UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY K. JONES, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

v.

PFIZER INC., et al.,

Defendants.

Civil Action No. 1:10-cv-03864-AKH

Hon. Alvin K. Hellerstein

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO EXCLUDE PLAINTIFFS' EXPERT STEVEN FEINSTEIN

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PRELIMINARY STATEMENT

To support their allegations of loss causation and damages, Plaintiffs rely entirely on the opinion of Steven Feinstein, an associate professor at Babson College who has testified for Plaintiffs' counsel in at least a dozen other cases and has been criticized in the past for a "Fantasy Island approach" that "bear[s] no relationship to reality."[1] Feinstein's opinion is inadmissible because it lacks any support in the relevant field and flies in the face of the undisputed facts and the clear law. Judge Swain recently excluded a plaintiff's economic expert in another securities-fraud case involving Pfizer for very similar reasons. *See In re Pfizer Inc. Sec. Litig*., No. 4-CV-9866-LTS-HBP, 2014 WL 3291230 (S.D.N.Y. July 8, 2014). Like the expert excluded in that case, Feinstein fails to base his opinions on "reliable principles and methods reliably applied." *Id*. at *1. In particular:

- Feinstein insists that the amount of "artificial inflation" in Pfizer's stock price stayed ***precisely the same ($1.26) on every single day during a more than three-year Class Period***, notwithstanding that the facts concerning the underlying government investigations, the alleged misstatements and omissions, and the company's disclosures all changed during that period. This remarkable assertion is set forth in a single paragraph of Feinstein's report, which contains no analysis of why the use of a "constant-inflation ribbon" is appropriate or supported by the facts or the law. As a consequence, Feinstein's opinion as to damages would not change even if the Court or the jury were to rule that most of the alleged misstatements are not actionable, which is a result the case law does not permit. His attempt to defend his approach by contending that Pfizer's obligation was not to disclose developments in the investigations over the three-year Class Period, but rather to declare itself "guilty" of illegal conduct on the first day of the Class Period and every subsequent day, is nonsensical and barred by clear Second Circuit law. *See City of Pontiac Policemen's & Fireman's Ret. Sys. v. UBS AG*, 752 F.3d 173, 184 (2d Cir. 2014).

- Feinstein acknowledges the importance of market analyst reports and uses them as the best gauge of the market's reaction to news when they suit his purpose, but he ignores

[1] *See Finkelstein v. Liberty Digital, Inc*., No. Civ. A. 19598, 2005 WL 1074364, at *12-21 (Del. Ch. April 25, 2005) (Strine, V.C.). The court in *Finkelstein* found the problems with Feinstein's opinion were "so pervasive and numerous that it is impossible to describe them all." *Id*. at *15. As the court found, "If Feinstein's wishes were horses, the petitioners would have ridden and owned Secretariat, Seattle Slew, and . . . Affirmed, Triple Crown winners all." *Id*. at *15.

the fact that ***not a single one*** of the hundreds of analyst reports that followed Pfizer's supposedly "corrective" disclosures attributed any significance whatsoever to the settlement of the government investigations. Feinstein's speculation that "something funny [was] apparently going on" with these hundreds of reports is not reliable scientific analysis and is no excuse for the inconsistent application of his own methodology.

- Feinstein relies on a single academic paper—which, to our knowledge, has never been accepted by any court as a basis for damages in a securities case—to determine the amount of a supposed "reputational penalty" that Pfizer suffered as a result of the announcement of an agreement in principle to settle the government investigations. Here again, Feinstein conducted no analysis in support of his assertion, which is contradicted by the fact that none of the hundreds of analyst reports deemed the settlement to be of any significance or suggested that it had caused some "reputation effect" reflected in the company's stock price.

For these reasons, and others explained below, the Court should exclude Feinstein's opinions and testimony.

BACKGROUND

Plaintiffs allege that Pfizer made misleading statements—or omitted information necessary to make those statements not misleading—about its marketing practices and certain government investigations regarding those practices, which the company ultimately resolved in a $2.3 billion settlement.[2] Plaintiffs have offered Feinstein as an expert on two issues: first, "whether investors suffered losses as a result of the Defendants' alleged misdeeds," i.e., loss causation; and, second, "to quantify damages sustained, if any, on a per share basis."[3]

[2] Declaration of Amanda M. MacDonald In Support of Defendants' Motion to Exclude Plaintiffs' Expert Steven Feinstein ("MacDonald Decl.") Ex. A (June 10, 2014 Report of Steven P. Feinstein) (hereinafter "Feinstein Rep.") ¶¶ 29-32; *see generally* First Amended Consolidated Class Action Compl., Apr. 15, 2011, Rec. Doc. 71 ("Amended Compl.").

[3] MacDonald Decl. Ex. A (Feinstein Rep.) ¶ 2.

1. Damages—Constant-Inflation Ribbon

Feinstein agrees that, to accurately measure damages, he is required to model the amount of inflation caused by Pfizer's alleged fraudulent misstatements on each day of the Class Period.[4] Yet Feinstein makes no attempt to allocate the purported inflation across the dozens of misstatements alleged by Plaintiffs in order to explain how each of those misstatements contributed to the inflation on the dates they were made. Nor does he take account of the significant changes in underlying facts that occurred during the Class Period—most notably that the investigations into three of the four medications did not even begin until mid-2007 or later, approximately two-thirds of the way into the Class Period. Instead, Feinstein opines that the amount of inflation ***never changed*** in the three years from January 19, 2006 to January 23, 2009 but remained at $1.26 on ***every day of the Class Period***, regardless of how many alleged misstatements or omissions Pfizer had made at any given point or what facts even existed and thus could have been disclosed.[5]

2. Loss Causation

Feinstein designed an "event study" that, he says, indicates there was a residual drop of $1.90 in Pfizer's share price on January 26, 2009, the alleged "corrective disclosure" date.[6] Even Plaintiffs, however, do not assert that the entire decline is attributable to the alleged fraud. Pfizer announced a number of news items on that day: (1) its $68 billion acquisition of Wyeth; (2) a 50-percent dividend cut; (3) 2009 per-share earnings guidance of $1.85 to $1.95, which fell well

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[4] As Feinstein put it, "recoverable damages are the amount by which fraud-induced inflation decreased between the time the investor purchased and sold the security." MacDonald Decl. Ex. A (Feinstein Rep.) ¶ 261 (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005)). Thus, if inflation varied throughout the Class Period, an investor could recover at most the inflation present in the stock on the day(s) that investor bought shares.

[5] MacDonald Decl. Ex. A (Feinstein Rep.) ¶ 258.

[6] *See id*. ¶¶ 31 (identifying January 26, 2009 as the sole corrective disclosure date), 118, 132, 147-49.

below analysts' consensus estimates of $2.50; and (4) fourth-quarter 2008 results, which included a $2.3 billion charge for the agreement in principle to settle the government investigations.[7] Other potentially significant information reached the market on the same day, including the fourth-quarter financial results of Wyeth (the target company).[8] Acknowledging—as he must—the need to identify what portion of the $1.90 is attributable to the government settlement in order to demonstrate loss causation, Feinstein purports to isolate the effect of each of the January 26 announcements.

In conducting this task, Feinstein employs a hodgepodge of different but equally flawed methodologies. With regard to the Wyeth acquisition, for instance, he identifies two news sources on January 23, 2009 (the previous trading day), which suggested Pfizer might acquire Wyeth and speculated on the transaction's financial terms. Based on those two news sources and earlier and even more speculative reports, he says that the ***$68 billion*** acquisition had ***no*** impact on Pfizer's stock price on the day of its announcement.[9] With regard to the announcement of Wyeth's financial results, on the other hand, Feinstein relies on the lack of negative analyst commentary to attribute "none of the residual decline in Pfizer stock" to that news.[10] And with regard to yet other announcements, such as the 50-percent dividend cut, Feinstein attempts to apply models drawn from academic literature to approximate the size of the market's reaction.[11]

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[7] MacDonald Decl. Ex. B (Pfizer, Form 8-K (Jan. 26, 2009)) (press release issued by company titled "Pfizer to Acquire Wyeth, Creating the World's Premier Biopharmaceutical Company"); MacDonald Decl. Ex. C (Pfizer, Form 8-K (Jan. 26, 2009)) (press release issued by company titled "Pfizer Reports Fourth-Quarter and Full-Year 2008 Results and 2009 Financial Guidance").

[8] All told, Feinstein identifies eleven pieces of potentially confounding information on January 26, 2009. *See* MacDonald Decl. Ex. A (Feinstein Rep.) ¶ 152.

[9] *Id.* ¶¶ 173-181.

[10] *Id.* ¶¶ 225-228.

[11] *Id.* ¶¶ 182-205.

Feinstein's top-down estimate attributes only $0.62 of the stock drop to all of the announcements other than the government settlement, leaving $1.28.

Feinstein then applies yet another, very different methodology to the news of the government settlement. Though he concludes, as noted above, that Wyeth's financial results were unimportant because analysts did not comment negatively about that announcement, he declines to apply the same methodology to the government settlement—which also elicited no negative commentary or extended discussion from analysts. *See infra* Part II.A. In deposition testimony, Feinstein offered an excuse for his methodological mixing and matching. According to Feinstein, Pfizer "intentionally confounded the information about the agreement—intentionally chose to time the Wyeth merger announcement on the same day as the [settlement] announcement," so that "analysts were overwhelmed with a flood of information" and were "essentially distracted."[12] In other words, Feinstein—based only on his personal view regarding Pfizer's state of mind in connection with the timing of its announcements—has chosen to disregard what analysts contemporaneously deemed to be important.[13]

Instead, Feinstein offers a simplistic estimate of the price change attributable to the government settlement alone. First, he assumes that the entire impact of the $2.3 billion settlement would have been news to the market, even though Pfizer previously had disclosed the possibility of a "substantial" fine. Then, he divides the $2.3 billion settlement amount between all of Pfizer's outstanding shares, which comes out to $0.34 per share.[14] Next, he applies a

[12] MacDonald Decl. Ex. D (Oct. 14, 2014 Deposition of Steven A. Feinstein) (hereinafter "Feinstein Dep.") at 72:22–73:12.

[13] *See also* MacDonald Decl. Ex. D (Feinstein Dep.) at 232:13-16 ("[R]elying on coverage by analysts was not a reliable approach to determining what other people thought was valuation relevant.").

[14] MacDonald Decl. Ex. A (Feinstein Rep.) ¶¶ 233-234.

finding from an academic paper, which examined companies subject to SEC investigations related to financial misstatements specifically (not to government investigations more generally or investigations of pharmaceutical marketing practices in particular), and asserts that Pfizer would have suffered a "reputation loss" 2.71 times larger than the settlement figure.[15] These two effects sum to $1.26 per share, which is the amount he asserts is the portion of the stock drop on January 26, 2009 attributable to the alleged fraud.[16]

LEGAL STANDARD

> Expert testimony is admissible only if:
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> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based upon sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702; *see Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993). The proponent of the expert opinion "has the burden to show that it is relevant and reliable and must do so by a preponderance of the evidence." *Faulkner v. Nat'l Geographic Soc'y*, 576 F. Supp. 2d 609, 619 (S.D.N.Y. 2008).

"Under Rule 702 and *Daubert*, district courts are assigned a critical gatekeeping role at the boundary between real science and junk science." *Davis v. Carroll*, 937 F. Supp. 2d 390, 411-12 (S.D.N.Y. 2013) (citing *Daubert*, 509 U.S. 579). "The trial court's gatekeeping function requires more than simply taking the expert's word for it." Fed. R. Evid. 702 advisory committee's note (2000 amends.) (citing *Daubert*, 43 F.3d 1311, 1319 (9th Cir. 1995)). Expert testimony should not be admitted if, among other things, (i) the expert fails to follow

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[15] *Id.* ¶¶ 252-255.

[16] *Id.* ¶ 256.

standards controlling the methodology's application, *see Daubert*, 509 U.S. at 593-94; (ii) the theory underlying the methodology is not generally accepted in the relevant expert community, *see id.*; (iii) the expert's conclusions were not supported by the evidence, *see Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146-47 (1997); or (iv) the expert fails to "employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field," *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

The key to admissibility is reliability. Ultimately, the court "must determine 'whether the proffered testimony has a sufficiently 'reliable foundation' to permit it to be considered.'" *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d Cir. 2002) (citations omitted). "*[A]ny* step that renders the [expert's] analysis unreliable under the *Daubert factors renders the expert's testimony inadmissible*." *Id*. at 267 (citation omitted). "[W]hen an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony." *Id.* at 266. "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 522 U.S. at 146; *see also In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 540 (S.D.N.Y. 2004).

ARGUMENT

I. FEINSTEIN'S CONSTANT-INFLATION RIBBON IS AN UNRELIABLE METHODOLOGY FOR DETERMINING DAMAGES.

Proof of the damages "caused by reliance on defendant's misrepresentations or omissions" is an essential element of a securities fraud case. *Royal Am. Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1015 (2d Cir. 1989). Feinstein's damages model amounts to nothing more than his assertion that there was always $1.26 of fraud-induced inflation in Pfizer's stock during the entire Class Period, because $1.26 was the price drop that occurred due to the January 26, 2009 alleged corrective disclosure. This methodology cannot be reconciled with common sense, the facts of this case, the governing law, or indeed even with the Plaintiffs' own allegations and other expert opinions.

A. Feinstein's Constant-Inflation Theory Is Inconsistent with the Undisputed Facts.

It is axiomatic that an expert opinion is not admissible if it fails to take account of the facts of the case that would, by common sense, dictate a different conclusion. *See Hous. Works, Inc. v. Turner*, 362 F. Supp. 2d 434, 447-48 (S.D.N.Y. 2005). Feinstein's constant-inflation approach violates that fundamental tenet.

The facts of this case changed significantly during the Class Period. At the outset of the Class Period, there was only one Department of Justice investigation relevant to Plaintiffs' allegations: the Bextra investigation. That investigation was in a preliminary stage; the government had not yet presented its case, much less demanded any amount in settlement. After the start of the Class Period in January 2006, numerous events took place that led Pfizer to update its disclosures, including the opening of investigations into the marketing of three other medications (Geodon, Lyrica, and Zyvox) in 2007.[17] Plaintiffs' disclosure expert, Edward Buthusiem, identified in his report several "key events during the investigation" that he believes Pfizer should have disclosed, including, for example, the government's presentation of its view of the case concerning Bextra in August 2006; the names of the products other than Bextra involved in the investigations that arose in 2007; and Pfizer's receipt of a formal target letter in

[17] MacDonald Decl. Ex. E (Lyrica subpoena); MacDonald Decl. Ex. F (Zyvox/Geodon subpoena).

2008.[18] Plaintiffs' expert on accounting, Paul Regan, also has taken account of these changing facts. He opines that the reserve he believes Pfizer should have taken changed by more than half a billion dollars as multiple events occurred and "the information . . . matured."[19]

Remarkably, despite the changing facts, Feinstein opines that Pfizer's stock price included ***exactly the same amount of inflation***—$1.26—on the very first day of the Class Period as on the very last day (and every day in between). Thus, in his opinion, an investor who bought Pfizer stock on January 19, 2006, when there was only one nascent investigation, overpaid ***by precisely the same amount*** as an investor who purchased on January 23, 2009, on the eve of the settlement announcement.[20]

The sum total of Feinstein's report devoted to defending his constant-inflation ribbon is the following paragraph:

> ***My conclusion that the inflation in the stock price would have been stable over the course of the Class Period, is driven by the fact that while the fine would have been lower had there been full disclosure earlier, this effect would have been offset by lost revenue and earnings stemming from restricted marketing practices***. Moreover, the reputation effect from learning that a company's management is intent on misdeeds, is reasonably comparable to the reputation

[18] MacDonald Decl. Ex. G (excerpts of Buthusiem Report) at 5, 8, 11-12. Buthusiem was the disclosures counsel for GlaxoSmithKline during part of the time period in which that company dealt with a similar government investigation that resulted in a $3 billion settlement. *See* MacDonald Decl. Ex. H (excerpts of August 1, 2014 Deposition of Edward Buthusiem). Notably, in his deposition, Buthusiem conceded that GlaxoSmithKline did not disclose the government's views of the evidence, *id*. at 140:6-17, or the names of all of the products involved, *id.* at 97:1-17, and did not specifically identify itself as the "target" of an investigation, *id.* at 363:1-13.

[19] *See* MacDonald Decl. Ex. I (excerpts of August 12, 2014 Deposition of D. Paul Regan) at 193:10-12, 241:9-11.

[20] MacDonald Decl. Ex. D (Feinstein Dep.) at 27:1-12. Of course, under the PLSRA, class members' damages are limited to the actual difference between their purchase price and their sale price, so it is possible that the circumstances in which the two hypothetical investors sold the stock could affect the damages they ultimately claim. What matters for purposes of the Rule 702 analysis, however, is that these investors could receive the exactly same amount of damages—the maximum possible $1.26 per share—notwithstanding the fact that one of them purchased their shares before almost all of the alleged misrepresentations or omissions.

effects from learning that they had done the misdeeds. For these reasons, among others, a constant inflation ribbon is appropriate.[21]

The key "drive[r]" of this damages methodology—for which he cites no authority or academic literature—is his supposition (and pure speculation) that although the government would have demanded a smaller settlement amount of Pfizer at earlier points in the Class Period, this effect would have been offset by lost revenue. Yet Feinstein did not perform any calculation of the actual revenues or earnings derived from each of the products during the Class Period (Bextra was no longer even being marketed), or the actual revenues or earnings that would allegedly have been lost from any earlier disclosure. Indeed, he performed no quantitative analysis whatsoever to demonstrate that the dollar-for-dollar offset, which he claims "drive[s]" his constant-inflation ribbon, would actually occur. In fact, Feinstein admitted in deposition that "[i]t's ***not exactly dollar-for-dollar***,"[22] and that a quantitative comparison of the two effects was "***an analysis I did not do on a dollar-for-dollar quantitative basis*** mostly because the data just was not ever made available by the company."[23] His testimony is, in essence, a guess: "[I]t seems that there's two countervailing factors. And so the best estimate is that they offset one another."[24] As the Second Circuit has stressed, an expert's analysis is admissible only if it is "reliable ***at every step***"; "***any*** step that renders the analysis unreliable under the *Daubert* ***factors renders the expert's testimony inadmissible***." *Amorgianos*, 303 F.3d at 267 (internal quotation marks omitted) (emphasis original). When a purported expert "proposes to give an expert

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[21] MacDonald Decl. Ex. A (Feinstein Rep. ¶ 259) (emphasis added).

[22] MacDonald Decl. Ex. D (Feinstein Dep.) at 162:6.

[23] *Id.* at 162:18-23 (emphasis added).

[24] *Id.* at 167:8-10.

opinion based on a guess, not facts," that testimony is inadmissible. *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d at 566.

B. Feinstein's Constant-Inflation Theory Fails To Disaggregate Damages.

One critical consequence of Feinstein's insistence on a constant-inflation ribbon is that he disavows any obligation to assess damages on a statement-by-statement or omission-by-omission basis, despite the fact that Plaintiffs allege dozens of supposed misstatements and omissions spanning the three-year Class Period and the Court or the jury may find some of them not to be actionable. He made this position crystal clear in his deposition:

> I may assume . . . that all the allegations were true, but if it turns out that someone says that some are . . . legitimate allegations and some are not legitimate allegations . . . we know the deception still occurred. ***So that would necessarily shift the responsibility for the deception onto the remaining alleged misrepresentations and omissions***.[25]

Feinstein's assertion that Pfizer's stock price was inflated by $1.26 on every relevant day, regardless of whether one, several, or all of Plaintiffs' alleged misstatements and omissions are credited, defies both logic and the law.

Plaintiffs are required to match or attribute specific damages estimates to specific alleged misstatements or omissions. Courts have rejected damages models that cannot disaggregate damages or match damages to liability findings—most recently when Judge Swain granted a motion to exclude a plaintiff's expert's opinion, which suffered from analogous deficiencies, in *In re Pfizer Inc. Securities Litigation*, No. 4-CV-9866-LTS-HBP, 2014 WL 2136053 (S.D.N.Y. May 21, 2014). *See also Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (rejecting

[25] MacDonald Decl. Ex. D (Feinstein Dep.) at 186:20–187:5 (emphasis added). *See In re Pfizer Inc. Sec. Litig.*, No. 4-CV-9866-LTS-HBP, 2014 WL 2136053, at *1 (noting as problematic the fact that expert could not "make any adjustments or otherwise disaggregate his computations" to remove dismissed claims when he "asserted in his prior report and in deposition testimony that his stock inflation opinions are premised on the assumption that Defendants are responsible for all of the alleged misrepresentations and omissions alleged in the complaint."). *See also* MacDonald Decl. Ex. D (Feinstein Dep.) at 182:11-21.

class certification where plaintiffs' damages expert did not purport to "measure only those damages attributable to" defendants' liability, and explaining that a "plaintiff's damages . . . must be consistent with its liability case") (internal quotation marks omitted); *In re BP p.l.c. Sec. Litig.*, No. 10-MD-2185, 2013 WL 6388408, at *16-17 (S.D. Tex. Dec. 6, 2013) (rejecting class certification in a securities fraud case where plaintiffs' expert proffered a constant-inflation model that would be "unresponsive to the jury's specific findings of liability" and would not "disaggregate 'inflation' according to the type of misrepresentation corrected or risk disclosed") (citation omitted).

Like this case, *In re Pfizer Securities Inc. Litigation* involved multiple alleged misstatements or omissions that spanned a multi-year timeframe.[26] Judge Swain excluded plaintiffs' proffered economic expert testimony because the expert could not properly account for how the amount of inflation included in the stock price varied throughout the class period, which became necessary when the court concluded that certain statements were not actionable. 2014 WL 2136053, at *1. The expert instead offered an ad hoc methodology, citing "no research reference or peer review information" in support of his problematic analysis, just as in this case. *Id*. In addition, as to certain other claims dismissed by the court, the expert could not "make any adjustments or otherwise disaggregate his computations" and instead "premised [his opinion] on the assumption that Defendants are responsible for all of the alleged misrepresentations and omissions alleged in the complaint." *Id*. The court ruled that this flawed opinion was "unhelpful to the jury in making calculations of damages proximately caused by Defendants' alleged

[26] Amended Consolidated Class Action Compl., *In re Pfizer Inc. Sec. Litig.*, No. 4-CV-9866-LTS-HBP (S.D.N.Y. Mar. 27, 2012).

misrepresentations and omissions" and therefore inadmissible. *Id.* at *2.[27] The same conclusion obtains here, where Feinstein has failed to offer any reliable explanation—other than his own *ipse dixit*—for his facially flawed constant-ribbon approach. Indeed, several of the individual defendants here were not employed by Pfizer during the entire Class Period, and thus cannot be held liable for statements or omissions made by others in their absence. Feinstein's analysis does nothing to account for this fact, but rather blindly applies the exact same damages calculation to all defendants irrespective of their individual circumstances.

Notably, the expert witness in *In re Pfizer Securities Litigation* committed a ***less*** egregious flaw than Feinstein. He at least implicitly conceded the need to attempt to disaggregate damages, but failed to pass muster under *Daubert* when he could provide "no explanation of the analytical basis for" how he would accomplish that task. *In re Pfizer Sec. Litig.*, 2014 WL 2136053, at *1. In contrast, Feinstein has committed a more extreme error by refusing even to acknowledge the need to disaggregate the damages caused by different alleged misrepresentations and omissions over time.

C. Feinstein's Justification of his Constant-Inflation Ribbon Is Inconsistent with Second Circuit Law.

When pressed at his deposition to square his constant-inflation opinion with the changing facts, Feinstein claimed that—contrary to Plaintiffs' other experts' opinions—Pfizer's legal obligation was not to disclose more about the investigations, which undeniably changed over time, but rather to announce to the world that the company was "guilty," even before the government had threatened any claims or, indeed, had even begun investigating some of the

[27] Because the Plaintiffs in that case could offer no evidence to establish damages, Judge Swain granted Defendants' motion for summary judgment in a separate order. *See In re Pfizer Sec. Litig.*, Nos. 4-CV-9866-LTS-HBP, 2014 WL 3291230 (S.D.N.Y. July 8, 2014). The same result should occur in this case, for this reason and others articulated in Pfizer's motion for summary judgment.

products.[28] According to Feinstein, the company should have confessed "the illegality of the company's business model."[29] That assertion, however, is barred by clear Second Circuit law, which does not require companies to accuse themselves of unadjudicated wrongdoing or confess to uncharged crimes. *See UBS AG*, 752 F.3d at 182; *In re Morgan Stanley Tech. Fund Sec. Litig.*, 643 F. Supp. 2d 366, 377 (S.D.N.Y. 2009) (companies subject to government investigations "have no duty to accuse themselves of unproven, allegedly illegal policies"), *aff'd*, 592 F.3d 347 (2d. Cir. 2010). Since Feinstein's constant-inflation ribbon is premised on the notion that this sort of disclosure was not only appropriate but was required, his opinion at most shows damages from a nonactionable omission and thus cannot satisfy Rule 702's most basic element of helpfulness. *See* Fed. R. Evid. 702(a) (testimony admissible only if it "will help the trier of fact . . . to determine a fact in issue").

D. Feinstein's Constant-Inflation Ribbon Is Inconsistent with His Own Methodology in Determining Loss Causation.

Tellingly, Feinstein's constant-inflation opinion is inconsistent with his own methodology for determining the amount of the loss attributable to the alleged fraud. As set forth more fully below, *see* Part III *infra*, Feinstein calculated the amount of the stock drop that he believes was caused by revelation of the government settlement by employing a formula found in an article in an economics journal. That method—which was constructed for an entirely different purpose and, to our knowledge, no court has ever applied in a securities case—entailed multiplying the amount of the settlement by 2.71 and adding that amount as a "reputational penalty" to the amount paid by Pfizer to resolve the matters. In other words, under Feinstein's own methodology for determining loss causation, the proper way to quantify all the harm that

[28] MacDonald Decl. Ex. D (Feinstein Dep.) at 116:11-24, 119:11-24, 137:1-12, 199:16-201:1, 207:8-12.

[29] MacDonald Decl. Ex. D (Feinstein Dep.) at 119:12-13.

resulted from the alleged fraud is premised on the amount of the settlement—here, $2.3 billion—plus 2.71 times $2.3 billion, for a total of 3.71 times $2.3 billion.

Feinstein admits, however, that at the beginning of the Class Period there was no $2.3 billion settlement, and claims that if the "truth" had been revealed at that point, the settlement incurred would have been smaller. Feinstein Rep. ¶ 259. Thus, according to his own loss-causation methodology of applying a multiplier to the settlement amount, the amount of inflation in Pfizer's stock price necessarily would have been smaller as well. But in addressing damages, Feinstein departs from the logic of his own loss-causation opinion and instead asserts that the amount of inflation was *constant* on every day of the Class Period. Feinstein's refusal to apply his own methodology requires that his opinion be excluded. *See Amorgianos*, 303 F.3d at 269 (exclusion upheld based on "[expert's] failure to apply his stated methodology"); *In re Ephedra Prods. Liab. Litig.*, 494 F. Supp. 2d 256, 258-599 (S.D.N.Y. 2007) ("[A]n expert's own failure to consistently apply his methodology can form the basis for the exclusion of any resulting opinions[.]").

In short, Feinstein's testimony as to damages bears no relationship to the facts or to economic reality, and evinces none of the "good grounds" or rigorous analysis necessary to render an expert opinion admissible under Rule 702 and *Daubert*.

II. FEINSTEIN'S OPINION ON LOSS CAUSATION DEFIES THE UNDISPUTED FACTS AND FAILS TO CONSISTENTLY APPLY HIS OWN METHODOLOGY.

A. Feinstein's Inconsistent Use of Analyst Reports Makes His Opinion Unreliable.

Rule 702 requires that an expert "reliably appl[y] the principles and methods" he has chosen. Fed. R. Evid. 702(d). In evaluating questions of loss causation, such as what the market concluded was important on a day when a company made multiple announcements, reviewing analysts' contemporary discussion is an invaluable tool. Feinstein himself acknowledges the value of analyst reports, both in this case and in prior testimony. But when confronted with the hundreds of analyst reports issued after January 26, 2009—***not one*** of which attributes a decrease in Pfizer's stock price to the government settlement or to any attendant reputation loss—he abandons this methodology. This unprincipled and unreliable application of his own methodology also compels exclusion of his testimony on loss causation.

When the analysts support his conclusions, Feinstein highlights them. In fact, his report expressly identifies his methodology as combining "careful analysis of management's statements, Company statements, ***analyst reports***, ***analysts' valuation models***, generally accepted principles of valuation, and an event study focusing on the empirical reaction of the stock price."[30] His report refers to and quotes many analyst reports. In particular, when determining whether the market found Wyeth's January 26 announcement of its fourth-quarter 2008 financial results to significantly affect Pfizer's stock price, Feinstein turns to analyst commentary and concludes, "[d]ue to the mixed financial results ***and the overshadowing news of the acquisition agreement***, I attributed none of the residual decline in Pfizer stock to the announcement of Wyeth's financial results that day."[31] In his deposition, Feinstein testified to the value of listening to analysts: "[O]ne of the things that analysts do is help disseminate

[30] MacDonald Decl. Ex. A (Feinstein Rep. ¶ 118) (emphasis added).

[31] *Id.* ¶ 228 (emphasis added). One section of Feinstein's report, "Analysts' Statements Confirm the Materiality of the Allegations," purports to prove that "[a]nalysts deemed information concerning the disclosure of timely and accurate information related to the DOJ's investigation into the Company's promotional practices important." *Id.* ¶ 121. Notably, that section relies on only two analyst comments from early 2008 and does not (because it cannot) cite a single report after the January 2009 announcement. In dozens of paragraphs, Feinstein quotes analysts when it suits his purposes. *See, e.g.*, *id.* ¶ 161 (citing "[a]nalyst commentary" to show "some portion, if not all, of the negative guidance related to FX was anticipated"). When discussing the Wyeth acquisition in particular, his report selectively quotes reports that support his thesis while strategically ignoring less favorable commentary: "Credit Suisse was not surprised by news of the acquisition[:] 'This is not surprising to us and we have written several times previously that such as [sic] acquisition makes strategic and financial sense.'" *Id.* ¶ 177.

information . . . [A]nalysts analyze the information. So in addition to simply conveying information, they also help the processing of the information."[32]

This approach is consistent not only with accepted practice, but with Feinstein's use of analyst reports in prior cases. For example, in a previous matter involving a disclosure which "contained multiple items, some of which were related to the alleged fraud and some of which were not," Feinstein "reviewed the analyst reports that were published after the announcement ***in order to determine which elements of the disclosure were considered most important***."[33] He noted that two of three reports did not mention one news item at all, and the third did not focus on it, and therefore concluded that the item was not important.[34] In another expert report in the same matter, he concluded that information "likely had a negligible impact on the stock price" because it "was not even mentioned during the Company's conference call."[35]

But when it comes time to consider the impact of Pfizer's January 26 announcement of the government settlement, Feinstein disregards the complete absence of analyst discussion on the subject. In the two weeks after January 26, sixteen leading financial institutions issued reports on Pfizer. The overwhelming focus of these reports was the company's acquisition of Wyeth, the reduced 2009 earnings guidance, and the 50-percent dividend cut. For example, a Deutsche Bank report from January 26, 2009 noted that the dividend cut "has clearly angered

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[32] MacDonald Decl. Ex. D (Feinstein Dep.) at 25:5-24.

[33] MacDonald Decl. Ex. J (excerpts from Sept. 15, 2008 Feinstein report in *In re Cooper Co.*) ¶ 252 (emphasis added).

[34] *See id.* ¶¶ 251-256.

[35] MacDonald Decl. Ex. K, (excerpts from Nov. 13, 2009 Feinstein report in *In re Cooper Co.*) ¶ 104. Conversely, in another matter, Feinstein asserted that the materiality of a certain piece of information was "demonstrated in the many questions analysts asked about this issue during the Company's conference calls." MacDonald Decl. Ex. L (excerpts from Nov. 14, 2008 Feinstein report in *Children's Place Retail Stores*) ¶ 184.

some investors, and the holders attracted purely to the yield may clearly choose other alternatives."[36] Although these reports contained extensive analysis—Deutsche Bank's report, for example, was thirteen pages, and other analyst reports were of comparable length—***not one*** of them devoted even a paragraph to discussing the settlement or its implications for Pfizer, or suggested the company had suffered a reputational loss as a result. Only four of the analyst reports mentioned the settlement at all: two listed it as a line item in historical financial tables,[37] and another two mentioned the settlement in one line, with one of those reports misstating the amount of the settlement as "$2.3 ***m***illion."[38] In total, ***over 200*** financial analyst reports concerning Pfizer were issued from January 26, 2009 through September 1, 2009 (the day before the settlement agreements with the government were executed). ***Not a single one*** discussed the settlement.[39]

Even Feinstein conceded in his deposition that, whatever conclusions analysts drew about the settlement, "[t]hey made that judgment not to include that analysis in their published reports,"[40] and that he could not recall a single report that attributed the decline in the stock to

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[36] MacDonald Decl. Ex. M (Deutsche Bank, "Merger Model Update, 4Q Review" (Jan. 26, 2009)), at 1.

[37] MacDonald Decl. Ex. N (BMO Capital Markets, "The Wyeth Purchase: Activity Yes, But Progress?," BMO Capital Markets (Jan. 28, 2009)); MacDonald Decl. Ex. P (UBS, "Attractive Risk-Reward – Upgrading to Buy" (Feb. 9, 2009)).

[38] Hilliard Lyons erroneously stated, "There was also a $2.3 million [sic] pretax charge for litigation to settle claims related to Celebrex and Bextra." MacDonald Decl. Ex. O (Hilliard Lyons, "PFE Agrees to Acquired Wyeth, Reports 4Q Results, Cuts Dividend" (Jan. 27, 2009)). Cowen and Company also noted that "Pfizer incurred a fourth quarter charge of $2.3B for allegations of past off-label promotional practices concerning Bextra; an additional charge of $800MM was incurred in Q3:08." MacDonald Decl. Ex. Q (Cowen & Co., "Combined PFE/WYE Offers Better Growth than PFE Alone but with Added Risk" (Jan. 27, 2009)).

[39] A "discussion," for purposes of this motion, means an analysis or commentary on the settlement. A one-line mention that merely reflects the language of the company's announcement, with no comment, is not a discussion.

[40] MacDonald Decl. Ex. D (Feinstein Dep.) at 294:5-6; *see also id.* at 92:18–93:3.

the settlement.[41] Moreover, when confronted with specific reports—several from analysts whose other commentary Feinstein cites in his report—he had little to say:

> Q: So there's nothing in [this Cowen & Company analyst report] here indicating that this analyst or these analysts was surprised or alarmed by the settlement or the amount; correct?
>
> A: Right[;] that's not indicated in this report.[42]

Feinstein ultimately resorted to asserting that these hundreds of analyst reports were "anomalous" or that "something funny [was] apparently going on" with the reports.[43] This is water-cooler talk, not scientific analysis. Moreover, an anomaly is something that is out of place; here, ***every one*** of the hundreds of analyst reports was consistent—the settlement was not significant and there was no reputational penalty. Feinstein apparently believes that the dozens of institutional authors of these reports simply were untruthful about the market's true reaction to the events of January 26.[44] This disregard of the analysts' statements flies in the face of his methodology in previous cases and his own extensive discussion of analyst reports that purportedly support his (other) opinions in this case. Feinstein's haphazard regard for analyst reports—which he cites when they support his conclusions, and ignores when they do not—is not a reliable application of a scientific methodology.

Worse yet, Feinstein's basis for selectively applying his methodology appears to be nothing more than his personal belief that Pfizer "intentionally confounded" the market.[45] At his

[41] *Id.* at 296:3-8.

[42] *Id.* at 272:1-7.

[43] *Id.* at 291:2-12, 303:19-21.

[44] *Id.* at 293:1-7, 304:14–306:15.

[45] *Id.* at 72:17-73:12. This was not a one-time statement but in fact one of the main themes of Feinstein's analysis of the January 26 announcements. *See also id.* at 78:19-79:8, 213:9-13, 222:2-11 ("[I]n the Pfizer case, you cannot ignore the fact that there was major—apparently intentional confounding

most extreme, Feinstein appears to suggest that Pfizer somehow induced the analysts' silence: "I don't think [the analysts] coordinated . . . . But I think some companies have more sway over their analysts than others."[46] These speculative observations—and everything that flows from them—must be excluded. As courts repeatedly have held, "[i]nferences about the intent or motive of parties or others lie outside the bounds of expert testimony." *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d at 547; *see also id.* at 541 (it is improper for experts to testify to their "interpretations of conduct or views as to the motivations of parties"); *SEC v. Badian*, 822 F. Supp. 2d 352, 357-58 (S.D.N.Y. 2011) (excluding an expert because he was "not qualified to testify as to what was in the defendant's mind"). Without the impermissible opinion regarding Pfizer's motives, Feinstein has nothing to support his assertion that the contemporaneous consensus of analysts was wrong. In these circumstances, there "is simply too great an analytical gap between the data"—hundreds of analyst reports that ignored the settlement—"and the opinion proffered," *Joiner*, 522 U.S. at 146, that somehow, notwithstanding that commentary, the settlement was responsible for two-thirds of the residual price decline on January 26. *See In re Rezulin*, 309 F. Supp. 2d at 542-543 (opinions "do not meet the core requirement of Rule 702 that expert testimony rest on 'knowledge,' a term that connotes more than subjective belief or unsupported speculation," when based on "personal, subjective views" of the evidence) (internal quotation marks omitted).

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information on the same day when assessing whether or not analyst commentary, is an indicator of valuation relevance.").

[46] *Id.* at 293:15-19.

B. Feinstein's Loss Causation Methodology Overstates the Amount of Loss Potentially Attributable to the Settlement.

Feinstein purports to base his assessment of loss causation on the market's "rational expectations" in light of Pfizer's disclosures.[47] In applying this approach, however, Feinstein goes seriously awry by failing to appreciate the undisputed facts that bore on the reasonable expectations of the market about the government investigations.

Where "substantial indicia of the risk that materialized are unambiguously apparent on the face of the disclosures alleged to conceal the very same risk, a plaintiff must allege . . . facts sufficient to apportion the losses between the disclosed and concealed portions of the risk that ultimately destroyed an investment." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005). Here, there is no dispute that Pfizer disclosed the existence of the government investigations and told the public that it was seeking to resolve those matters and that substantial fines and penalties could result. Thus, under any view of the undisputed facts, the market clearly understood that some risk of a major settlement existed—that risk was not concealed. In addition, if Pfizer had disclosed additional details of the investigations as Plaintiffs contend, the "reasonable expectations" of the market would not have been that a $2.3 billion settlement was a certainty, but rather that some (in Plaintiffs' view, higher) risk of that result would obtain. Thus, even crediting Plaintiffs' allegations that (i) Pfizer's disclosures did not sufficiently warn the public of the likely magnitude of the eventual settlement and (ii) some portion of the drop on January 26 was due to the announcement of the settlement (neither of which is correct, for reasons explained in Pfizer's summary judgment motion), Plaintiffs are entitled to recover only the marginal loss attributable to any concealed risk, not to the full amount of any settlement-related drop that occurred on January 26.

[47] *Id*. at 100:23-24.

Feinstein's opinion utterly fails to account for this bedrock principle. He makes no deduction in his calculations for the market's reasonable expectations concerning a settlement based on Pfizer's disclosures. Nor does he incorporate the fact that the disclosures Plaintiffs demand would not have led the market to believe a large settlement was a certainty. Instead, he counts the full amount of what he sees as the settlement-related drop as compensable loss. Precisely this sort of error was among the reasons the court in *In re BP p.l.c. Securities Litigation* found the proffered expert opinion in that case insufficient to establish class-wide damages. *See* 2013 WL 6388408, at *16 (where plaintiffs alleged that company's statements "understated a known risk," the expert's opinion would "compensate[] investors for the full value of the stock price drop . . . [and thus] overcompensates investors for their harm").

III. FEINSTEIN MISAPPLIES ACADEMIC PAPERS TO CONCLUDE THAT PFIZER SUFFERED A REPUTATIONAL PENALTY AND TO ESTIMATE THE IMPACT OF THE DIVIDEND CUT.

Feinstein's quantitative loss causation analysis is flawed for an additional reason. When setting out to allocate specific dollar amounts to each of the announcements on January 26, Feinstein cherry-picks two academic papers, which addressed entirely distinct questions, to opine that (1) the dividend cut caused only a minor drop in Pfizer's stock price; and (2) the single largest component of the drop was a "reputation effect" of $0.92. But the papers that Feinstein chose to rely upon—without conducting any of his own research—respond to a different question and a different fact pattern than at issue here. His opinions are therefore inadmissible under *Daubert*. *See* 509 U.S. at 593-94 (an expert's methodology is flawed when he fails to follow standards controlling its application, or the theory underlying his methodology is not generally accepted in the relevant expert community).

Feinstein's first opinion mangles a paper by Jonathan Karpoff, which analyzes the reputational losses experienced by companies that were "targeted by SEC enforcement actions for financial misrepresentation from 1978-2002."[48] Feinstein attempts to extend that analysis to this case. But Pfizer's situation contains none of the key factors articulated in the Karpoff study: the company did not engage in financial misrepresentations, it was not subject to an SEC enforcement action, it had no restatement, and it experienced no withdrawal of opinion on its financial statements by its auditor KPMG. Moreover, during the past decade, many other pharmaceutical companies—including Merck, Amgen, Abbott, Eli Lilly, and GlaxoSmithKline—also settled Department of Justice investigations related to their marketing practices: the Karpoff model fails to accurately predict the magnitude of the stock movement in even a single one of these cases. In fact, in many instances, the share prices of these companies rose on the date of their announcements.[49] Feinstein's misapplication of Karpoff's article requires exclusion of his loss causation opinion. *See, e.g.*, *In re Rezulin Prods. Liab. Litig.*, 369 F. Supp. 2d 398, 411-25 (S.D.N.Y. 2005) (excluding expert who relied on studies that were only tangentially relevant).

In addition, although Karpoff's paper largely focuses on the reputational effect of financial misstatements, there is absolutely no evidence of reputational effect in this case: as mentioned previously, not a single analyst mentioned any surprise at the settlement or made any comment about Pfizer's reputation. Reputation is the view held of one by others in the relevant community: for public companies, analysts are that relevant community. Therefore, that no analyst mentioned a reputational penalty (or anything remotely close) establishes that no such penalty existed. Feinstein imports a finding from a study that does not speak to the circumstances of this case. He therefore strays well past the boundaries of

[48] MacDonald Decl. Ex. R (Jonathan M. Karpoff et al., *The Cost to Firms of Cooking the Books*, 43 J. Financial & Quantitative Analysis 581, 581 (2008)).

[49] MacDonald Decl. Ex. S (Revised Exhibit 11 to Report of Ken Lehn).

"intellectual rigor that characterize[] the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152.

Feinstein also purports to estimate the impact of the dividend cut on Pfizer's stock price by using a linear equation, developed in a paper by Yakov Amihud and Kefei Li.[50] As noted by Kenneth Lehn, Pfizer's expert witness, Feinstein's use of the Amihud and Li study is not generally accepted among economists and leads to absurd conclusions.[51] For example, Feinstein claims that the size of the dividend cut is irrelevant; regardless of whether the company had cut the dividend by one percent or 99 percent, his predicted change in stock price would be the same. In addition, if one mechanically applied Feinstein's model to dividend cuts beyond 2024, it would conclude that there would be a ***positive*** price reaction to a dividend cut.[52] Also, the predicted change in the stock price is the same regardless of whether the company in question is primarily owned by growth investors or income or value investors—the latter group obviously placing much more value in a high dividend than the former. As multiple analyst reports noted in the wake of the dividend cut, however, the dividend cut had "clearly angered some investors."[53] The effect of a dividend cut almost certainly would be pronounced considering the

[50] MacDonald Decl. Ex. T (Yakov Amihud & Kefei Li, "The Declining Information Content of Dividend Announcements and the Effects of Institutional Holdings," 41 J. Financial & Quantitative Analysis 637 (2006)).

[51] MacDonald Decl. Ex. U (excerpt of Oct. 24, 2014 deposition of Prof. Kenneth Lehn) at 266:23-269:22.

[52] Amihud and Li's equation is: Expected Stock Price Change = -2.63 + 0.0013 × (Year). Ex. T at 641. Thus, if one inserts 2024 into the equation, the expected stock price change would be *positive* (0.0012).

[53] MacDonald Decl. Ex. M (Deutsche Bank, "Pfizer – Merger Model Update, 4Q Review" (Jan. 26, 2009)), at 1; *see also* MacDonald Decl. Ex. O (Hilliard Lyons, "PFE Agrees to Acquire Wyeth, Reports 4Q Results, Cuts Dividend" (Jan. 27, 2009)), at 1 (dividend cut "is unlikely to set well with existing PFE shareholders who must now accept the more nebulous promise of increased shareholder value from the deal as opposed to receiving current income"); MacDonald Decl. Ex. N (BMO Capital Markets, "The Wyeth Purchase: Activity Yes, But Progress?" (Jan. 28, 2009)), at 1 ("[R]educing its dividend reduces PFE shares attractiveness."); MacDonald Decl. Ex. V (Merrill Lynch, "Transaction boosts long-term outlook; lowering PO" (Jan. 28, 2009)), at 1 ("The 50% dividend cut was disappointing, but it now

fact that Pfizer historically had raised its dividend for more than 40 years before the stunning 50-percent cut announced on January 26.[54] Feinstein's analysis ignores this critical fact. *See Davis*, 937 F. Supp. 2d at 418 (opinion should be excluded when it "rests on inadequate factual foundations" or a "misleadingly partial selection of relevant facts").

For these independent reasons, the Court should exclude Feinstein's opinion concerning loss causation.

CONCLUSION

For the reasons stated above, the Court should exclude Feinstein's opinions and testimony.

Date: October 30, 2014

Respectfully submitted,

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appears to be reflected in the stock."); MacDonald Decl. Ex. W (Credit Suisse, "A Closer Look Reinforces Merits, Upgrade PFE to Outperform" (Feb. 2, 2009)) ("PFE stock is down 16% post deal as the case to sell was clear (high dividend yield investors were exiting the stock) . . . .").

[54] MacDonald Decl. Ex. X ("Fighting Headwinds—Boeing, Lilly, Pfizer, Waste Management vote payouts," Barron's, Dec. 22, 2008.

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I hereby certify that, on this 30th day of October, 2014, the foregoing Memorandum in Support of Defendants' Motion to Exclude Plaintiffs' Expert Steven Feinstein was filed with the Court through the CM/ECF system and thereby served to all parties of record.

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Docket Text:
MEMORANDUM OF LAW in Support re: [249] MOTION in Limine *to Exclude Plaintiffs' Expert Steven Feinstein*. . Document filed by Frank D'Amelio, Jeffrey B. Kindler, Alan G. Levin, Henry A. McKinnell, Pfizer, Inc., Ian C. Read, Allen Waxman. (MacDonald, Amanda)

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