

In The Matter Of:
MARY K. JONES, individually v.
PFIZER INC., et al,

August 9, 2011

SOUTHERN DISTRICT REPORTERS
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1 UNITED STATES DISTRICT COURT
 2 SOUTHERN DISTRICT OF NEW YORK
 3 -----x

3 MARY K. JONES, individually
 4 and on behalf of all others
 5 similarly situated,

5 Plaintiff,

6 v. 10 CV 3864 (AKH)

7 PFIZER INC., et al,

8 Defendants.

9 -----x

10 New York, N.Y.
 11 August 9, 2011
 12 11:03 a.m.

11 Before:

12 HON. ALVIN K. HELLERSTEIN,
 13 District Judge

14 APPEARANCES

15 ROBBINS GELLER RUDMAN & DOWD
 16 Attorneys for Plaintiff
 17 BY: WILLOW RADCLIFFE
 18 MATTHEW MELAMED
 19 HENRY ROSEN

19 CAHILL GORDON & REINDEL
 20 Attorneys for Defendants
 21 BY: CHARLES A. GILMAN
 22 DAVID G. JANUSZEWSKI
 23 AMY D. LAMBERTI
 24 -AND-
 25 CADWALADER WICKERSHAM & TAFT
 BY: HAL S. SHAFTEL

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1 that accruals for contingencies to the extent the occurrence is
 2 probable and related damages are estimable, that's in
 3 conformity with SAS-5. But often these investigations are
 4 subject to substantial uncertainties, and Pfizer said it could
 5 not reasonably estimate maximum exposure. It did say, however,
 6 throughout the class period, quote, it is possible that
 7 criminal charges and fines and/or civil penalties could result
 8 from pending government investigations. It said throughout the
 9 class period that these investigations, quote, could result in
 10 the payment of a substantial fine and/or civil penalty.

11 Even when Pfizer settled its civil litigation --
 12 THE COURT: These were statements in the K's?
 13 MR. GILMAN: In the K's, in the Q's, yes, sir.

14 Beginning before the class period, throughout the class period.
 15 Those are Exhibits A through N in the compendium.
 16 And if I could approach, I've put them on just three
 17 pages, just the document and the quote.

18 THE COURT: Yes.
 19 Have you shown that to the plaintiffs?
 20 MR. GILMAN: I will hand it to them now. There's no
 21 editorial; it's just a quote from the documents, and he has
 22 them all.

23 THE COURT: Sure.
 24 MR. GILMAN: Your Honor, even after Pfizer settled the
 25 bulk of its civil litigation, it stated in a form 10-Q for the

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1 (In open court)
 2 (Case called)

3 THE COURT: All right. Let's start, Mr. Gilman.
 4 MR. GILMAN: Your Honor, plaintiffs are not
 5 complaining about the offer and sale of Pfizer securities, but,
 6 rather, off-label promotion of Pfizer drugs and management's
 7 failure to prevent it.

8 The FDA permits doctors to prescribe drugs for
 9 off-label or nonFDA approved use; but a manufacturer may not
 10 promote its drugs for such uses. Off-label promotion is
 11 remediable by the government. In 2009, Pfizer paid a heavy
 12 price to resolve marketing matters with the government.
 13 Management's alleged failure to prevent off-label promotion or
 14 halt the wrongdoing of other employees in connection therewith
 15 is remediable by derivative litigation. That, too, has already
 16 been litigated to final judgment in this court before Judge
 17 Rakoff.

18 Before the start of the alleged class period pled in
 19 the complaint, Pfizer disclosed the existence of state and
 20 federal investigations concerning the marketing of Bextra and
 21 other drugs, and said that those investigations could have a
 22 material adverse effect on our results of operations in any
 23 particular period.

24 Throughout the class period, Pfizer disclosed its
 25 accounting principles for accruals for contingencies, saying

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1 relevant quarter that those settlements, quote, do not apply to
 2 the previously purported actions relating to Bextra. It
 3 reported that the Justice Department investigation was
 4 continuing, and it could result in substantial fine or civil
 5 penalty.

6 We respectfully submit, your Honor, that more is
 7 required of plaintiffs than pointing to Pfizer's announcement
 8 in January 2009 of government settlement, however large, and
 9 tacking on a conclusory allegation that the company's earlier
 10 statements were false when made.

11 The failure to predict the outcome of a complex
 12 government investigation, the existence of which, the
 13 uncertainty of which, and the possible adverse materiality,
 14 both civil and criminal, of which were all repeatedly disclosed
 15 16 times prior to and during the class period, while so clear
 16 in hindsight to plaintiff is not securities fraud.

17 THE COURT: The plaintiffs don't style the gravamen of
 18 their action the way you do. I think they talk about it in an
 19 insufficiency of disclosure, and in the failure to have
 20 reserves, which identify the reserves on their balance sheets.

21 MR. GILMAN: Precisely.
 22 THE COURT: Am I right? That is the gravamen.
 23 MR. GILMAN: That's what they say.
 24 But, your Honor, it comes back to what I'm saying.
 25 The failure to have a reserve is the failure to

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1 predict the outcome of a complex investigation.
 2 THE COURT: Well, no, a reserve is an accounting
 3 procedure to set aside a certain amount of money, or to apply a
 4 certain amount of money to show that profits are subject to an
 5 uncertainty that might have to be reduced.
 6 MR. GILMAN: It is only permitted under
 7 Generally-Accepted Accounting Principles to accrue a reserve
 8 when the loss is both probable and reasonably estimable.
 9 Pfizer announced 16 times that it was not reasonably
 10 estimable, and they made disclosure of the investigation and
 11 its possible material outcome.
 12 As Judge Cote said in SEC v. KPMG, dealing with Xerox,
 13 having a reserve too early, the rainy-day cushion reserve that
 14 we all litigated 30 years ago, your Honor, is just as wrong as
 15 having no reserve where it is probable and estimable and one
 16 should be had. And if we had a \$2.3 billion reserve in 2007
 17 for a settlement that didn't happen until 2009, we would have
 18 been sued in 2007 for doing that.
 19 THE COURT: Probably not, but that doesn't answer the
 20 question, which is was a loss like that probable, and was it
 21 reasonably estimable.
 22 MR. GILMAN: There is no fact pled with particularity
 23 in the complaint from which this Court permissibly can infer
 24 that at the time those statements were made, that we cannot
 25 accrue a reserve larger than we have because of uncertainties.

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1 There is no fact pled that anyone did not believe that in good
 2 faith to be true at the time it was said.
 3 Your Honor, as for the other particulars, they are
 4 saying that the disclosures that were made did not say that
 5 Pfizer was engaged in off-label promotion. They say the words
 6 "off-label" were not in any of the 10-Ks.
 7 What was said in the 10-Ks is the investigations
 8 concerned the marketing of Pfizer products for indications
 9 other than those approved by the FDA. That's the definition of
 10 off-label, and they say it in paragraph 4.
 11 THE COURT: You give me a chart. Where do I find that
 12 on the chart?
 13 MR. GILMAN: Your Honor, that would be the November 5,
 14 '04 10-Q, the second item in the chart, the bolded concerning
 15 possible promotion of those products with such indications.
 16 This Court --
 17 THE COURT: Let me read it.
 18 MR. GILMAN: Yes, sir.
 19 (Pause)
 20 THE COURT: So the first one in the 2003 10-K and
 21 annual report mentions Bextra in relationship to its marketing
 22 and sale, but it doesn't disclose the nature of the
 23 investigation, what it's for. And I think plaintiffs take
 24 issue with that.
 25 The second item, November 5, 2004 10-Q, makes

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1 reference to investigations and the possibility of large
 2 judgments and settlements which could be material.
 3 MR. GILMAN: And it also says, your Honor, the
 4 investigations concern promotion of products for
 5 nonFDA-approved uses, which is the definition. That's the
 6 judicial and the statutory definition.
 7 THE COURT: "Documents and information concerning
 8 clinical trials of certain of our pharmaceutical products for
 9 indications other than those approved by the FDA, concerning
 10 possible promotion of those products for such indications."
 11 What does "indications" mean?
 12 MR. GILMAN: A patient ailment.
 13 THE COURT: Is that a word of art?
 14 MR. GILMAN: I believe so.
 15 But, your Honor, a use nonapproved by the FDA is, in
 16 fact, the definition of off-label promotion. In their
 17 complaint they so concede in paragraph 4 of their complaint,
 18 where they define, for purposes of this lawsuit, off-label
 19 promotion as, quote, the practice of promoting drugs for
 20 unapproved uses is referred to as off-label marketing.
 21 That's exactly what was disclosed.
 22 And, your Honor, the disclosures that you're looking
 23 at on the first page and the top half of the second page all
 24 precede the beginning of the class period. That is all before
 25 the start of the class period. And then throughout the

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1 class --
 2 THE COURT: Let me read the one -- the first one
 3 during the class period.
 4 MR. GILMAN: Certainly.
 5 (Pause)
 6 THE COURT: So you're saying that the reference to
 7 material adverse effect warns the reader that settlements could
 8 be sizable.
 9 MR. GILMAN: Oh, certainly. And it continues on.
 10 They use phrases like "it is possible that criminal
 11 charges and fines and/or civil penalties could result from
 12 pending government investigations."
 13 It speaks to their efforts to resolve them. It speaks
 14 to precisely that which is alleged.
 15 This isn't the first complaint, your Honor, that's
 16 paraded these allegations.
 17 The first was the resolution, as it were, with the
 18 government on the off-label sales. The second was a derivative
 19 litigation which was fully litigated to final judgment in this
 20 court, settlement approved earlier this year by Judge Rakoff.
 21 Virtually identical allegations to the complaint in
 22 this case.
 23 THE COURT: That resulted in the recovery on behalf of
 24 the corporation against the same individuals that are sued
 25 here?

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1 MR. GILMAN: Yes. Largely the same. There were a
 2 couple of individuals additional in that array of defendants,
 3 and a couple of individuals here that perhaps are not named,
 4 but largely the same.
 5 THE COURT: So the recovery for the corporation for
 6 wrongs committed by the individuals -- withdrawn.
 7 That really covers a different aspect of damages.
 8 Here, the class is suing these individuals for
 9 responsibility for making statements that caused losses on
 10 shares. In that instance, the company was suing derivatively
 11 to recover expenses paid and various waste that occurred by
 12 reason of tortious act.
 13 MR. GILMAN: It was also to recover the injury to the
 14 corporation from the failure to stop off-label sales.
 15 But your Honor is quite correct.
 16 The point I'm making though is that Judge Rakoff,
 17 looking at the same disclosure documents, looking at the same
 18 10-Ks, the same --
 19 THE COURT: Yeah, but that was not a disclosure case.
 20 MR. GILMAN: That's only because he said it's not a
 21 disclosure case.
 22 THE COURT: It's not. It's not a disclosure. It's a
 23 derivative case; it's for waste and mismanagement. It's a
 24 different damage.
 25 MR. GILMAN: They pled a securities violation by the

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1 corporation. They pled a failure to disclose. He dismissed
 2 with prejudice the securities claims --
 3 THE COURT: It's irrelevant to his jurisdiction.
 4 The derivative claims are for waste and mismanagement,
 5 not the security violation. That may color in the background,
 6 but it doesn't really go to the gravamen of the lawsuit.
 7 MR. GILMAN: My only point was --
 8 THE COURT: This is a different issue, Mr. Gilman.
 9 I think the main point you're giving to me is that
 10 there were substantial disclosures all along; and, therefore,
 11 that's inconsistent with the lawsuit which claims there were
 12 misstatements.
 13 MR. GILMAN: Yes, sir.
 14 THE COURT: So let me hear from the plaintiff.
 15 MS. RADCLIFFE: Good morning, your Honor.
 16 Willow Radcliffe from Robbins Geller.
 17 THE COURT: How are you, Ms. Radcliffe?
 18 MS. RADCLIFFE: I'm good, thank you.
 19 I'd like to start with the attachment that was handed
 20 to you.
 21 THE COURT: Yes.
 22 MS. RADCLIFFE: There's some language in there that
 23 indicates that Pfizer may have a material adverse risk. I'd
 24 like to point out the context in the exhibits the defendants
 25 submitted with respect to their statements that they would have

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1 no material adverse risk.
 2 The quote that they provided, for example, to Exhibit
 3 I isn't actually found that I can find in their exhibits.
 4 THE COURT: I'm looking at Exhibit I.
 5 MS. RADCLIFFE: Exactly.
 6 And this goes to basically the heart of what you went
 7 to, is whether the disclosures the defendants made regarding
 8 these series of investigations were false and misleading at the
 9 time. Defendants have injected a truth-on-the-market defense.
 10 It's a very high burden. It typically is not decided at the
 11 pleadings stage.
 12 So if you look at exhibit --
 13 THE COURT: I'm sorry, Ms. Radcliffe. Say that again.
 14 MS. RADCLIFFE: I'm sorry.
 15 Defendants have essentially submitted a
 16 truth-on-the-market defense; that their disclosures were
 17 adequate. They've admitted they had a duty to disclose, but
 18 they indicate that they disclosed fully and with the necessary
 19 credibility and intensity which is required under the Second
 20 Circuit in order for their disclosures to be not misleading.
 21 THE COURT: Those are wonderful words, credibility and
 22 intensity.
 23 MS. RADCLIFFE: Intensity. And that's from Ganino.
 24 And I probably mispronounced that.
 25 THE COURT: Who wrote that?

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1 MS. RADCLIFFE: Now you got me. I'll look it up.
 2 If you look at Exhibit I, and you have to sort of put
 3 this in a contextual view, because Pfizer had discontinued its
 4 Bextra drug in 2005. It discontinued it for marketing -- I
 5 mean, excuse me, for safety reasons related to heart issues and
 6 other indications. So Bextra is no longer on the market. The
 7 market already knows there's concerns with the sale of Bextra
 8 previously.
 9 THE COURT: And when was it no longer on the market?
 10 MS. RADCLIFFE: I believe it's April of '05.
 11 THE COURT: OK.
 12 MS. RADCLIFFE: So in their 2006 financial statement
 13 that they've submitted as Exhibit I, which is directly related
 14 to the class period, this is after they've already promised the
 15 government and investors that they do not commit off-label
 16 marketing violations; that they are in compliance with FDA
 17 rules, under government investigations and requests for
 18 information --
 19 THE COURT: I'm with you.
 20 MS. RADCLIFFE: And if you look at prior to that, the
 21 top heading on the previous heading page, "Legal Proceedings
 22 and Contingencies."
 23 THE COURT: OK.
 24 MS. RADCLIFFE: OK. And I believe it's the second
 25 sentence, the bottom of the paragraph, says: "We do not

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1 believe any of them will have a material adverse effect on our
 2 financial condition."
 3 Now, a subheading to that is on the next page, the
 4 excerpt they provided, which is subheading F, which provides
 5 that Pfizer is highly regulated and involved in a lot of
 6 investigations. And it says we have received -- I'm sorry.
 7 It's the third paragraph down.
 8 It says: "Since 2003, we have received requests for
 9 information and documents concerning the marketing and safety
 10 of Bextra and Celebrex from the Department of Justice and a
 11 group of state attorneys general. We have been considering
 12 various ways to resolve these matters."
 13 Plaintiffs have pled that that disclosure is
 14 inadequate; it is, in fact, misleading; it does not disclose
 15 the risk that Pfizer faced as a result of its blatant off-label
 16 marketing.
 17 THE COURT: It does not what?
 18 MS. RADCLIFFE: Disclose the risk that Pfizer faced as
 19 a result of its blatant off-label marketing.
 20 THE COURT: And it doesn't say anything material
 21 adverse effect.
 22 MS. RADCLIFFE: Yes, and it did have a material
 23 adverse effect.
 24 THE COURT: But it doesn't say.
 25 MS. RADCLIFFE: Well, in fact --

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1 THE COURT: The disclosure under government
 2 investigations and request for information, does it mention
 3 that these are likely to have or could possibly have a material
 4 adverse effect?
 5 MS. RADCLIFFE: Well, in context, if you read the
 6 subheading we just read on paragraph 19, it says, in fact, we
 7 do not believe any of these will have a material adverse
 8 effect.
 9 THE COURT: It seems to me paragraph 19 deals with
 10 civil litigation, various patent product liability, consumer
 11 commercial securities, environmental and tax litigations and
 12 claims, government investigations and other legal proceedings
 13 that arise from time to time in the ordinary course of our
 14 business.
 15 And then comes the statement: "We do not believe any
 16 of them will have a material adverse effect on our financial
 17 position."
 18 And then the next subparagraph, F, deals with
 19 government investigations and requests for information.
 20 Is there a statement about material adverse effect in
 21 these paragraphs?
 22 MS. RADCLIFFE: There is not. And I would posit that
 23 the caveat under subheading 19 goes to the government
 24 investigations referred to as subheading F under the main
 25 heading section 19.

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1 THE COURT: I don't understand that.
 2 MS. RADCLIFFE: Well, I believe that subheading F
 3 refers to the government investigations that was read in the
 4 first sentence that you indicated under subheading 19 that
 5 related to government investigations.
 6 THE COURT: It's hard for me to understand how the
 7 first subparagraph under 19 is F. I don't have enough extract
 8 to know how to follow this.
 9 Do you have the full document?
 10 MS. RADCLIFFE: I do not. And I can certainly submit
 11 it to the Court, if necessary.
 12 THE COURT: Mr. Gilman, do you have the full document?
 13 MR. GILMAN: Not with me, your Honor, but we can have
 14 it delivered.
 15 THE COURT: Does anybody have a memory of the full
 16 document, how it is that you have a 19 -- what's predominant,
 17 what's subordinate?
 18 MR. GILMAN: If your Honor would look at the chart --
 19 we're on Exhibit I, counsel has focused you -- that is a quote
 20 from the full document. If we are missing a page in the
 21 extract, your Honor, I represent to the Court that this will
 22 appear on the full document.
 23 And it says: We cannot reasonably estimate potential
 24 exposure. And that it could have a material adverse effect on
 25 the results of operations in any period. And there could be

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1 criminal charges, fines, and civil penalties.
 2 THE COURT: I should have the full document. You're
 3 making a point on this and drawing an issue. I need to have
 4 the full document.
 5 MR. GILMAN: We'll work with counsel, and we'll
 6 provide you with a full document. And we'll do that, your
 7 Honor, with respect to each of the exhibits, just so that
 8 you'll have them if you need them.
 9 THE COURT: Please don't inundate me.
 10 MR. GILMAN: We'll try not to, your Honor.
 11 MS. RADCLIFFE: Well, your Honor, I would point out
 12 that our complaint alleges with respect to each of the
 13 statements during the class period it is accompanied by the
 14 language that --
 15 THE COURT: Let me have the paragraph in the
 16 complaint. I read the complaint, but it's hard to get a
 17 picture.
 18 MS. RADCLIFFE: Well, your Honor --
 19 THE COURT: What paragraph?
 20 MS. RADCLIFFE: I'm sorry, I believe it's paragraph
 21 16.
 22 THE COURT: So what you're saying here is that the
 23 off-label policy of Pfizer was going on even while the
 24 investigations were pending. Pfizer didn't stop.
 25 MS. RADCLIFFE: What we are saying, your Honor, is

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1 that they had entered into a 2004 corporate integrity
2 agreement, promising not to commit off-label marketing; that it
3 would cease and desist.
4 When they entered into the \$430 million Neurontin
5 settlement, they promised the government that this would not
6 happen at Pfizer. And the U.S. attorneys who were
7 investigating the matter basically said that they were breaking
8 that pledge before the ink was already dry on the plea --
9 THE COURT: That's not a securities disclosure issue.
10 MS. RADCLIFFE: No, it's not a securities disclosure
11 issue, but the disclosure of what defendants knew and what they
12 disclosed, and whether what they disclosed was credible and
13 with the requisite intensity to inform shareholders of the risk
14 that Pfizer faced.
15 And I would take with respect to the accounting
16 provisions that defendants cited, there are two provisions of
17 GAAP that are relevant here: One is FAS No. 5, paragraph 10.
18 And paragraph 10 does not say that you need to have an
19 estimate. It needs to say that you either -- you disclosed the
20 nature of the contingency, and you disclosed the possible range
21 under FAS 510. It doesn't have to be a certainty.
22 THE COURT: Mr. Gilman argues that the amounts were
23 not quantifiable at the time; they were not estimable.
24 MS. RADCLIFFE: Well, under accounting principles, how
25 you estimate your contingencies is based on your past

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1 historical experience. And basically, with respect to Pfizer,
2 there's a repeat history of violations, their involvement in
3 violations of off-label marketing, both before and during the
4 class period. Whether it was the subsidiaries they acquired or
5 whether Pfizer itself, they have a past history defined by
6 government statute. They know that they have to disgorge the
7 ill-gotten gains from their off-label marketing.
8 With respect to Bextra, they knew at the start of the
9 class period, there was \$664 million --
10 THE COURT: So, in a word, you're saying that they
11 should have at least have given the criteria or ascertained
12 penalty and fine.
13 MS. RADCLIFFE: Yes. And most importantly, your
14 Honor --
15 THE COURT: What were those criteria?
16 MS. RADCLIFFE: Well, with respect to assessing the
17 fine and what is the amount of the contingency, under GAAP, if
18 you know any amount, you need to accrue for that amount, if you
19 can reasonably estimate it. It's not a certainty.
20 THE COURT: What happens in the general run of things
21 is that the accountants run over the accounts, and they're told
22 or they otherwise learn of these pending government
23 investigations, so they come to the company's counsel and they
24 ask for a disclosure of them. And then they consider whether a
25 reserve should be required.

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1 It's at that point that they -- if there is to be a
2 reserve, the question is how much. And it has to be estimable.
3 So you're saying that there are criteria which
4 suggested that it would be at least a certain amount, and
5 presumably that would be the floor of the reserve.
6 MS. RADCLIFFE: Correct, your Honor.
7 THE COURT: What are those criteria?
8 MS. RADCLIFFE: Certainly.
9 Your past history with respect to the matter.
10 THE COURT: How can you say the resolution of a
11 criminal or investigative proceeding creates a precedent for
12 what a later finding would be?
13 MS. RADCLIFFE: Well, defendants knew at the start of
14 the class period -- they've admitted in the civil settlement --
15 that there was \$664 million of off-label marketing of Bextra
16 prior to the class period. That was the ill-gotten gains, the
17 pecuniary gain from the off-label marketing.
18 They also know, subject to the statute, that they are
19 subject to a criminal multiplier because they are repeat
20 offenders.
21 THE COURT: So what you're saying is that they should
22 have said this --
23 MS. RADCLIFFE: Yes. I'm saying that they should have
24 said this --
25 THE COURT: -- in words or substance, so that the

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1 reader would understand that the exposure was some kind of a
2 larger amount than had been given up in the past. And that
3 would be estimable to that degree.
4 MS. RADCLIFFE: Yes, your Honor.
5 THE COURT: Would you mind if I broke into your
6 argument and asked Mr. Gilman to comment on that point?
7 MR. GILMAN: Your Honor, the Second Circuit has said:
8 "The FDA permits doctors to prescribe drugs for off-label
9 uses." That's Ortho Pharmaceuticals v. Cosfo.
10 THE COURT: I know that.
11 What they are alleging here is that there was a
12 marketing program to get doctors to do that. So although
13 doctors can prescribe, it can be illegal to induce doctors to
14 prescribe by paying them in it.
15 MR. GILMAN: The point, your Honor, is how do you know
16 which sale is an unlawful sale and which isn't. The fact that
17 it is prescribed by a doctor for an off-label use does not make
18 it unlawful. That is why it is highly complex. That is why it
19 is confusing. That is why you cannot reasonably estimate. And
20 the number is a settlement number, your Honor, not a finding.
21 THE COURT: I understand, Mr. Gilman.
22 But the argument would be that the senior management
23 knew in countenance this sales practice, this marketing
24 practice; and so they knew the vulnerability. And presumably
25 they knew the criteria in the statute, and the likelihood that

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1 a successive fine would be larger than previous fines. So they
 2 knew that these disclosures were inadequate.
 3 These are allegations; I am not adopting them. But I
 4 have to decide in this proceeding whether there is a fair
 5 disclosure of this kind of a mispractice. And up to this
 6 point, it seems to me that plaintiffs have said enough to
 7 warrant going forward.
 8 MR. GILMAN: Your Honor, plaintiff's --
 9 THE COURT: At least on this issue.
 10 MR. GILMAN: Plaintiff's case is predicated on prior
 11 settlements, a prior corporate integrity agreement in 2004.
 12 THE COURT: That's right.
 13 MR. GILMAN: OK. Your Honor, that corporate integrity
 14 agreement didn't promise there will never be an off-label sale.
 15 The corporate integrity agreement promised we will create an
 16 ombudsman so that people can report things; and that we will
 17 put in place procedures and policies and practices so that
 18 hopefully that which happened will not happen again.
 19 There is no allegation in the complaint that they
 20 didn't fully comply with the corporate integrity agreement.
 21 There is an ombudsman; there is a blue book of policies; there
 22 are procedures and practices. And the fact that they allege
 23 that there was some up-the-ladder reporting by some qui tam
 24 relators, they don't say it was to any of the named defendants;
 25 they don't say any of the named defendants were told any of

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1 this. What they say is that the policies and the practices and
 2 the procedures, in fact, were working, because people were
 3 reporting things, and there was a period of self-confession,
 4 and there was a period of ongoing investigation.
 5 THE COURT: This is also not that kind of a procedure
 6 either.
 7 But what the plaintiffs are alleging is that there was
 8 a persistence of marketing practice that was illegal and
 9 contradicted the integrity agreement; and that there was enough
 10 credibility in this whole activity to warrant an inference that
 11 the insiders knew it.
 12 That's their case. They may be able to prove the
 13 case; they may not be able to prove the case. But at this
 14 point, that's not my judgment. My judgment is whether or not
 15 there's a plausible relationship to the facts as I learn them
 16 and the allegations. And I think at this point they've passed
 17 that threshold, at least the issues that I've discussed with
 18 you. But I think these are the issues that permeate this whole
 19 case from beginning to end.
 20 So I'm inclined to believe that this is an acceptable
 21 complaint.
 22 MR. GILMAN: I don't think it's a securities fraud
 23 complaint. It's a complaint. It's a corporate mismanagement
 24 complaint.
 25 THE COURT: Let me just add a word or two.

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1 They've alleged that in various marketing reports in
 2 the securities community that the insiders have themselves or
 3 acquiesced in others said to the investment community that our
 4 accounts are appropriate; they conform to GAAP, they conform --
 5 we audited it according to auditing standards, when, in fact,
 6 they knew they didn't because of the continuation of these
 7 kinds of activities and the inadequate treatment of those
 8 disclosures in the financial reporting.
 9 That's their allegation.
 10 I think they've said enough to satisfy me that that's
 11 OK, and that they will be able to prove it. Whether or not
 12 they will be able to prove it is another matter.
 13 MR. GILMAN: Your Honor, Bextra was off the market as
 14 of April 2005. That's prior to the class period. There was no
 15 promotion -- Bextra was the entire criminal fine. It was 100
 16 percent of the \$1.3 billion criminal fine. That is not an
 17 ongoing wrong. That is not promotion.
 18 THE COURT: Answer that, Ms. Radcliffe.
 19 MS. RADCLIFFE: Yes, your Honor.
 20 He's correct that the criminal fine is related to
 21 Bextra. And that's precisely why at the beginning of the class
 22 period they should have taken account in their financials for
 23 the false -- I'm sorry, for the contingent risk related to
 24 Bextra, because they knew it had all happened. Those
 25 financials are included in the class period. The year-end 2005

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1 financials, which include Bextra, were reported in the class
 2 period. And precisely because the sales of Bextra had ended
 3 and they knew about the DOJ investigation, they knew about the
 4 business plans to promote Bextra off-label, that's a business
 5 plan, that's a 2004 business plan, they knew all of that, and
 6 yet during the class period they did not disclose any of that
 7 to investors either in their provisions regarding accruals, in
 8 what they told investors --
 9 THE COURT: Mr. Gilman.
 10 MR. GILMAN: There's no ongoing wrongdoing, your
 11 Honor. There's no promotion. There's no sale --
 12 THE COURT: There's ongoing issues of liability, she
 13 says.
 14 MR. GILMAN: There is a government investigation which
 15 is fully disclosed. It might result in criminal fines, which
 16 is fully disclosed. It might result in civil penalties, which
 17 is fully disclosed. It might have an adverse impact in any
 18 particular financial period, which is fully disclosed 16 times.
 19 THE COURT: It's not, she says, fully disclosed
 20 sufficient to give a reader an understanding.
 21 MR. GILMAN: That's self-flagellation, and this Court
 22 has never --
 23 THE COURT: No, it's not.
 24 MR. GILMAN: Your Honor, respectfully --
 25 THE COURT: Mr. Gilman, there are ways to describe

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1 this. I've been through this as a lawyer, as you have more
2 times than I have, but there are ways to describe this. You
3 can't describe the criteria -- and you can talk about the
4 company's belief in its defenses, but you can't describe the
5 criteria for loss. And you haven't done that. You've just got
6 a one-liner, which I think Ms. Radcliffe would argue does not
7 give sufficient credibility and intensity to the risk that is
8 being discussed.

9 That's her point, Mr. Gilman. She can be right, she
10 can be wrong; but at this point in time, I think she said
11 enough.

12 So the motion is denied, and we go into the next phase
13 of the case.

14 MS. RADCLIFFE: Thank you, your Honor.

15 MR. GILMAN: Thank you, your Honor.

16 THE COURT: What's going to be the next phase of the
17 case?

18 MR. GILMAN: Presumably --

19 THE COURT: You haven't really discussed that with her
20 yet, really thought about it enough, because she probably
21 believed that you would win, as any good advocate would.

22 I need to have a plan for the case. I'd like to see
23 it run efficiently and without the wasted time of discovery
24 disputes and other kinds of annoyances that afflict too many of
25 these cases.

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1 So what I think we ought to do is give you a chance to
2 plan your discovery, Ms. Radcliffe, discuss it fully with
3 Mr. Gilman, and then to come forward, giving me a plan to the
4 extent you agree and to the extent you disagree.

5 MS. RADCLIFFE: Yes, your Honor.

6 THE COURT: And I'm not going to delegate this to a
7 magistrate judge. I don't believe in that. I didn't like it
8 when I was a lawyer, I don't think I should do it now, unless I
9 have to. So I'll keep the case, and I'll be seeing you at
10 various times along the case with the idea of trying to
11 economize on excessive numbers of depositions and excessive
12 discovery requests. It's not to say you won't have decent
13 discovery; you will. But I'd like both of you to think not in
14 terms of the discovery game, but of the end game.

15 MS. RADCLIFFE: Yes, your Honor.

16 THE COURT: So what's a good time to see you both?
17 Go off the record for a few minutes.
18 (Off record)

19 THE COURT: We'll have our first status conference on
20 September 23 at 10:30. I have a form for the case management
21 report. I think you need to go beyond the normal -- you can
22 take it off the individual rules. I'd like to learn about any
23 kind of computer issues in terms of what you conceive of is
24 discovery. So focus on that and see if that's going to be a
25 problem, and anything else you can think about.

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1 Your initial discovery will be documents. So I think
2 probably what would make sense is to arrange for a document
3 discovery, and we can have our session together before you
4 start your depositions. You won't know your deposition targets
5 until you go through the written discovery.

6 So I think in terms of your planning, plan the
7 discovery and plan a period for discovery, and then I'll meet
8 with you to chart the depositions.

9 MS. RADCLIFFE: Thank you, your Honor.

10 THE COURT: I'm not a fan of interrogatories or
11 discovery requests. I learned that from Milton Pollack, the
12 late Milton Pollack.

13 MR. GILMAN: As did I, your Honor.

14 THE COURT: Yes. So I've tried to emulate a lot of
15 his practices as a judge, not always successfully. He had such
16 a unique manner about him. But I'm grateful if you leave with
17 a conversation. You don't need letters; just have some
18 conversation about what needs to be produced and what special
19 problems. And the letters can come to me in joint form.

20 I don't take letters individually written. There's a
21 procedure outline in Individual Rule 2E for discovery disputes.
22 But if there is any disputes, if you have a dispute, write a
23 joint letter, each side states its position, and I'll endeavor
24 to rule in a very quick way so you won't waste time.

25 I don't like making federal cases out of discovery

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1 issues. So I rarely, if ever, write on them; but I decide them
2 fairly promptly, often within 24 hours on the 2E letter.

3 All right. I guess that's it.

4 MS. RADCLIFFE: Thank you, your Honor.

5 THE COURT: All right.
6 So I'll see you on the 23rd.

7 MR. GILMAN: Thank you, your Honor.

8 MR. ROSEN: Thank you, your Honor.

9 THE COURT: Thank you.
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