell
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Attorneys for Defendant Kindler
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Attorneys for Defendant Waxman
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Attorneys for Defendant Read
23 BY: SHEILA BIRNBAUM
24 MICHAEL CARLINSKY

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1 THE COURT: I am going to ask everyone, before he or
2 she speaks, to state your name for my benefit and for the court
3 reporter.

4 This is the final pretrial conference in Jones v.
5 Pfizer, 10 Civ. 3864. I would like to start by going down the
6 pretrial order and then follow that by the motions in limine,
7 and then we will get to other things as we go along.

8 This is a jury trial and the first issue that arises
9 in reading the pretrial order is the length that should be
10 proposed for trial. Plaintiff believes that it will take 60
11 hours for the plaintiff to put on its case and suggests that
12 each side have 60 hours of time in a timed trial. The
13 defendants believe that time should be allocated at 22 and a
14 half hours per side.

15 The time of a trial is a function of witnesses and a
16 function of exhibits, so let's go down the list of potential
17 witnesses. Where do I find that?

18 Who will speak? Mr. Dowd?

19 MR. DOWD: Yes, your Honor.

20 THE COURT: You are speaking for the plaintiffs?

21 MR. DOWD: Yes, on that issue.

22 THE COURT: Where do I find it?

23 MR. DOWD: The witness list should be attached to the
24 JPTL, Exhibit B-2, your Honor.

25 THE COURT: I have it.

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1 So you have 44 live witnesses?

2 MR. DOWD: Yes, your Honor.

3 THE COURT: And 11 by deposition. What are the
4 chances, you think, that I will allow 44 witnesses?

5 MR. DOWD: I think it is pretty slim, your Honor, and
6 I would tell you this: I am going to send the defendants,
7 tonight, the names of 10 witnesses that we are not going to
8 call that will come right off that list.

9 THE COURT: What are the chances that you think that
10 you will have 34 witnesses in my courtroom?

11 MR. DOWD: It depends on some of the other issues.
12 They have this big advice of counsel defense, your Honor. If
13 the Court rules in our favor on that you have four more
14 witnesses go off the list. That will leave, really, the six
15 defendants, two of the plaintiffs who should be very short.
16 There are eight experts right now for us and there are 13
17 current and former Pfizer employees.

18 THE COURT: And with respect to the 11 witnesses by
19 deposition, why can't they testify?

20 MR. DOWD: Your Honor, we don't control them. Most of
21 them are former Pfizer employees who live outside the
22 jurisdiction.

23 THE COURT: Do they live within 100 miles?

24 MR. DOWD: They don't, your Honor.

25 THE COURT: Are they employees of the defendant?

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1 MR. DOWD: Former employees of the defendant. There
2 is one that we think does business in New Jersey who we have
3 served with a subpoena recently, and I assume they are going to
4 want to contest it.

5 THE COURT: So, they prefer that these people testify
6 by deposition?

7 MR. DOWD: I assume that is what the defendants want.

8 THE COURT: Where is the defendants' list?

9 MR. PETROSINELLI: Your Honor, Joseph Petrosinelli for
10 Pfizer.

11 It is Exhibit C-2 of the pretrial order.

12 THE COURT: Some of the people are the same, aren't
13 they?

14 MR. PETROSINELLI: I was going to say, your Honor,
15 most of the people on our list are duplicates from the
16 plaintiff's list; for example, the defendants and current and
17 some even former employees of Pfizer. I think the big
18 difference, your Honor, is if you look back at Exhibit B-2, the
19 plaintiff's list, about half of the witnesses who are not on
20 our list are what I would call drug marketing witnesses, in
21 other words -- and we have motions in limine on this, but the
22 big difference in the list as I look at them is the plaintiffs
23 have about 20 to 25 witnesses on their list who are subject to
24 our motions in limine but would relate not to security
25 disclosures but drug marketing. That's, I think, the

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1 difference, your Honor.

2 THE COURT: Well, I think I will defer the issue of
3 timed trial and depending upon the order I sign, if I have too
4 many people commenting on the same thing, I will hurry both
5 sides along and I think we will finish this in two to three
6 weeks without having to assign arbitrary limits. If things
7 don't go that way we will figure out another way.

8 You know, the real problem is not the Court. I am
9 paid the same whether I have another trial or this trial. It
10 doesn't really make any difference but many jurors are paid two
11 weeks. After that, they're not paid. If they work for a
12 hospital they get two weeks' pay. I think from both sides'
13 perspective a juror who doesn't want to be there after two
14 weeks is not a good juror to have and that's why the trial
15 should be limited to two weeks and everyone should try as hard
16 as possible to get this done within the capacity of two weeks.
17 And I will try to move the case in that fashion as best I know
18 how. And, I generally do know how.

19 You should know that I am starting a trial Monday that
20 I believe will finish within two weeks. It is an ugly case
21 involving gender discrimination and hostile work environment
22 but it will start Monday and I think finish. So, you are the
23 next case and I think you will go on January 26.

24 Let's talk about the size of the jury. In every civil
25 case I have had I have had an eight person jury. I know that

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1 the plaintiffs wants nine and the defendants want 12, but I
2 really see no reason to deviate from eight. It is a unanimous
3 jury so it doesn't make a difference if it is eight or nine or
4 12. Nobody is going to want to retry this case so why have 12
5 and add chances for a mistrial. I think it is sensible to stay
6 with eight which means there are no alternates. And, any jury
7 between six and 12 is competent. So, even if we lose a juror
8 or two we will still have enough. So, unless I hear an
9 argument to the contrary we will have a six-person jury.

10 MR. DOWD: That's fine with the plaintiffs, your
11 Honor.

12 THE COURT: Okay.

13 MR. PETROSINELLI: Your Honor, Joseph Petrosinelli for
14 Pfizer.

15 THE COURT: Yes.

16 MR. PETROSINELLI: I think we proposed 12, I guess for
17 the very reason your Honor suggests.

18 THE COURT: You want a mistrial?

19 MR. PETROSINELLI: No. Not at all. We don't want to
20 have a mistrial because we don't have enough jurors. No one
21 wants to try this case again.

22 THE COURT: You don't have to. We will get this done
23 speedily, efficiently, and with eight jurors.

24 MR. PETROSINELLI: Thank you, your Honor.

25 THE COURT: Okay. So, in a civil case each of you has

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1 three peremptories. Defendants want more because they say
2 there are more defendants but you are all united in interest.
3 I don't see any reason there shouldn't be three for a side.

4 MR. PETROSINELLI: Your Honor, may I be heard on that?

5 THE COURT: Yes. That's why I say these outlandish
6 things, so I can get responses to them.

7 MR. PETROSINELLI: Some of the individual defendants
8 may want to be heard on that too.

9 Actually, given the plaintiffs' arguments in the case,
10 given their theories, they have different defendants charged
11 with liability for different statements and if we cited Judge
12 Haight's opinion -- and I know it has been cited by a number of
13 courts or a number of judges in this court -- which is that if
14 the plaintiffs' theory is such that there are some defendants
15 who could be found liable and some who couldn't, that is, the
16 plaintiffs could argue for a split verdict if they have to, and
17 here you have defendants who of the six individual defendants,
18 some of whom weren't even at the company when certain
19 statements were made, some of them are accountants, some of
20 them are lawyers and the theories are different.

21 So, we think that given -- and we sort of agree with
22 Judge Haight's reasoning, that because the theories are
23 different and because the plaintiffs will be able to argue for
24 different verdicts and of liability or not liability depending
25 on how the evidence comes in that we haven't asked, obviously,

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1 for 12 extra peremptories but --

2 THE COURT: You're the main defendant, right?

3 MR. PETROSINELLI: Yes, your Honor. We are the
4 corporate defendant.

5 THE COURT: And you will be certainly be taking up the
6 interest of your directors and officers. I can't see any
7 split. Some may be in, some may be out. Some may be getting
8 out before the case begins. Particularly I have in mind the
9 people who were no longer there when the alleged wrongs took
10 place. I am not ready on those motions. I know that many of
11 you have had an intense interest to argue this before we began.
12 I just could not accommodate you. There is very few things I
13 wouldn't do when Sheila Birnbaum asks me to do something but
14 this time I didn't.

15 MR. PETROSINELLI: There are very few things I
16 wouldn't do for Sheila.

17 THE COURT: Yes, but you are on the same side.

18 MR. PETROSINELLI: Judge, of the six there are only
19 two --

20 THE COURT: You know, Mr. Dowd, that Ms. Birnbaum was
21 a special master in the 9/11 cases and worked closely with me
22 to settle those cases and, like many other members of the bar
23 we are good friends, but I can tell you that it will not affect
24 my judgments in this case.

25 MR. DOWD: That's fine, your Honor. That is

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1 absolutely fine with the plaintiffs. We understand.

2 THE COURT: I just wanted you to know that.

3 MR. PETROSINELLI: Your Honor, I was going to say, so
4 of the six named defendants there are only two current
5 executives. There are four former executives.

6 THE COURT: Well, I have got to parse that out and I
7 am not yet ready, but I will.

8 MR. PETROSINELLI: Okay. Thank you, your Honor.

9 THE COURT: And soon, but I don't really see the need
10 for additional peremptories.

11 Who represents the accountants?

12 MR. DOWD: The accountants aren't defendants, your
13 Honor.

14 THE COURT: They're not?

15 MR. DOWD: I think what Mr. Petrosinelli meant is that
16 some of the individual defendants were CFOs and the other guys
17 were lawyers but they're all Pfizer guys.

18 THE COURT: So what is the difference going to be,
19 Mr. Petrosinelli?

20 MR. PETROSINELLI: The difference, your Honor, for
21 example they have a theory as to the reserves, the FASB-V
22 accounting reserves weren't properly set. That directly
23 implicates the CFOs.

24 THE COURT: It affects the president also. It affects
25 all the directors.

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1 MR. PETROSINELLI: But they're not -- the directors
2 aren't defendants here. These are different executives. For
3 example, general counsel is a defendant. He has nothing to do.

4 THE COURT: Getting for --

5 MR. DOWD: Yes, your Honor, I don't think it is right.
6 First of all, they cite Judge Haight's opinion, they leave out
7 the paragraph where he says you get --

8 THE COURT: What was inconvenient to them.

9 MR. DOWD: Exactly. Because it says you get
10 additional peremptory challenges the defendants have
11 cross-claims and things like that. These guys were represented
12 by the same law firm --

13 THE COURT: It is discretionary.

14 MR. DOWD: -- for four and a half years.

15 THE COURT: It is discretionary.

16 MR. DOWD: I understand that, your Honor.

17 I also think that they're represented by the same law
18 firms and now suddenly they have different interests like
19 they're going to find out something about a particular juror
20 with respect to the CFO that is not going to equally apply to
21 the CEO who is liable for the same statement? It just doesn't
22 make sense. I will take four, too, if they want. I have a
23 million clients.

24 THE COURT: I think the best argument for giving them
25 an extra is that it is hard for -- how many lawyers are there

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1 going to be, six lawyers on the defense? It is hard for six
2 lawyers to work together, so I think we will give them four;
3 you take three.

4 MR. DOWD: Your Honor, I accept that but it is going
5 to be just as big an argument between the three of us.

6 THE COURT: Still, you are getting three.

7 I have forgotten what is characteristic of the way we
8 do peremptories in my court. I learned this from Jerry Lynch
9 when he was a District Judge and now he that he is on the Court
10 of Appeals I feel safer in applying it.

11 So, I conduct voir dire by asking questions of the
12 jurors. I don't know if anybody has asked for any special
13 interrogatories. I haven't really gone over the voir dire yet
14 but I ask all the questions. Challenges come as a
15 challengeable question or an answer arises and if the juror is
16 challenged or can't sit, someone is brought from the array to
17 fill in the juror's place and the questioning goes on.

18 I will sit enough jurors so that we have eight plus
19 seven peremptories, that makes 15 will be seated. There will
20 be a larger array and where the array is will be decided by my
21 deputy and the jury clerk.

22 People will come to fill in. I think I will ask for
23 50 people because if they hear that trial will take more than
24 two weeks, I fear there will be a fair number who will find a
25 reason why they would be some place else. But, that should be

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1 sufficient.

2 Then we go on, they get a series of 10 questions that
3 are left at their seat. The questions ask them to tell us
4 about who lives with them, where they live, generally, and what
5 county; if they've been born in the United States or they're
6 naturalized; what work they did; what work their spouses did;
7 work done by any adult in their residence; what books they
8 read; TV stations they watch; what internet channels they like
9 to look at; what newspapers they read; what magazines they
10 read. And at the end of that each of you takes out a pad and
11 marks down the juror numbers that are being excused. You have
12 10 minutes to do that so the plaintiff will mark off up to
13 three peremptories, defendants will mark off as a group up to
14 four. If you coincide in your choices or if you don't exercise
15 all your peremptories, I will excuse from the back of those two
16 sitting forward so that we have eight people sitting. That will
17 take 10 minutes a side and then we will be ready to go ahead
18 with openings.

19 So, I expect that it will take about two to three
20 hours to pick a jury and then we will start immediately with
21 the openings. There will be one opening to a side. Openings
22 are not closings. If I think that there is overstepping I will
23 stop the attorney. What I mean by an opening is that you will
24 present the context of your case so the jury will understand
25 how the witnesses that you expect to call will fit into the

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1 case. I will get a prepared statement hopefully from the both
2 of you combined of what this case is all about.

3 The pleadings will not go to the jury. They will have
4 nothing at all except your words to teach, to guide them. But,
5 when I charge them at the beginning of the case I will tell
6 them what the case is about and I would like to read the
7 statement that you both prepare.

8 So, Mr. Dowd, you will take the lead and pass it to
9 Mr. Petrosinelli and he will involve whoever on his team should
10 be involved and we will come up with a joint statement? If you
11 don't come up with a joint statement I will prepare my own.

12 MR. DOWD: Yes, your Honor.

13 THE COURT: Work out a timing, get it to me a day or
14 so before.

15 I need to tell the jury who will be the witnesses so
16 that is going to be a real challenge because you are going to
17 have to pare down your lists to those you really will call. I
18 know that there is a tendency to have a lot more people listed
19 than what will actually be used. You are all experienced trial
20 lawyers and know that if you want to persuade a jury you have
21 to do it with as few people as possible, you just can't lead
22 the people on. And you want to both be persuasive so you will
23 pare down your lists and then I will tell the jury, in
24 alphabetical order, I don't care who calls who, who will be the
25 people, what are the objects and so on, and see if anyone has

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1 any familiarity with those so that it can be considered whether
2 or not they should be recused or not.

3 Are there any witnesses that need interpreters?

4 MR. DOWD: No, your Honor.

5 MR. PETROSINELLI: Not that I know of, your Honor.

6 THE COURT: How will you do exhibits? Computer?
7 Chart? Computer pictorial representation? Slides? Or what?

8 MR. DOWD: Yes, your Honor. We will do it with --
9 probably hopefully there is a drop-down screen.

10 THE COURT: There is no drop-down screen, we put up a
11 screen.

12 MR. DOWD: The TV screens, we will probably show them
13 on there and we have individual monitors for the jury, the
14 Court will have them, counsel will have them. Obviously, we
15 all know what everybody's exhibits are. We actually have
16 our -- my technical guy Michael Torres is here today so he
17 would like to take a couple minutes after the hearing, if he
18 could, to look around and he will talk to defendant's technical
19 person so we can bring in one set of equipment.

20 THE COURT: Can we possibly use one set of technical
21 people for both sides?

22 MR. DOWD: We use in-house people, your Honor, so I
23 would rather use my guy to -- he has been with me before on
24 these but they have consistently in the past, even if
25 defendants use an outside vendor they always seem to get along

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1 all right.

2 THE COURT: Can I do this? If defendants are
3 cross-examining and they want to use your exhibits, can they
4 use your technical person to put up whatever they want?

5 MR. DOWD: Yes. They could. Usually I think what we
6 do is we just flip a switch and then their guy is controlling
7 what goes up on the screen and then they flip a switch and we
8 control what goes up when questioning witnesses and I have
9 never had a problem with it.

10 THE COURT: Mr. Petrosinelli, does that work?

11 MR. PETROSINELLI: That sounds right to me, your
12 Honor. The last trial I did a couple months ago they had a
13 switch and they flipped it.

14 THE COURT: So, the technical people should get
15 together and work together.

16 MR. DOWD: They will, your Honor.

17 THE COURT: And clear it with Brigitte Jones who will
18 get you -- I think you both should have your technical people
19 make a trial run. I have a trial going so you will have to
20 find when the courtroom is available for them, but see that it
21 works.

22 MR. DOWD: And we should contact Ms. Jones?

23 THE COURT: Yes.

24 MR. DOWD: Yes, your Honor.

25 THE COURT: There are various objections to various of

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1 the witnesses. Shall I rule on them now?

2 Why don't I ask Mr. Petrosinelli to state the
3 objections to plaintiff's witnesses.

4 MR. PETROSINELLI: Your Honor, are you going to -- you
5 mentioned earlier today that you were going to hear arguments
6 on motions in limine.

7 THE COURT: Right.

8 MR. PETROSINELLI: Because I think most of, if not
9 all --

10 THE COURT: You would rather do that first?

11 MR. PETROSINELLI: Most, if not all of our objections,
12 are based on motions in limine. So, when you get to that
13 motion maybe we can point that out to you?

14 THE COURT: What about exhibits? Same thing?

15 MR. PETROSINELLI: Largely the same thing, your Honor.

16 THE COURT: The case will be tried Monday through
17 Thursday. We start at 10:00. I have a mid-morning break. We
18 will break close to 1:00, an hour and a quarter for lunch, and
19 we will try to get through an afternoon until about 5:00
20 without a break unless somebody needs a break. That gives us
21 about two and a half hours a session, a five-hour trial day. I
22 generally do not give side bars by request, only if I want one.
23 So, there will be a few side bars. You can ask for it but
24 chances are you won't get it. Let me know what problems are
25 going to come up so I can rule on them before and make it

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1 easier for you and for me and for the jury.

2 My job, as I see it, is to make sure the jurors get a
3 full trial day. I like to try the case in a way that makes it
4 interesting to the jury. I also like, as much as possible, to
5 let you do the case. I will make the rulings but if I feel
6 that there is some more information that a jury needs to
7 understand the case, I will intervene.

8 Objections are one word: Objection. There will be no
9 speaking objections. If I want an explanation I will ask for
10 it at a side bar. Generally at a side bar. So, just stand up
11 and state "objection" and I will generally know what you have
12 in mind.

13 I think from the defendant's perspective we should
14 have Mr. Petrosinelli, if he is going to be the lead counsel,
15 state an objection that will be good for every defendant. Each
16 of the defendants do not and should not stand up and say I also
17 object. I think that should work for most situations.

18 Is that satisfactory?

19 MR. DOWD: That's fine, your Honor.

20 THE COURT: Will it work okay, Mr. Petrosinelli?

21 MR. PETROSINELLI: The only thing I can think of, and
22 others can jump in here, is one problem is there are some
23 things as to which the company doesn't object to, for example
24 on relevance grounds or something, but an individual who has
25 been gone from the company at the time that they're talking

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1 about, the evidence, might have an objection that the company
2 wouldn't have. That's the only thing I can think of. And
3 whether they're admissions of the company or hearsay as to --

4 THE COURT: Will you plan to rotate the lead for
5 objections? One way of doing that is to give the person, the
6 lawyer who represents that person, the lead on objecting for
7 everyone.

8 MR. PETROSINELLI: I think we would want to talk about
9 that amongst ourselves, if that's okay.

10 THE COURT: If you can figure out a way of doing this
11 efficiently. It is confusing to the jury to have a number of
12 people object and most times it is not necessary. I can
13 understand why it might be useful in certain situations. Let
14 me know if it is and I will accommodate you but I don't think
15 it is necessary for most.

16 MR. PETROSINELLI: Yes, your Honor. Thank you.

17 THE COURT: Before we go on to the motions in limine
18 is there anything that anyone would like to know?

19 MR. CARLINSKY: Your Honor, Michael Carlinsky for
20 defendant Ian Read.

21 THE COURT: Yes, Mr. Carlinsky?

22 MR. CARLINSKY: Your Honor said that each side would
23 have one opening.

24 THE COURT: Yes, you are right. What should I do?

25 MR. CARLINSKY: What I would ask the Court to do is

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1 if, whatever individual defendants remain in the case, that the
2 lawyers for the individual defendants be given an opportunity
3 to present a short -- and I am emphasizing short -- I would say
4 no more than 15 minutes. Your Honor may say --

5 THE COURT: I am not going to do it on time,
6 Mr. Carlinsky. I think your point is well put. I think each
7 personal defendant should have the opportunity to address the
8 jury, identify the client, and what is particular about the
9 client.

10 MR. CARLINSKY: Thank you.

11 THE COURT: Okay? I am not having time limits. I am
12 going to depend on your own good senses to do this but I will
13 be free to jump in if I feel like you are abusing the
14 privilege.

15 Let's do the motions in limine.

16 MR. FARINA: Your Honor, the first in limine motion is
17 a Daubert motion directed to the plaintiff's causation and
18 expert Steve Feinstein. It is also a case dispositive motion,
19 as the plaintiffs have acknowledged. I don't know whether your
20 Honor is going to take up the case dispositive motions today.

21 THE COURT: No.

22 MR. FARINA: I am happy to argue it now.

23 THE COURT: I am not prepared.

24 MR. FARINA: Okay.

25 THE COURT: Let me find your motion.

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1 MR. FARINA: Your Honor, we would be prepared to argue
2 that motion today along with the other in limine motions. It
3 is, however, a case dispositive motion, if you would prefer to
4 take that up with the summary judgment motions.

5 THE COURT: I'm not coming into this as prepared as I
6 usually am so I can't answer the question.

7 MR. FARINA: Your Honor, we are happy to --

8 THE COURT: I will hear you when I am more prepared.

9 MR. FARINA: Sure.

10 THE COURT: I am looking upon most of these
11 evidentiary issues but try me out, see what happens. Let me
12 just find this first.

13 MR. FARINA: Sure.

14 THE COURT: Tell me what you want to do.

15 MR. FARINA: Your Honor, it is the motion to exclude
16 Professor Steven Feinstein. It is a dispositive motion and
17 also an in limine and Daubert motion. The reason why it is a
18 dispositive motion is, as a number of Courts have held in this
19 circuit, absent a damages and causation expert in a securities
20 case, the case cannot go forward. We think there are fatal
21 flaws -- your Honor, it is docket no. 250.

22 THE COURT: Why don't you start and I will get it.

23 MR. FARINA: Sure.

24 Your Honor, this motion does go to the guts of the
25 case and I know there has been some substantial briefing on it.

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1 I am happy to start today, I am happy to go today.

2 THE COURT: Go as far as you can.

3 MR. FARINA: Okay. Your Honor, I do have a single
4 demonstrative that I would like to hand up, if I could.

5 THE COURT: Sure.

6 MR. FARINA: Your Honor, I will explain what this is
7 in just a moment.

8 THE COURT: Go ahead.

9 MR. FARINA: Your Honor, this motion is based on
10 substantially the same grounds as were invoked by Judge Swain
11 in the Pfizer securities case that she was handling until last
12 year when she rejected the plaintiff's expert's opinion and
13 dismissed that securities case. It is almost identical to a
14 motion that was granted in the Court handling the BP securities
15 case where that expert's opinion suffered from the same
16 essential flaw. It is a flaw that is made evident by the
17 Supreme Court's decision in the Comcast case which was decided
18 in 2013.

19 The fundamental problem with the expert's opinion is
20 that it cannot be squared with the plaintiff's own allegations.
21 So, this isn't just an issue for cross-examination. This isn't
22 just an issue where I can prove that the expert is wrong. The
23 fundamental problem is that the expert's opinion cannot be
24 reconciled with the plaintiff's own allegations and, therefore,
25 it is not something that would be useful to the jury. It is

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1 not something that passes muster under Daubert. That is what
2 Judge Swain said in the Pfizer securities case, that is what
3 the Court handling the BP case -- and that was in the context
4 of class certification with the same fundamental problem.

5 So, what is that fundamental problem? That
6 fundamental problem is that the expert has opined that the
7 amount of inflation caused by the alleged fraud was constant
8 throughout the entire class period. Even though this is a
9 three-year class period where the plaintiffs themselves, the
10 plaintiffs' allegations are that the company and the
11 individuals made almost four dozen misstatements across the
12 entire class period that allegedly inflated the price of the
13 stock. Those are the plaintiffs' allegations. The plaintiffs
14 also argue that there were material omissions during this
15 three-year class period.

16 THE COURT: Where do I find Steven Feinstein's
17 affidavit or report?

18 MR. FARINA: We have it as an exhibit to our motion,
19 your Honor.

20 THE COURT: Exhibit what?

21 MR. FARINA: It would be Exhibit --

22 THE COURT: Declaration of Amanda MacDonald.

23 MR. FARINA: Yes, it is Exhibit A to the declaration
24 of Ms. MacDonald is the report.

25 THE COURT: That's attachment no. 1?

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1 MR. FARINA: Yes.

2 Now, what you will find in Professor Feinstein's
3 report is very little about this issue because that is one of
4 the problems with his opinion, he doesn't offer any analysis or
5 explanation why he has used what is called a constant inflation
6 ribbon.

7 THE COURT: Exhibit 1 is a deposition transcript; is
8 that right?

9 MR. FARINA: No, your Honor. Exhibit A to the Mac
10 Donald --

11 THE COURT: Attachment 1.

12 MR. FARINA: It is docket 251.

13 THE COURT: I have that.

14 MR. FARINA: And should be Exhibit A.

15 THE COURT: Exhibit what?

16 MR. FARINA: Exhibit A, your Honor.

17 THE COURT: I had that and it is a deposition
18 transcript. Attachment no. 1.

19 MR. FARINA: I have another copy, your Honor, if you
20 would like me to hand it up.

21 THE COURT: Okay. Got it.

22 MR. FARINA: Your Honor, if you can take a moment and
23 look at the demonstrative I handed up? This is the point.
24 What Feinstein has done is he has said the stock dropped a
25 certain amount on the day of the corrective disclosure that is

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1 January 2009, so he says that is the amount of inflation that
2 was in the stock caused by the material omissions, the alleged
3 omissions and alleged misstatements that the plaintiffs are
4 arguing. And the plaintiffs are arguing that the defendants
5 made a total of 43 misstatements throughout the class period.

6 So, if you look at this demonstrative, all of those Xs
7 during this entire three-year period are the alleged
8 misstatements that the plaintiffs say inflated the price of
9 Pfizer stock. That's their claim, that throughout this entire
10 three-year period, over and over and over again starting on day
11 one but continuing through the class period, that there were
12 affirmative misstatements that inflated the value of the stock.

13 The problem with Professor Feinstein's opinion, the
14 fundamental problem that caused the experts in these other
15 cases to be rejected, is that Feinstein says that the shares
16 were inflated by the exact same amount on every single day
17 during the class period. So, after the 43rd alleged
18 misstatement Professor Feinstein says that the inflation was
19 \$1.26. After the first alleged misstatement he says that the
20 inflation was the same amount.

21 So, even though there are alleged misstatements that
22 continue throughout the class period, Professor Feinstein says
23 it doesn't cause the inflation to go up or down.

24 Now, that is a huge problem in a case like --

25 THE COURT: You are not quarreling with his

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1 credentials, are you?

2 MR. FARINA: His credentials are not the issue, your
3 Honor, it is his work product, assumptions, actual opinions.

4 THE COURT: You don't like his report.

5 MR. FARINA: His report has a single paragraph -- a
6 single paragraph -- saying that he has a constant inflation
7 ribbon.

8 THE COURT: Single paragraph saying what?

9 MR. FARINA: That there is a constant inflation
10 ribbon.

11 THE COURT: What paragraph is that?

12 MR. FARINA: 259, your Honor.

13 THE COURT: So you don't think he knows what he is
14 saying.

15 MR. FARINA: What he is saying doesn't square with
16 what the plaintiffs are alleging.

17 THE COURT: So you will bring that out in
18 cross-examination.

19 MR. FARINA: Your Honor, this is exactly the problem
20 that Judge Swain said couldn't go to a jury.

21 THE COURT: Why not?

22 MR. FARINA: Because --

23 THE COURT: That's what juries do.

24 MR. FARINA: Well, your Honor, in order to past muster
25 under Daubert, in order for it to be admissible testimony for

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1 the jury it has to be based upon a reliable foundation, and
2 under the Supreme Court's Comcast decision --

3 THE COURT: I'm not going to arrogate myself to the
4 jury. I am a gate keeper. The man has credentials, he is
5 learned in his profession, he is making various kinds of
6 conclusions with various kind of data and he says what he wants
7 to say. He may be wrong but you are a skillful cross-examiner.

8 MR. FARINA: Your Honor, he is not offering an opinion
9 to the jury which is have the jury do what it needs to do,
10 which the jury will have to decide whether or not there was
11 inflation in the price of the stock. The jury in Household and
12 in Vivendi --

13 THE COURT: Is that what he says? He says the
14 inflation was constant and he gives a reason why it was
15 constant. You may not like the reason but it is his reason.

16 MR. FARINA: Your Honor, there is no analysis at all
17 and he acknowledged in his deposition that there is no analysis
18 to support it.

19 Here is the problem, your Honor: The damages that he
20 calculates are based on the settlement of four government
21 investigations. Three of the four government investigations
22 didn't start until halfway or two thirds through the class
23 period. It is fund fundamentally inconsistent with the
24 plaintiff's case, your Honor. How could it possibly be that
25 the shares were inflated as a result of a failure to disclose

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1 an investigation that hadn't happened yet.

2 The Comcast decision by the U.S. Supreme Court, your
3 Honor, says that the expert's theory, in order for it to have
4 any value to the jury, at least has to be reconcilable with the
5 plaintiff's allegations. That is the fundamental problem here.
6 It is not that he is wrong. He is clearly wrong. If he were
7 just wrong then that would be for the jury. But, it is
8 fundamentally inconsistent with the plaintiff's allegations.
9 It is fundamentally inconsistent with the facts.

10 The shares could not have been inflated for --

11 THE COURT: Which allegation is it inconsistent with?

12 MR. FARINA: Your Honor, there are 43 allegations that
13 are marked off on this schedule. These are misstatements that
14 they're claiming are material misstatements that inflated the
15 price of the stock.

16 THE COURT: So I have the complaint and what should I
17 look at that is inconsistent?

18 MR. FARINA: Your Honor, there is an attachment, and
19 they did this with their opposition to summary judgment, if I
20 can approach I can hand it to your Honor? This is attachment
21 Exhibit B, and these are the alleged false and misleading
22 statements during the class period, it is 37 pages long, it has
23 43 different alleged misstatements. Those are misstatements
24 that happen all throughout '06, '07 and '08. How could it
25 possibly be that there are damages that there is inflation

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1 caused by alleged misstatements that hadn't happened yet? It
2 is just not possible.

3 THE COURT: Let's see if Mr. Dowd can --

4 MR. KASNER: Excuse me, your Honor. Jay Kasner on
5 behalf of Alan Levin from Skadden.

6 Your Honor, I would like to be heard on this issue as
7 well.

8 THE COURT: Splendid. Sit down now.

9 Mr. Dowd?

10 MR. DOWD: Yes, your Honor. Mr. Smith is going to
11 address it.

12 MR. SMITH: Your Honor, I agree with you.

13 THE COURT: My questions are not statements.

14 MR. SMITH: I understand that but I do tend to agree
15 with your suggestions that Mr. Farina has raised a number of
16 issues that he cross-examined our expert with. Now his
17 complaint --

18 THE COURT: He says that what the expert says is
19 inconsistent with what you have alleged. Is it?

20 MR. SMITH: That is flat out false.

21 THE COURT: Tell me why.

22 MR. SMITH: This case is about Pfizer concealing the
23 risks associated with that government investigation; the
24 investigation into --

25 THE COURT: He is talking about effects.

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1 MR. SMITH: I'm sorry?

2 THE COURT: He is talking about effects. He says
3 let's say there is a misstatement. What is the consequence?
4 He has your expert saying the consequences are even and
5 constant.

6 MR. SMITH: Right. Well, as my expert explained, the
7 assumption underlying his analysis was that those statements
8 had the effect of maintaining inflation, not creating
9 inflation.

10 Mr. Farina is misstating the expert's opinion.

11 THE COURT: Explain that.

12 MR. SMITH: There is a difference.

13 There is a statement that can cause the stock price to
14 increase. Right? And you deal with certain statements that
15 are omissions. This is something that nobody knows about,
16 they're material omissions. The market doesn't know about the
17 admitted fact and because it is an admitted fact the stock
18 price does not react up or down until the fraud is disclosed.

19 THE COURT: The trouble with this motion, Mr. Farina,
20 is that it requires a lot more knowledge about the case than I
21 have. I am not in position to grant it now. Maybe I will
22 before Mr. Feinstein testifies. At this point the motion is
23 denied.

24 MR. SMITH: Thank you, your Honor.

25 THE COURT: Do you have anything to add, Mr. Kasner?

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1 MR. KASNER: Yes, your Honor. May I approach the
2 lectern for a moment?

3 THE COURT: Stay where you are. Tell me what you want
4 to add.

5 MR. KASNER: Your Honor, I represent Alan Levin.

6 THE COURT: Tell me what you add.

7 MR. KASNER: A legal basis for the argument Mr. Farina
8 was making.

9 It is undisputed, your Honor, that for causation
10 purposes causation is an element of liability, as your Honor
11 knows. Under the Circuit decision in *Lentell v. Merrill Lynch*
12 and the Supreme Court decision in *Dura Pharmaceuticals*, a
13 plaintiff is obliged and Dr. Feinstein was obliged to say,
14 okay, I say the stock, over this three-year period, was
15 inflated by X. But that's not the end of the analysis, your
16 Honor, under the law. The applicable principles say where
17 there are other factors at work in inflating the price of the
18 stock you, Dr. Feinstein, are obliged to tell me, the jury, or
19 me, Judge Hellerstein, what pieces of that inflation relate to
20 something --

21 THE COURT: The same ruling, Mr. Kazner.

22 Let's have a rule that I will enforce: If another
23 lawyer gets up to state something that the first lawyer did not
24 state well enough, I am going to sit him right down.

25 MR. KASNER: I understand, your Honor.

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1 THE COURT: You are not adding anything because of
2 your client's situation, you are adding something because you
3 think you can say it better than Farina.

4 The motion is denied. Sit down.

5 What is the next motion?

6 MR. FARINA: Your Honor, just to clarify, am I to
7 understand that once we have actually heard the allegations
8 that we have leave to reassert the grounds of the motion?

9 THE COURT: Yes.

10 MR. FARINA: Thank you, your Honor.

11 THE COURT: As a general rule, on motions in limine I
12 can't know enough on a motion in limine, at least for most
13 motions in limine to have confidence that I have heard enough
14 and thought enough and had enough context to make a binding
15 decision. The value of these motions to you is that it
16 indicates my thinking.

17 I think you made a good point, Mr. Farina, but I am
18 not in a position to grant your motion now and I think,
19 ultimately, it is going to be the jury that decides this. Now,
20 there is a decision of opinion among judges in terms of the
21 role of gatekeeper. Some think that their role has a high gate
22 to it. I have been a jury lawyer for a long time, I have
23 confidence that juries get it right more so than judges get it
24 right. So, I rely mostly on cross-examination and the jury
25 decision with regard to experts. If an expert is qualified,

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1 let him speak. The jury will find the truth.

2 Okay. Next?

3 MR. DOWD: Your Honor, we heard one of theirs and I
4 would ask the Court to hear our motion in limine to exclude
5 reliance evidence in argument, it is about their advice of
6 counsel defense and Mr. Forge speaks to it.

7 THE COURT: Okay. Where would I find it on ECF?

8 MR. FORGE: I will get you the document number in one
9 minute, your Honor.

10 THE COURT: What is it? Do you want the schedule?

11 MR. FORGE: Your Honor, the docket number for the
12 opening brief is 346.

13 THE COURT: What do you want to keep out?

14 MR. FORGE: This is evidence regarding reliance on
15 others. The opposition is docket no. 400 and the reply brief
16 is docket 421.

17 THE COURT: Okay. I am listening.

18 MR. FORGE: Your Honor, I am not going push the Court
19 as you haven't had time to go over these pleadings. I would
20 really appreciate the opportunity to come back and later this
21 week if your Honor would be available.

22 THE COURT: Let's see where we go.

23 MR. FORGE: Okay.

24 Your Honor, the Court remembers about a year and a
25 half ago we went through a full summer of litigating the

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1 lawyers to whom the plaintiffs were going to have access to
2 discovery. And the constant mantra throughout that entire
3 summer --

4 THE COURT: Can we just get to the point?

5 MR. FORGE: They said they're only going to rely on
6 Dennis Block and Larry Fox and nobody else. When it came time
7 to talk to Dennis Block and Larry Fox they both said,
8 unequivocally, that they never advised the defendants regarding
9 the substantive information that is in the disclosure and
10 admitted from the disclosures that are at issue today the most
11 prominent one, the one that is easiest is the defendant's
12 constant representation that they believe they had substantial
13 defenses to the government investigation.

14 That is the easiest one to knock out, your Honor.

15 What the defendants did was they downplayed the risk
16 of a government investigation.

17 THE COURT: Please, don't make a motion in limine,
18 what we do to make a motion at the end of the case. I am not
19 going to grant them. If they are relying on counsel they have
20 to prove it. If they can't prove it, it will be evident later.
21 I am not going to do it in the way of summary judgment now but
22 that is what you are doing, Mr. Forge.

23 MR. FORGE: I understand your Honor's take on it.

24 THE COURT: This is a big case. I don't have time for
25 all this nonsense. These are not motions that can succeed.

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1 You know that.

2 MR. FORGE: Your Honor, I beg your indulgence for a
3 couple minutes. I will be brief but I am telling you both
4 Dennis Block and Larry Fox, they both said it wasn't us, we
5 relied on the other counsel, the very counsel they shielded
6 from discovery. The defendants, in their papers, are invoking
7 those other counsel.

8 THE COURT: They wouldn't let you take depositions?

9 MR. FORGE: They wouldn't let us take depositions.

10 THE COURT: And now they're relying on them.

11 MR. FORGE: And now they are relying on them.

12 THE COURT: It is not going to happen but I am not
13 making a ruling.

14 MR. FORGE: Okay. Thank you, your Honor.

15 THE COURT: But, defendants should know that if people
16 on whom they rely rely on others and those were shielded, the
17 answer is that the witness is not going to be allowed to
18 testify.

19 MR. FARINA: Your Honor, Dennis Block and Larry Fox
20 are going to testify to their disclosure advice based upon
21 their training, their knowledge of the securities laws. That
22 is going to be the testimony the jury is going to hear.

23 THE COURT: That's why you won the motion.

24 Next motion.

25 (continued on next page)

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1 THE COURT: Next motion.

2 MR. PETROSINELLI: Your Honor, could we be heard on
3 motion in limine number 1? It is docket number 342. It is a
4 motion to exclude a witness named Jerome Avorn.

5 Your Honor, I can be very quick with this motion.
6 Dr. Avorn is a medical doctor. His role in the case is
7 important -- I took his deposition -- was basically to read the
8 company documents and say Pfizer intended to do this, Pfizer
9 intended to do that. He did that once before in this court.

10 THE COURT: Where do I find his report?

11 MR. PETROSINELLI: His report is attached to our
12 motion. It is a declaration of Ms. MacDonald, and it is
13 Exhibit SS-2.

14 THE COURT: To what --

15 MR. PETROSINELLI: I'm sorry. It is ECF Number 342.

16 THE COURT: Number 342. And that's the memorandum of
17 law?

18 MR. PETROSINELLI: Yes.

19 THE COURT: It is attached to the memorandum of law?

20 MR. PETROSINELLI: Yes, your Honor.

21 Your Honor, could I hand you up something that's
22 excerpts from his report because that's the ones I'm talking
23 about?

24 THE COURT: Okay. Give me the report.

25 MR. PETROSINELLI: Okay, I will do so, your Honor.

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1 THE COURT: Is it 384?

2 MR. PETROSINELLI: I'm not confident of that, your
3 Honor. Could I just --

4 THE COURT: 384 is a declaration of Amanda MacDonald.

5 MR. PETROSINELLI: Yes.

6 THE COURT: It is a motion in limine to exclude
7 plaintiffs' designated expert Jerome Avorn.

8 MR. PETROSINELLI: That's it, your Honor.

9 THE COURT: I can't tell where it is in there. You
10 say SS?

11 MR. PETROSINELLI: SS-2.

12 THE COURT: Do you have a hard copy?

13 MR. PETROSINELLI: We're looking for one, your Honor.

14 While we're looking for that, your Honor, if your
15 Honor wants, I can hand up a copy. But, Judge, Dr. Avorn
16 appeared in another litigation against Pfizer before Judge
17 Kaplan.

18 THE COURT: My case.

19 MR. PETROSINELLI: Dr. Avorn's opinion, your Honor,
20 both in his report and his deposition, his sole role in the
21 case was to read Pfizer documents and testify that the
22 documents showed the inference he drew from the documents was
23 that Pfizer intended to promote drugs off label.

24 THE COURT: That is a jury activity.

25 Who is going to respond?

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1 MR. DOWD: Your Honor, it absolutely is an issue for
2 the jury. Dr. Avorn is going --

3 THE COURT: Why do I need someone else to tell the
4 jury what is intended by some words?

5 MR. DOWD: Oh, no. Dr. Avorn isn't going to say
6 Mr. McKinnell intended this or so-and-so intended this. He is
7 going to talk to Pfizer's marketing strategy. He is going to
8 explain what off-label promotion is, which I had no idea what
9 it was until I came here. He is going to explain doctor
10 detailing and how they promote their products. I mean that's a
11 key part of the case.

12 THE COURT: Those are permissible, aren't they,
13 Mr. Petrosinelli?

14 MR. PETROSINELLI: Those would be permissible, but
15 those weren't in his report.

16 THE COURT: All I see is a deposition. What was his
17 report?

18 MR. PETROSINELLI: What I gave you are excerpts from
19 his report. Those are the statements I'm talking about from
20 his report. If your Honor just reads them, you'll see what
21 they say.

22 THE COURT: I'm looking at the sixth one. Pfizer's
23 marketing plans make it clear that the company intended to stay
24 the course in continuing to expand the use of Bextra. That's
25 not permissible testimony.

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1 Another one. This reflects a purposeful strategy
2 coming from senior management explicitly to promote Lyrica for
3 uses not approved by the FDA. That's not permissible.

4 These kind of things are not permissible, so don't
5 offer them.

6 MR. DOWD: Your Honor, I'm assuming I can still call
7 Dr. Avorn --

8 THE COURT: I'm not making a ruling that you can't.
9 I'm making a ruling that Dr. Avorn can't testify as to someone
10 else's intent.

11 MR. DOWD: Fair enough, your Honor.

12 THE COURT: Motion is granted to that extent and
13 denied otherwise.

14 Next.

15 MR. FORGE: Your Honor, may I talk about three
16 witnesses that we would like excluded? It overlaps with the
17 motions in limine.

18 THE COURT: Okay.

19 MR. FORGE: Your Honor, three of the witnesses we seek
20 to exclude -- we can do this separately -- but three of the
21 witnesses are three names that might be familiar to your Honor:
22 Gary Giampetruzzi, Carlton Wessel, and Ethan Posner.

23 THE COURT: I had dinner with them last night.

24 MR. FORGE: You may also remember them from a year and
25 a half ago, when we sought to depose all three of them.

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1 THE COURT: Yeah, because it's the only case I had.

2 I have not been living this case day and night like
3 you have. I don't know these people from Adam.

4 MR. FORGE: I'm sorry. They have been my nightmare.
5 I'm thankful for you that they're not yours.

6 The bottom line, your Honor, is that we asked to
7 depose these specific individuals. We asked to get documents
8 from these specific individuals.

9 THE COURT: You asked to depose them. They're now
10 witnesses. They're not going to be witnesses.

11 MR. FORGE: Thank you, your Honor.

12 MR. FARINA: Your Honor, they asked to depose them on
13 privileged materials. Since that time, they have expanded the
14 case to include the events in the government investigation.

15 THE COURT: You have not allowed them to testify.
16 They're not going to testify.

17 MR. FARINA: They only asked for them to testify on
18 privileged matters. Your Honor said the matters remained
19 privileged so they couldn't depose them. They didn't ask to
20 depose them on non-privileged matters.

21 THE COURT: If you didn't let them testify, they're
22 not going to testify.

23 Motion granted.

24 MR. FORGE: Thank you, your Honor.

25 THE COURT: That's what happens when you play games in

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1 discovery. They come home to roost. Discovery is not an end
2 in itself.

3 What is next?

4 MR. FORGE: We also have a motion regarding Mary
5 Holloway. I know you might not remember that name, but it's a
6 little closer in time. She is the former Pfizer regional
7 manager.

8 THE COURT: How am I going to remember what I did
9 today?

10 MR. FORGE: She's the former --

11 THE COURT: Is someone taking notes? We're busy. So
12 Katie is not going to be able to keep up on this, either. I
13 would appreciate if someone on the plaintiffs' side could take
14 notes on these dispositions. Someone on the defendants' side
15 will do the same thing.

16 MR. FORGE: Your Honor, Ms. Holloway is the former
17 Pfizer regional manager who pled guilty to off-label promotion.
18 We were in here a couple of months ago.

19 THE COURT: I kind of remember her name.

20 MR. FORGE: She was the woman who your Honor held has
21 a continuing Fifth Amendment privilege as to questions; and
22 therefore, we weren't able to compel her answers to the
23 questions. And your Honor invited both sides to brief the
24 issue regarding an adverse inference instruction.

25 As your Honor is probably aware -- and I know you're

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1 aware of Brink's v. City of New York case because you
2 graciously steered us in that direction. It is called an
3 adverse inference instruction, but it is a very neutral
4 instruction. It simply instructs the jury that a witness has a
5 Fifth Amendment privilege not to answer a question, and they
6 may or may not --

7 THE COURT: You want me to give an adverse inference
8 instruction?

9 MR. FORGE: Yes, your Honor.

10 THE COURT: Do you have it in writing?

11 MR. FORGE: Yes, your Honor.

12 Very brief deposition portions and an adverse
13 inference instruction, that's all we're asking for.

14 THE COURT: Do you have it in writing?

15 MR. FORGE: Yes, your Honor.

16 THE COURT: Has it been cleared by your adversary?

17 MR. FORGE: It has been given to my adversary but not
18 cleared because they object to it. They object to the notion
19 of it.

20 THE COURT: If I said I was giving it, I am going to
21 give it. I would like to clear it, and I would like the
22 defendants to have an opportunity -- give it to them in
23 writing. Mr. Petrosinelli, is the objection to giving it or to
24 the words that are being used?

25 MR. PETROSINELLI: To giving it, your Honor. Your

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1 Honor didn't say you were going to give it. In fact, you
2 expressly said that we should brief it to decide whether it is
3 required.

4 MR. FORGE: I want to be clear on that, your Honor.
5 I'm not saying your Honor decided it. You invited us to brief
6 it. There was expressed disagreement over whether it would be
7 appropriate.

8 THE COURT: You did brief it?

9 MR. FORGE: Yes. Both sides briefed it.

10 MR. PETROSINELLI: Both sides prepared briefed it,
11 your Honor.

12 THE COURT: So I'm not prepared to answer it.

13 MR. FORGE: Okay. Thank you, your Honor.

14 MR. PETROSINELLI: Your Honor, could I be heard on the
15 defendant's motion in limine number 5, docket number 355,
16 because this does relate to what we talked about earlier, which
17 is the witnesses in the pretrial order and our objections to
18 the plaintiffs' witnesses? So it would be docket 355, motion
19 in limine number 5.

20 THE COURT: Go ahead.

21 MR. PETROSINELLI: Your Honor, I think I mentioned
22 this earlier. When you look at the plaintiffs' witness list,
23 about half of them are the underlying drug marketing witnesses,
24 and I want to bring this to your Honor's attention as an
25 in limine motion because I think it really does affect trial

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1 management here, which is that they want to litigate whether or
2 not Pfizer engaged in off-label promotion. And if that is
3 allowed --

4 THE COURT: That is not an issue, is it?

5 MR. PETROSINELLI: It is not an issue.

6 THE COURT: Because Pfizer admitted it.

7 MR. PETROSINELLI: We have a guilty plea with respect
8 to off-label promotion, and we have documents that we produced
9 to them where we acknowledge that there were instances of
10 off-label promotion.

11 THE COURT: Let's see what Mr. Dowd has to say.

12 MR. DOWD: Mr. Forge is going to address that, your
13 Honor.

14 MR. FORGE: Your Honor, you have hit the nail on the
15 head. We are not going to take a long time to present what has
16 already been admitted, but clearly we have to let the jury know
17 that this very conduct that they were denying during the class
18 period did, in fact, occur and that they were well aware of it.

19 THE COURT: Let me understand this. Did they deny or
20 they just did not say?

21 MR. FORGE: Both, your Honor. They specifically said,
22 when a subsidiary that they had pled guilty to a violation of
23 the Food, Drug, and Cosmetic Act, Mr. Waxman, in a statement
24 that all of the defendants who were at the company at that time
25 would have had say over, stated in a press release: We

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1 voluntarily disclosed this information. This is something that
2 occurred before we acquired the subsidiary. Specifically, we
3 have protections in place, we have programs in place to guard
4 against this specific type of conduct. And he referred
5 specifically to off-label promotion.

6 In many other statements, your Honor, the defendants
7 talked about their advantage, their competitive advantage over
8 others because of their compliance with all FDA regulations.
9 They specifically spoke to FDA marketing regulations they were
10 complying with. That is the essence of the case. They held
11 themselves out to investors as the type of entity where the
12 investors didn't have to worry about a risk like these other
13 companies, being caught breaking the law. We have a 150-year
14 legacy of following the law. It is the cornerstone of our
15 case, one of our most important competitive advantages.

16 And as it turned out, it was the exact opposite.
17 They, in fact, committed the biggest --

18 THE COURT: How are you going to prove it is the exact
19 opposite?

20 MR. FORGE: Because we have those admissions, your
21 Honor. We have those admissions. We have the admissions that
22 their gain was --

23 THE COURT: Why do you need it to prove --

24 MR. FORGE: Your Honor, we're only talking about a
25 couple of witnesses.

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1 THE COURT: I'm asking: Why at all?

2 MR. FORGE: Because my guess --

3 THE COURT: You know what is going to happen. The
4 witnesses are not going to say as much as you want them to say.
5 Mr. Petrosinelli is going to be effective in showing some
6 exaggerations and showing some other things, and what you win
7 by showing the admissions you'll lose by witnesses.

8 MR. FORGE: Your Honor, I understand that --

9 THE COURT: That is as a matter of just guidance by an
10 older man. In terms of what takes up the jury's time, I don't
11 understand why you're going to need witnesses. You can't have
12 a witness to this except whatever that particular witness did.
13 That doesn't prove enough. It doesn't say enough.

14 MR. FORGE: That's why, your Honor, it will be very
15 limited. The witnesses will be very limited.

16 THE COURT: It will be very limited because it's not
17 going to happen.

18 MR. FORGE: Your Honor, the thing is --

19 THE COURT: You hear me, Mr. Forge? It is not going
20 to happen.

21 MR. FORGE: I hear you, your Honor.

22 THE COURT: You don't need it, and it's not relevant,
23 and you're not going to do it.

24 The motion is granted.

25 MR. FORGE: Can I understand who are we talking about

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1 here? I don't know.

2 THE COURT: Whatever witnesses you have to testify
3 what that witness did or sold that you say is illegal.

4 MR. FORGE: So, therefore, the other side of this,
5 there is going to be no dispute from the defense that they
6 engaged in this and the extent to which they engaged in it.

7 THE COURT: If they do, they're stupid enough to do
8 it, I will give you room to come back.

9 MR. FORGE: Okay. Thank you, your Honor.

10 THE COURT: But they're not going to do it.

11 Next.

12 Are you finished?

13 MR. DOWD: We don't have anything pressing, your
14 Honor. I think most of the issues you've addressed. There are
15 some that are still pending.

16 THE COURT: Are there any other motions in limine?

17 MR. FORGE: Your Honor, could I get one clarification
18 on your ruling earlier?

19 THE COURT: Yes.

20 MR. FORGE: Your Honor, I already have testimony --
21 and it is submitted to your Honor -- from both Larry Fox and
22 Dennis Block saying they relied on the investigations counsel.
23 At what point do we present that to your Honor to prevent them
24 from testifying? If I understood your Honor's comment earlier
25 was, if they relied on others who were shielded from discovery,

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1 they're not going to testify.

2 THE COURT: Knowing Dennis Block a little bit, Dennis
3 is smarter than anyone he relies on. Although he will say he
4 relied on someone, he will give you an answer based on his own
5 information and knowledge. So probably -- I'm guessing -- that
6 Dennis may refer to others to sort of bootstrap what he said to
7 you.

8 MR. FORGE: Your Honor, here's Dennis Block: The
9 first part, talking about we have substantial defenses in these
10 matters, did you personally and professionally make the
11 assessment that there were substantial defenses regarding the
12 government investigations?

13 No.

14 THE COURT: It is a meaningless statement. What does
15 he testify that is meaningful?

16 Tell me, from the defense, what does he testify that
17 is meaningful?

18 MR. FARINA: Your Honor, he is going to testify that
19 that statement was part of a warning that was a perfectly
20 appropriate securities disclosure. That is what he is going to
21 testify to.

22 Your Honor has addressed this in discovery. You
23 specifically --

24 THE COURT: Please listen carefully.

25 MR. FARINA: Yes.

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1 THE COURT: When I ask you what he said, there's
2 probably a statement that you can read. Try to find what he
3 said, so you can read it to me.

4 MR. FARINA: Your Honor, frankly, their theory of the
5 case has changed since Mr. Block was deposed. This issue with
6 the substantial defenses is now the centerpiece of their case.

7 What Mr. Block will testify to, and what he did
8 testify to in his deposition, was that that was an appropriate
9 disclosure.

10 THE COURT: What was an appropriate disclosure?
11 Whatever disclosure Dennis will say, that that was appropriate?

12 MR. FARINA: The disclosure that they have challenged
13 that he was responsible for --

14 THE COURT: In answering that, did he make reference
15 to anybody else?

16 MR. FARINA: He certainly had discussions with others,
17 and those discussions have not been shielded from discovery --

18 THE COURT: Listen very, very carefully.

19 In answering that way, did he refer to anybody else?
20 The answer is: Yes, no, or I don't know.

21 MR. FARINA: At least with respect to some of the
22 disclosures, he referred to discussions that he had with
23 others, and he was permitted to testify about those
24 discussions. We didn't shield that from discovery.

25 THE COURT: If that was the case, the company could

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1 rely on what Mr. Block said, but plaintiffs would also have a
2 right to probe and ask what the other fellow told Mr. Block.

3 MR. FARINA: Your Honor, they deposed the other
4 fellow, and they asked him: What did you tell Mr. Block? And
5 they were permitted to ask that question. And Doug Lankler
6 answered that question.

7 MR. FORGE: That is completely untrue, your Honor. We
8 were not allowed to depose Ethan Posner. Mr. Farina knows
9 that. We were not --

10 THE COURT: How can two people say one thing is true
11 and the other say it is not?

12 MR. FORGE: Let me read to you from their own papers:
13 The company's board, senior executives, and in-house lawyers
14 all relied on Covington's judgment to inform them that the
15 company had meritorious defenses.

16 The undisputed fact is that Pfizer and its disclosure
17 counsel -- that is Dennis Block -- relied on investigation
18 counsel's judgment --

19 THE COURT: Excuse me. That is not testimony. That's
20 brief language.

21 MR. FORGE: The defendants, your Honor. That's their
22 own paper.

23 THE COURT: That's their brief.

24 MR. FORGE: But that's what they're conceding. Dennis
25 Block said the same thing, your Honor.

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1 THE COURT: If you would like to preclude Dennis
2 Block's testimony in a certain respect, read me the testimony,
3 not what the defendant said the testimony was.

4 MR. FORGE: No, no. I have read you the part of
5 Dennis Block:

6 You relied on others for that -- and this is
7 substantial defenses -- for that conclusion?

8 Yes.

9 This is Larry Fox, the other one. I asked him: Did
10 you render any legal advice regarding the accuracy of the
11 statement, we believe we have substantial defenses in these
12 matters?

13 This is Mr. Fox: I would not have said that. This is
14 my view. Nobody in the company would ever have thought to even
15 ask me whether I have personal knowledge of the strength of our
16 defenses --

17 THE COURT: That is objectionable. This is
18 evidentiary, and it is not something I'm going to rule on now.
19 You can make an objection at the time on many other evidentiary
20 grounds.

21 The question that you're putting to me is that the
22 company relied on something that Block or Fox said, and when
23 Block or Fox said I relied on others, the company did not let
24 you inquire of those others what they said to Block --

25 MR. FORGE: Exactly.

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1 THE COURT: -- and what they said to Fox.

2 MR. FORGE: Exactly.

3 THE COURT: You will have to show me, if you want me
4 to rule your way, exactly what that testimony was and exactly
5 what you were blocked from asking. Otherwise, I'm not going to
6 rule on the motion.

7 The problem here is that you haven't done your
8 homework enough.

9 MR. FORGE: Your Honor, I have done my homework. It
10 is laid out in our papers. I promise you --

11 THE COURT: It is?

12 MR. FORGE: Yes, your Honor.

13 THE COURT: Let's pick out your papers.

14 MR. FARINA: Your Honor, every single thing that was
15 told to Mr. Block --

16 THE COURT: Let him read it, please.

17 Do you have a transcript here among the 39 boxes that
18 were being brought up to court?

19 MR. FARINA: We had to send those boxes back.

20 THE COURT: Yes. The judge got angry.

21 MR. FORGE: Okay, this is Dennis Block again, your
22 Honor: In other words --

23 THE COURT: Source?

24 MR. FORGE: I'm sorry. This is docket number 288.

25 THE COURT: What does he testify?

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1 MR. FORGE: This is page 56 of his deposition
2 transcript --

3 THE COURT: Dated?

4 MR. FORGE: -- lines 2 through 11.

5 I believe, your Honor, it was in September of 2013.

6 THE COURT: Okay.

7 MR. FORGE: I don't know exactly.

8 THE COURT: What did he say?

9 MR. FORGE: Did you actually participate in any sort
10 of internal investigation related to the government
11 investigations?

12 Oh, no. No, no. I had no knowledge --

13 THE COURT: Stop. I'm not interested in what he
14 investigated. If you're asking advice and he gave advice and
15 you were blocked from inquiring into it, that's what I want to
16 know. Did he give advice on which the company relied?

17 MR. FORGE: He gave advice based on others' advice.

18 THE COURT: That is what we want to find out.

19 MR. FORGE: Here is Larry Fox, his counterpart: Did
20 you make probability determinations concerning losses in
21 connection to these cases -- to cases?

22 No, we -- I and Dennis -- would look to our litigators
23 to fully inform us of their view, but we would not, no.

24 That is Larry Fox's deposition.

25 THE COURT: That's a different issue. That has to do

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1 with reserves. I think I have a motion with reserves. That's
2 a different issue.

3 MR. FORGE: No, but it is all tied together, your
4 Honor.

5 THE COURT: No, it is not tied together, Mr. Forge.

6 That is enough. I have heard enough. If you want me
7 to make a ruling, be prepared on exactly what it is you want me
8 to rule on.

9 Motion is denied.

10 MR. FORGE: Your Honor, I am prepared.

11 THE COURT: Motion denied.

12 MR. FORGE: I have many other --

13 THE COURT: Motion denied.

14 Don't do that to me.

15 What else? Anything?

16 MR. SMITH: Counsel, were you going to bring up the
17 motion to exclude Paul Regan?

18 MR. PETROSINELLI: I'm sorry?

19 MR. SMITH: You had a motion to exclude Paul Regan.

20 MR. FARINA: We have a motion to exclude part of his
21 testimony. I think that would be better directed after we have
22 gone a little bit into the trial and the issues are clarified.
23 We will reserve on that, as well as the other in limine
24 motions.

25 THE COURT: What am I going to do to effect a

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1 reduction of exhibits?

2 Whoever wants to win the case is going to have to
3 focus attention on a limited number of exhibits, and since the
4 exhibits tend to be very large, on a limited number of entries
5 within the exhibits. How can we reduce the number of exhibits
6 in that fashion?

7 MR. DOWD: From our perspective, your Honor, we had
8 1,300 exhibits two weeks ago. We cut it down to under 700 last
9 week. We'll cut it again. We just have to streamline our
10 case. We're going to do that. We told the defendants which
11 ones we pulled. I assume these guys are good trial lawyers,
12 and the women are good trial lawyers, and they're going to do
13 the same thing. I think we'll get down there.

14 MR. FARINA: We agree with that, your Honor.

15 THE COURT: Shall I sign the pretrial order?

16 MR. DOWD: Yes, your Honor.

17 THE COURT: Do you want another conference before the
18 trial?

19 MR. FARINA: Your Honor, we would like to have an
20 opportunity to argue the summary judgment motions.

21 THE COURT: I know that, particularly the individuals
22 who stopped being officers and directors before the class
23 period.

24 I'm doing the best I can. Katie just joined me, and
25 we're trying to get up, as best we can, to the case. We'll do

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1 it, but it may be on a timeline than is slower.

2 MR. DOWD: Your Honor, just for the record, as well,
3 plaintiffs also filed a motion for partial summary judgment on
4 the advice of counsel and reliance, and I know that there is a
5 lot of that testimony that you were looking for.

6 THE COURT: I don't believe I can grant that motion.
7 That's really fact-intensive. I think I can deal with motions
8 of individuals, either to grant them or to deny them, but on
9 motions like you're making, and I suppose there are motions by
10 defendants, I can't decide that. That's the purpose of the
11 jury trial.

12 MR. DOWD: I would ask the Court to review it because,
13 otherwise, we get stuck in that sword-and-shield situation that
14 all the cases warn about.

15 THE COURT: Anything else?

16 I'm duty-bound to ask you: Is the prospect for
17 settlement gone, or is it still an active proposition?

18 MR. DOWD: I don't think we're headed that way, your
19 Honor. We've talked a little bit.

20 THE COURT: I'm glad to try the case, but I have to
21 ask this question.

22 MR. DOWD: I understand.

23 THE COURT: Mr. Petrosinelli.

24 MR. PETROSINELLI: Your Honor, I think we told you
25 last year we had an initial mediation session. There has been

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1 some talk of another one. I don't know what Mr. Dowd's
2 statement just now means. Maybe there's not going to be
3 another one.

4 THE COURT: Well, he's acting tough.

5 MR. DOWD: Your Honor, we're always happy to talk.

6 THE COURT: My attitude is that I'm interested to help
7 if you want help up until the trial begins. When the trial
8 begins, I will not suspend -- not even for an hour -- to allow
9 settlement discussions to go on. If you ask me at the end of
10 the day, can we start late tomorrow because we want to discuss
11 settlement, the answer would be no. If you want my help, it
12 has to be before trial. It should be clear.

13 Okay. Thank you.

14 If you want to start one day late and use the first
15 day to explore whatever you want to explore on different
16 issues, I am available. Just let me know by mid-week before
17 then. It may be useful now that we're at a point where we know
18 a lot more about the case that we can have another useful
19 session that will help the trial proceed more efficiently. We
20 can decide whether we do that later on, but I just want you to
21 know that is an option.

22 MR. PETROSINELLI: Your Honor, we have some of those
23 technology forms.

24 THE COURT: Off the record.

25 (Adjourned)

