UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY K. JONES, Individually and on Behalf of All Others Similarly Situated, Plaintiff vs. PFIZER INC., et al., Defendants.	Civil Action No. 1:10-cv-03864-AKH <u>CLASS ACTION</u> PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE PLAINTIFFS' EXPERT DR. STEVEN FEINSTEIN

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Plaintiffs Stichting Philips Pensioenfonds and Mary K. Jones, on behalf of the class of Pfizer Inc. ("Pfizer" or the "Company") investors, respectfully submit this memorandum of law in opposition to Defendants' Motion to Exclude Plaintiffs' Expert Steven Feinstein.

I. INTRODUCTION

Dr. Steven Feinstein has offered opinions regarding the causal connection between defendants' alleged fraud and Pfizer's January 26, 2009 stock price decline, and the economic damages suffered by the class members. Defendants do not challenge Dr. Feinstein's qualifications to offer these opinions. He is a highly respected and widely published Associate Professor of Finance at Babson College, with nearly 30 years of experience in both academia and banking, including experience as an economist with the Federal Reserve Bank in Atlanta.

There is no dispute that Dr. Feinstein reliably conducted an event study analysis, which is accepted as the appropriate method of economically assessing the issues of loss of causation and damages. There is no dispute that based on his event study analysis, Dr. Feinstein reliably identified a statistically significant, negative residual return of 11.53% for Pfizer's stock price in response to the disclosure of Company-specific information on January 26, 2009. Defendants' own expert, Dr. Kenneth Lehn, adopted the results of Dr. Feinstein's event study analysis and conceded that the January 26, 2009 11.53% negative residual return identified by Dr. Feinstein is accurate. And, there is no dispute that disclosure of the record $2.3 billion resolution of the U.S. Department of Justice's ("DOJ") investigation of Pfizer's unlawful conduct, and resultant 90% plunge in 4Q08 earnings, was firm-specific information released by the Company on January 26, 2009.

Based on his event study analysis and consideration of a voluminous amount of record evidence, Dr. Feinstein has provided a sufficient and reliable basis for his opinion that Pfizer's January 26, 2009 revelation of the resolution of the DOJ investigation substantially caused plaintiffs

to suffer an economic loss. Similarly, Dr. Feinstein has provided a sufficient and reliable estimate of $1.26 per share damages caused by Pfizer's fraudulent conduct. Defendants argue, however, that Dr. Feinstein's reliance on the Company's January 26, 2009 earnings release, Pfizer's January 26, 2009 analyst conference call, contemporaneous analyst reports and contemporaneous news articles – all of which discussed the resolution of the DOJ's investigation and its financial implications – is somehow insufficient to support a reliable loss causation opinion. Ironically, defendants make this argument even though they acknowledge that Dr. Feinstein's consideration of that evidence is a necessary step in providing a reliable loss causation opinion. Defendants also argue that Dr. Feinstein's use of a constant inflation ribbon and disaggregation of damages are unreliable even though these methods are acknowledged by case law and bolstered by tested, peer-reviewed, published and well-accepted academic research. Notably, defendants' expert offered no alternative means to disaggregate and measure damages or assess loss causation.

Defendants' arguments are fatally flawed. At best, defendants' arguments merely go to the weight of Dr. Feinstein's opinions, not their admissibility. As the Supreme Court has explained, "[v]igorous cross-examination [and] presentation of contrary evidence" are the traditional methods of attacking otherwise admissible expert testimony. *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 596 (1993). Dr. Feinstein is qualified, his opinions are based on sufficient facts and data, they are the product of reliable principles and methods, and his testimony is relevant and will assist the jury. Accordingly, they satisfy Fed. R. Evid. 702 and the Court should deny defendants' motion in its entirety.

II. DR. FEINSTEIN'S LOSS CAUSATION AND DAMAGES OPINIONS

In his June 10, 2014 expert report ("Feinstein Report"), Dr. Feinstein details his opinions, and the bases for them, regarding loss causation and damages. *See* Declaration of Trig R. Smith in

Support of Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Exclude Plaintiffs' Expert Dr. Steven Feinstein ("Smith Decl."), Ex. 1, filed concurrently herewith. Specifically, Dr. Feinstein opines: (i) Pfizer's common stock suffered a statistically significant residual price decline on January 26, 2009 of 11.53% or – $1.90 per share; (ii) the price decline was due to the revelation of Pfizer-specific information; (iii) the economic loss suffered by Pfizer shareholders was substantially caused by Pfizer's announcement of the resolution of the DOJ's investigation into the Company's unlawful off-label promotion of pharmaceutical products; and (iv) $1.26 out of the total $1.90 per share residual decline on January 26, 2009 was caused by materialization of the concealed risks concerning the DOJ's investigation and is the per share damages suffered by plaintiffs and the class. *See* Feinstein Report, ¶¶17-18, 118-126, 145-256.

To reach the $1.26 per share damage estimate, Dr. Feinstein controlled for and, where appropriate, removed ("disaggregated") the price impact of potential non-fraud-related ("confounding") information associated with the undisputedly Pfizer-specific $1.90 residual decline on January 26, 2009. In other words, in Dr. Feinstein's opinion, approximately one-third of that share price decline reflects losses that are not related to the alleged fraud and are not included in the estimated damages. As set forth in the Feinstein Report, Dr. Feinstein estimated the per share price impact for each of the potential confounding factors as follows: (i) $0.06 for strengthening of the U.S. Dollar during 2009; (ii) $0.00 for increased pension expenses during 2009; (iii) $0.00 for the Wyeth acquisition; (iv) $0.22 for the 50% dividend cut; (v) $0.00 for credit agency announcements; (vi) $0.00 for lower interest income during 2009; (vii) $0.34 for increased effective tax rate through 2011; and (viii) $0.00 for Wyeth's 4Q08 and FY 2008 financial results. *See id.*, ¶¶150-256. On October 14, 2014, Dr. Feinstein was deposed concerning the scope and the bases for his loss causation and damages opinions.

III. DR. FEINSTEIN'S QUALIFICATIONS

Dr. Feinstein is an Associate Professor of Finance at Babson College where he has taught courses concerning the subjects of capital markets, investments, equity analysis, financial management, quantitative methods and security valuation. He received a Ph.D. in Economics from Yale University, an M.A. in Economics from Yale University and a B.A. in Economics from Pomona College. Dr. Feinstein worked as an economist at the Federal Reserve Bank of Atlanta and holds a Chartered Financial Analyst designation from the CFA Institute. He has published extensively in the field of financial economics, with professional papers appearing in, among others, the *Atlanta Federal Reserve Bank Economic Review, The Journal of Risk, The Journal of Forensic Economics, Managerial Finance* and *Risk Management*. Dr. Feinstein is the founder and president of Crowninshield Financial Research, Inc., a financial economics consulting firm. *See* Feinstein Report, Exhibit-2 (*curriculum vitae*). As the Court is aware, Dr. Feinstein submitted an opinion concerning market efficiency in support of plaintiffs' motion to certify the class. *See* Dkt. No. 106.

IV. ARGUMENT

A. Dr. Feinstein Has Reliably Estimated a Statistically Significant Drop in the Price of Pfizer's Common Stock on January 26, 2009

An "event study" is a widely accepted methodology used by economic experts in securities class actions to determine whether a stock price decline was causally connected to the materialization of a previously concealed risk. *See, e.g.*, *Sciallo v. Tyco Int'l*, No. 03 Civ. 7770 (KBF), 2012 U.S. Dist. LEXIS 96967, at *8-*9 (S.D.N.Y. July 9, 2012) (noting the "most prevalent method" of establishing loss causation "is through an 'event study' prepared by an expert witness") (citing *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 511-12 (2d Cir. 2010)). Defendants' expert, Dr. Lehn, agrees that Dr. Feinstein has reliably conducted an event study to identify the statistically significant drop in the price of Pfizer's common stock on January 26, 2009. Smith

Decl., Ex. 2 (October 24, 2014 Deposition Transcript of Kenneth Lehn ("Lehn Depo")) at 98:2-99:10, filed concurrently herewith. Further, Dr. Lehn agrees that Pfizer stock suffered a negative residual return of 11.53% on that day attributable to the disclosure of Company-specific information. *See* Smith Decl., Ex. 3 ("Lehn Report"), ¶¶20-21 & n.15; Lehn Depo. at 102:3-9. In fact, ***Dr. Lehn adopted Dr. Feinstein's residual return estimate*** because each expert's estimate was virtually identical. *See* Lehn Depo. at 98:16-99:10.[1] In adopting the results of Dr. Feinstein's event study analysis, defendants' expert also concedes that the announcement of the $2.3 billion charge for resolution of the DOJ investigation, as well as the 90% plunge in 4Q08 versus 4Q07 earnings due to the charge, was new, Company-specific information announced by Pfizer on January 26, 2009. *See* Lehn Depo. at 104:22-106:22; Lehn Report, ¶17.

B. Dr. Feinstein Has Reliably Opined that Pfizer's January 26, 2009 Stock Price Drop Was Substantially Caused by Materialization of Risks Concealed by the Fraud

In addition to undertaking an event study analysis, Dr. Feinstein has articulated the factual basis for his opinion that disclosure of the record $2.3 billion charge to resolve the DOJ's investigation was a substantial cause of the Company's stock price drop on January 26, 2009. *See* Feinstein Report, ¶¶118-149;[2] *Vivendi*, 634 F. Supp. 2d at 353, 364 (noting "[o]nce plaintiffs' expert has isolated days where the stock declines were statistically significant relative to these downturns, he must consider firm-specific events that might have caused those declines"). In reaching his loss

[1] Defendants do not dispute that Dr. Feinstein's event study analysis accounted for and virtually eliminated the possibility that any macro-economic or industry-related news disclosed on January 26, 2009 had any impact on Pfizer's stock price drop. *See* Lehn Depo. at 103:1-104:21; *see In re Vivendi Universal, S.A., Sec. Litig.*, 634 F. Supp. 2d 352, 357 (S.D.N.Y. 2009) (observing that an event study "regression analysis identifies days in which a company's value decreases net of market and industry" forces).

[2] In contrast, defendants' expert baldly suggests, without any analysis at all, that the disclosure of a $2.3 billion fine had zero impact on Pfizer's stock price.

causation opinion, Dr. Feinstein considered Pfizer's January 26, 2009 disclosures of firm-specific events, related evidence about those disclosures and other information publicly disseminated on and immediately after January 26, 2009.[3] Feinstein Report, ¶¶108-109, 118-149 & Exhibit-1.

Dr. Feinstein considered Pfizer's January 26, 2009 pre-market-open press release which revealed the Company's 4Q08 earnings had declined 90%, to $0.04 per share, compared to the same period a year earlier due to the $2.3 billion resolution of the DOJ's investigation. *See id.*, ¶¶108, 145. Dr. Feinstein considered Pfizer's discussion of the $2.3 billion charge during the Company's January 26, 2009 analyst conference call. *Id.*, ¶108 (defendants admitting that the "'significant year-over-year decrease[] [was] primarily driven by a $2.3 billion pre-tax and after-tax charge'" to settle the DOJ's allegations of the off-label promotion). Dr. Feinstein considered analyst reports issued in the immediate aftermath of Pfizer's January 26, 2009 curative disclosure, a number of which specifically discussed the $2.3 billion charge and its impact on Pfizer's 4Q08 and FY 2008 earnings. *Id.*, ¶109. For instance, in the wake of Pfizer's disclosure of its 4Q08 earnings press release, Hilliard Lyons said "'[r]eported [4Q08] EPS declined sharply due to charges. Fourth quarter EPS from continuing operations were $0.04 versus $0.40 last year. . . . There was also a $2.3 [billion] pretax charge for litigation to settle claims related to Celebrex and Bextra . . . .'" *Id.*, ¶109. Cowen and Company reported "'Pfizer incurred a fourth quarter charge of $2.3B for allegations of past off-label promotional practices concerning Bextra . . . .'" *Id.* BMO stated "'[r]eported EPS of $0.04 included $0.61 in charges including a $0.34 charge related to legal settlements.'" *Id.*

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[3] Defendants' expert, Dr. Lehn, agrees that this is an accepted methodology for assessing loss causation and, in fact, utilized the same methodology in reaching certain of his opinions. *See* Lehn Report, ¶¶31-44 (reviewed commentary of various market participants, but ignored defendants' own public statements and commentary of major news outlets); *id.*, ¶¶108, 114-115 (reviewed news stories, Securities and Exchange Commission ("SEC") filings and analyst reports in connection with a cross-sectional event study analysis of Pfizer's competitors).

Dr. Feinstein also relied on news reports issued in the immediate aftermath of the Company's January 26, 2009 curative disclosure. *See* Feinstein Report, Exhibit-1. Further, no fewer than 15 articles dated between January 26 and January 28, 2009, specifically discussed Pfizer's disclosure of the $2.3 billion fine. *See* Smith Decl., Exs. 4-18. For example, on January 26, 2009, a *Dow Jones Newswires* article reported "fourth-quarter net income plunged 90% on $2.3 billion in litigation charges." Smith Decl., Ex. 12. The same day, *The Wall Street Journal Health Blog* disseminated an article entitled "Pfizer Takes $2.3B Charge Tied to Bextra Probe." Smith Decl., Ex. 7. Similarly, on January 27, 2009, *The Wall Street Journal* issued an article entitled "Pfizer Sets $2.3 Billion Settlement Agreement with U.S. Tied to Alleged Off-Label Marketing of Painkiller Bextra." Smith Decl., Ex. 17. On the same day, *The New York Times* reported "[t]here was too much gloomy news to deal with [including the Company] taking a $2.3 billion charge to settle a federal investigation over illegal off-label promotion." Smith Decl., Ex. 11.[4] Dr. Feinstein considered and relied on more

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[4] Defendants make much ado about Dr. Feinstein's testimony regarding "anomalous" analyst reports and whether Pfizer had intentionally confounded the market on January 26, 2009. *See* Memorandum in Support of Defendants' Motion to Exclude Plaintiffs' Expert Steven Feinstein (Dkt. No. 250) ("Defs.' Mem.") at 19-20. Defendants however, mischaracterize Dr. Feinstein's testimony as "opinions" that must be excluded. *See id.* As defendants are fully aware, Dr. Feinstein neither offered an opinion that defendants tried to blame the impact of the disclosure of the DOJ fine on other news nor does he intend to offer that opinion at trial. *See* Feinstein Report, ¶¶2, 17-18. Still, the evidence supports that Pfizer intentionally confounded the news on January 26, 2009. *See* Smith Decl., Ex. 19 at PFE DERIV 01137493 (January 23, 2009 Disclosure Committee Minutes stating "[t]he Chair noted that the meeting was being held one business day earlier than scheduled because the fourth quarter 2008 earnings release will be issued on Monday, January 26, earlier than scheduled, so that it can be issued in tandem with the release announcing the merger agreement with Wyeth."). The market ramifications of the premature "leak" of the Wyeth merger were not lost on Pfizer senior management. *See* Smith Decl., Ex. 20 at PFE DERIV 01125205 (noting on January 23, 2009, "[t]hought [the *WSJ*] were going to hold off one more day"). Further, in a January 27, 2009 article, *The Wall Street Journal* reported that Pfizer's Wyeth takeover announcement "came amid the kind of bleak industry news that caused Pfizer Chief Executive Jeffrey Kindler to search for a big deal to begin with" including a fourth-quarter "$2.3 billion charge to resolve" previously disclosed investigations by U.S. prosecutors and allegations it promoted "off-label marketing of the withdrawn painkiller Bextra." Smith Decl., Ex. 21.

than sufficient information and data to support his loss causation opinion.[5]

In an effort to counter the breadth of the record evidence that Dr. Feinstein considered, defendants repeatedly argue that "not one of [the hundreds of analyst reports] attributes" the January 26, 2009 stock price drop to the announcement of the $2.3 billion 4Q08 charge. Defs.' Mem. at 16; *see also id*. at 2, 18. From that flawed premise, defendants contend that Dr. Feinstein could not have reliably opined that the Company's stock price drop was caused by revelation of the resolution of the DOJ's investigation and $2.3 billion fine. *Id.* at 16-18. What defendants conveniently ignore is that not a single one of those "hundreds" of analyst reports actually attribute any proportion of the January 26, 2009 stock price drop to any of the information revealed by Pfizer that day. Not one analyst said, "the stock price dropped because of the Wyeth merger." Not one analyst said, "the stock price dropped because of the dividend cut." Not one analyst said "the stock price dropped because of the 2009 revenue and earnings guidance." By defendants' reasoning, that must mean Pfizer's stock price dropped for no reason at all. Defendants' own expert, however, has acknowledged that Pfizer's stock price did drop sharply on January 26, 2009 and that drop was in response to the disclosure of Company-specific information. *See* Lehn Depo. at 98:16-99:10, 104:22-106:22.

Furthermore, defendants' "not one analyst attributed the stock price drop to the DOJ settlement" argument is entirely inconsistent with their suggestion that Pfizer's stock price must have dropped due to news unrelated to the announcement of the $2.3 billion charge. *See* Defs.' Mem. at 4

[5] While defendants virtually ignore contemporaneous news reports on, and immediately after, January 26, 2009, their expert has conceded that experts commonly rely on news reports as part of the economic approach in reaching loss causation opinions. *See* Smith Decl., Ex. 22 at 175:3-176:14 (Dr. Lehn admitting that news reports, "as part of economic analysis that would be evidence, yes"); Smith Decl., Ex. 23 at 82:21-84:3 (Dr. Lehn relying on news releases for the purpose of opining there was no corrective disclosure).

("Other potentially significant information reached the market on the same day, including the fourth-quarter financial results of Wyeth . . . ."); *id*. at 17 (suggesting "the company's acquisition of Wyeth, the reduced 2009 earnings guidance, and the 50-percent dividend cut" caused the stock price decline); *id*. at 24-25 (the "effect of a dividend cut [on Pfizer's stock price] almost certainly would be pronounced").

In a further attempt to attack Dr. Feinstein's loss causation opinion, defendants claim that not one out of 200 analyst reports issued between January 26, 2009 and September 2, 2009 discussed the $2.3 billion resolution of the DOJ investigation. *See id*. at 17-18. The fact is that four analyst reports issued in the immediate aftermath of Pfizer's January 26, 2009 disclosures specifically discussed the $2.3 billion settlement and its implications for the Company's 4Q08 financial results.[6] Defendants' expert admits as much. *See* Lehn Report, ¶36; Lehn Depo. at 130:5-14. Defendants also argue that Dr. Feinstein's loss causation opinion should be excluded because he cited to certain analyst reports but did not cite others. *See* Defs.' Mem. at 16-19.[7] Tellingly, defendants' expert

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[6] To make their claim about "hundreds of analyst reports," defendants look past the analyst reports they concede discussed the resolution of the DOJ investigation, and lump together analyst reports published about Pfizer in the eight months ***after*** the period January 19, 2006 to January 23, 2009 (the "Class Period") (February to September 2009). *See* Defs.' Mem. at 18. Nowhere do defendants or their experts explain why there would be any expectation that analyst reports issued months after the end of the Class Period would be expected to comment on an earlier stock price decline. In fact, as discussed above, none of those later analyst reports linked the January 26, 2009 stock price drop to ***any*** information disclosed that day, even though it was the largest decline in Pfizer's stock price in over three years. Defendants' expert, moreover, does not identify any basis for why considering analyst reports issued months after the relevant stock price decline would be relevant, let alone requisite, to a loss causation or damages analysis.

[7] Defendants misleadingly critique Dr. Feinstein's methodology by asserting his report "relie[d] on only two analyst comments from early 2008 and does not . . . cite to a single report after the January 2009 announcement" to conclude that investors believed the DOJ investigation was important. *See* Defs.' Mem. at 16 n.31. Again, Dr. Feinstein's report clearly establishes that he considered and relied on hundreds of analyst reports in issuing his opinions. *See* Feinstein Report, Exhibit-1. The fact that Dr. Feinstein did not quote from analyst reports defendants think are better for their position

selectively quoted from a limited number of analyst reports. *See, e.g.*, Lehn Report, ¶¶57, 69-70, 72. Apparently, defendants believe that is only appropriate for their own experts.

The parties' experts agree that the review of contemporaneous analyst reports, a company's disclosures and contemporaneous news reports is a methodology utilized by economists in reaching opinions concerning loss causation. Defs.' Mem. at 16. Defendants cannot dispute that Dr. Feinstein relied on hundreds of analyst reports in issuing his opinions. *See* Feinstein Report, Exhibit-1. The fact that defendants want Dr. Feinstein to quote from analyst reports other than those he did, however, provides no basis for exclusion and "go[es] to the weight, not the admissibility of his testimony." *Gaudette v. St.-Gobain Performance Plastics Corp.*, No. 1:11-cv-932 (MAD/RFT), 2014 U.S. Dist. LEXIS 41790, at *20-*21 (N.D.N.Y. Mar. 28, 2014); *see also Campbell v. Metro. Prop. & Cas. Ins. Co.*, 239 F.3d 179, 186 (2d Cir. 2001) (same); *McCullock v. H.G. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995) (same); *Cedar Petrochem.*, 769 F. Supp. 2d at 284-85 (holding where experts "base[] their conclusions on their own review of documents . . . [w]hether those facts are sufficient to render their opinions persuasive is a question for the finder of fact"). Thus, Dr. Feinstein's loss causation opinion is admissible under Rule 702 and defendants may confront him with what they believe to be "contrary evidence" at trial. *See Daubert*, 509 U.S. at 596.

Defendants next contend that Dr. Feinstein's loss causation opinion "overstates" losses attributable to the alleged fraud. *See* Defs.' Mem. at 21-22. Specifically, defendants argue "[p]laintiffs 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." *Id.* at 21. Defendants' argument fails because it misconstrues the law concerning how damages are estimated in a

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does not render his methodology or opinions unsound. *See Cedar Petrochem., Inc. v. Dongbu Hannong Chem. Co.*, 769 F. Supp. 2d 269, 284-85 (S.D.N.Y. 2011).

materialization of the risk case.[8] Indeed, the identical argument defendants make here was rejected in *Vivendi*:

> [S]uppose Vivendi had concealed from the public in December 2001 a 50% risk that it would experience a liquidity crisis in May 2002. Had plaintiffs been aware of that risk, they would have paid [euro] X less for the stock. Logically, had the risk been 100%, they would have paid even less (although not necessarily [euro] 2X less). If Vivendi does experience a liquidity crisis in May 2002, the risk has become 100%, and the price decline would reflect what would have happened had a 100% risk been announced in December 2001 rather than a 50% risk. Accordingly, defendants argue, plaintiffs must disaggregate the additional damages caused by the materialization of the risk from those attributable to the risk itself. ***Defendants cite to no case law for this argument, and the Court has not found any***.[9]

Vivendi, 634 F. Supp. 2d at 370-71 (adding "it is hard to see how price declines allegedly caused by the materialization of the risk should not be incorporated into plaintiffs' damages"). Like the defendants in *Vivendi*, defendants here have cited no case law to support their argument. Similarly, the Court should reject it as meritless.

Assuming that defendants' argument is legally sound, which it is not, their contention does not fit the facts of this case. Defendants' argument is premised on the notion that Pfizer had disclosed all material facts about the DOJ's investigation into rampant off-label promotion of pharmaceutical products during the Class Period. *See* Defs.' Mem. at 8 (asserting Pfizer "updated" its SEC disclosures concerning the DOJ investigation). But, defendants have come forward with absolutely no evidence that Pfizer's stock price dropped during the Class Period in response to a single purported "updated" disclosure concerning the DOJ investigation. *See* Lehn Depo. at 126:19-

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[8] Defendant's argument also conflates the elements of damages and loss causation. *See Vivendi*, 634 F. Supp. 2d at 364 (observing "it is important not to confuse causation with damages"). For purposed of loss causation, the issue is whether some part of a stock price decline is causally connected to a fraud related disclosure. *Id*. How much of the decline was due to the fraud is a damages issue.

[9] All emphasis is added and citations and footnotes are omitted, unless otherwise noted.

127:8 (admitting he had not identified any economically meaningful stock price drop). As such, defendants have no basis to criticize Dr. Feinstein for not netting Pfizer stock price drops during the Class Period from his $1.26 per share estimate of damages. And, for good reason. Defendants have come forward with no evidence that investors paid less for Pfizer's stock during the Class Period due to the Company's purportedly informative descriptions of the DOJ investigation. *See Vivendi*, 634 F. Supp. 2d at 370-71 ("Had plaintiffs been aware of that risk, they would have paid . . . less for stock."); *see also* Lehn Depo. at 126:19-127:8 (admitting that whether shareholders paid less for Pfizer's stock during the Class Period was not a part of his analysis).

Because Dr. Feinstein has reliably opined that the January 26, 2009 disclosure of the resolution of the DOJ investigation – the materialization of the concealed risk – substantially caused plaintiffs' economic losses, the Court should deny defendants' motion to exclude his loss causation opinion. *See, e.g.*, *Gould v. Winstar Commc'ns, Inc.*, 692 F.3d 148, 161-62 (2d Cir. 2012) (reversing summary judgment and holding that even if the defendant could establish that disclosure of non-fraud factors resulted in a substantial decline in Winstar's stock price, it "hardly foreclose[s] the reasonable inference that some part of the decline was substantially caused by [Winstar's] disclosure about the fraud itself . . . a jury reasonably could [still] find the requisite 'causal link between [defendants'] alleged misconduct and the economic harm ultimately suffered'") (quoting *Emergent Capital Inv. Mgmt., LLC v. Stonepath Grp., Inc.*, 343 F.3d 189, 197 (2d Cir. 2003)).

C. Dr. Feinstein Has Reliably Estimated the Damages Caused by Defendants' Fraudulent Conduct

Defendants devote a substantial amount of their brief to criticizing Dr. Feinstein's reliance on the "constant inflation ribbon" methodology to estimate damages. *See* Defs.' Mem. at 1, 3, 7-14. What defendants fail to acknowledge is that courts have widely recognized the constant-dollar inflation ribbon as the gold-standard for estimating class-wide damages in securities fraud cases.

Contrary to defendants' arguments, Dr. Feinstein's methodology is eminently reasonable and will assist a jury in making factual findings concerning damages. *See* Fed. R. Evid. 702.

Traditionally, §10(b) damages are calculated using the "out-of-pocket" damages rule. *See Rosado v. China North East Petroleum Holdings, Ltd.*, 692 F.3d 34, 38 (2d Cir. 2012) (noting a defrauded buyer is entitled to damages equal to the difference between the price paid and the value of the stock when purchased) (citing *Levine v. Seilon, Inc.*, 439 F.2d 328, 334 (2d Cir. 1971); *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 168 (2d Cir. 1980)). Indeed, the "out of pocket" rule of damages was adopted by the Supreme Court in *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 155 (1972).

It is the generally accepted practice to estimate "out-of-pocket" damages in securities fraud cases by reference to the decline in the stock price when an allegedly concealed risk has materialized. *See Vivendi*, 634 F. Supp. 2d at 358-59, 370-71 & n.6 (acknowledging the constant-dollar inflation ribbon methodology to be a reliable estimate of per share inflation in materialization of the risk cases);[10] *In re Novatel Wireless Sec. Litig.*, No. 08cv1689 AJB (RBB), 2013 U.S. Dist. LEXIS 154599, at *36-*37 (S.D. Cal. Oct. 25, 2013) (finding the "commonly accepted method to

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[10] *See also In re BP p.l.c. Sec. Litig.*, MDL No. 10-md-2185, 2014 U.S. Dist. LEXIS 69900, at *76-*79, *88 n.14 (S.D. Tex. May 20, 2014) ("[T]he 'out-of-pocket' measure of damages employed in most securities fraud cases is particularly consonant with the 'fraud-on-the-market' theory. Because the value of the unpriced risk is considered from the perspective of the marketplace as a whole, it remains constant across the [class] of investors."). It is noteworthy that defendants cite to an earlier opinion in the *BP* case, but disregard Judge Ellison's controlling May 20, 2014 opinion. *See* Defs.' Mem. at 12 (citing only to *In re BP P.L.C. Sec. Litig.*, MDL No. 10-md-2185, 2013 U.S. Dist. LEXIS 173303 (S.D. Tex. Dec. 6, 2013)). Judge Ellison's earlier opinion, moreover, is clearly distinguishable from this case. At that time in the *BP* case, plaintiffs' damages theory created individualized issues precluding class certification because two distinct frauds had been alleged (*i.e.*, one fraud concerning misleading statements made ***before*** the Deepwater Horizon explosion and the second fraud concerning misleading statements made ***after*** the Deepwater Horizon explosion). *BP*, 2013 U.S. Dist. LEXIS 173303, at *55. As a result, a single damages analysis was not appropriate. Here, plaintiffs have alleged a single, consistent fraud throughout the Class Period.

calculate the value line known as backcasting" was a "reasonable and logical" method to assess the true value and artificial inflation in the stock price prior to the date of the corrective disclosure); *In re Enron Corp. Sec. Derivative & "ERISA" Litig.*, 529 F. Supp. 2d 644, 716 (S.D. Tex. 2006) (observing the "out-of-pocket measure . . . allows 'a purchaser to recover the difference between the purchase price and the true value of the securities absent the alleged fraud as measured by the correction in the market price following [a] curative disclosure'"); *In re Royal Dutch/Shell Transp. Sec. Litig.*, 404 F. Supp. 2d 605, 610 (D.N.J. 2005) (observing the out-of-pocket rule permits "a purchaser to recover the difference between the purchase price and the true value . . . measured by the correction in the market price following curative disclosure"); *Goldberg v. Household Bank, F.S.B.*, 890 F.2d 965, 966-67 (7th Cir. 1986) (holding that the stock price "drop when the truth appears is a good measure of the value of the information, making it the appropriate measure of damages"); *Harris v. Union Elec. Co.*, 787 F.2d 355, 368 (8th Cir. 1986) (holding that the true value of securities when sold "is reflected by the drop in the market price once the fraud was discovered"); *Blackie v. Barrack*, 524 F.2d 891, 909 n.25 (9th Cir. 1975) (noting that "the change in [stock] price after a corrective release" is "evidence of the inflation when purchased").

Defendants conspicuously avoid authority, including that from within this District that clearly explains why the constant-dollar inflation ribbon methodology is particularly appropriate in cases like this one:

> [I]t is hard to see how price declines should not be incorporated into plaintiffs' damages. Plaintiffs allege that they could not have assumed the risk . . . because it was concealed from them. Defendants are essentially arguing that plaintiffs should bear a risk they did not assume and that was intentionally concealed from them. Imposing liability for this loss would not be downside insurance for investors. ***Not imposing liability, however, might be a windfall for fraudsters***.

Vivendi, 634 F. Supp. 2d at 371.

Defendants' mere suggestion that the constant-dollar method is unreliable here because "it does not fit the facts of this case" is as self-serving as it is meritless. At the beginning of the Class Period, Pfizer reported the results of its 2006 Risk Inventory and Analysis. *See* Smith Decl., Ex. 24 at PFE-DERIV 010002335-55. Pfizer concluded that illegal off-label promotion was "***Almost Certain***" to occur. *Id.* at PFE DERIV 01002350. Further, ***Pfizer classified off-label promotional risk at the highest possible level***. *Id.* The likely impacts on Pfizer as a result of its illegal conduct being publicly exposed included:

- ***Greater than a $1.0 billion reduction in profitability;***
- ***Sustained loss of market share for the Company's products;***
- ***Significant diminution in the reputation of Pfizer; and***
- ***A sustained reduction in market capitalization.***

Id. at PFE DERIV 01002341. In June 2007, moreover, defendant Ian C. Read warned the Company's Audit Committee that the "***[r]eputational impact***" on Pfizer as a result of promoting its products off-label "***is arguably among the greatest exposures facing the company***." Smith Decl., Ex. 25 PFE DERIV 00003791-99 at 92. According to defendants' own Class Period admissions, the constant-dollar inflation ribbon is an ***exact fit*** to the facts here. *See Vivendi*, 634 F. Supp. 2d at 371 (the constant-dollar inflation approach is most appropriate where the risk of the loss is virtually certain at the beginning of the Class Period and where the magnitude of that risk is significant). Defendants clearly understood the impact revelation of the unlawful off-label promotion would have on Pfizer's stock price. That is precisely why they deliberately withheld those risks from investors.

Utilizing a constant-dollar inflation ribbon, Dr. Feinstein estimated $1.26 per share in "out-of-pocket" damages. *See* Feinstein Report, ¶¶153-257. His estimate of Class Period inflation is reliably based on Pfizer's stock price drop on January 26, 2009, when the Company revealed the

$2.3 billion resolution of the DOJ investigation. *See id.*, ¶¶229-238. Dr. Feinstein utilized this widely-accepted and traditional method of estimating damages with a constant inflation ribbon because defendants' misleading statements and omission are alleged to have concealed risks associated with the DOJ's investigation into Pfizer's rampant and illegal off-label promotion of pharmaceutical products throughout the Class Period. *See id.*, ¶¶29-32; Dkt. No. 71, ¶¶2-20; Declaration of Amanda M. MacDonald in Support of Defendants' Motion to Exclude Plaintiffs' Expert Steven Feinstein (Dkt. No. 251) ("MacDonald Decl."), Ex. D (October 14, 2014 Deposition Transcript of Steven Feinstein ("Feinstein Depo.")) at 108:16-116:4. As alleged by plaintiffs, at all times during the Class Period investors were deprived of the opportunity to price those risks into Pfizer's stock and, thus overpaid for their investment. *See* Dkt. No. 71, ¶¶19, 132, 135, 154-156. Accordingly, Dr. Feinstein's damage estimate methodology is an excellent fit with the facts and plaintiffs' theory of liability.

Defendants contend that Dr. Feinstein's estimate of $1.26 per share inflation during the Class Period is "pure speculation" because Pfizer's accrual for their illegal off-label promotions could have been lower at the beginning of the Class Period versus the $2.3 billion accrual announced on January 26, 2009.[11] *See* Defs.' Mem. at 8-11. The Court should reject this argument. Indeed, Dr. Feinstein explained why defendants' critique here is misplaced:

> Q. You understand that other experts in other cases identify or attempt to identify the amount of inflation that was either added or removed, based on statements that are made during the class period.

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[11] Plaintiffs' accounting expert, D. Paul Regan, has opined that Pfizer should have taken a ***minimum*** of a $1.0 billion charge at the beginning of the Class Period and that the $1.0 billion was "***conservative*** because . . . ***Pfizer's Bextra conduct was, in many ways a repeat of the behavior determined to be illegal in the Neurontin settlement***." Smith Decl., Ex. 26 (Supplemental Expert Report of D. Paul Regan ("Regan Report")) at 32. Had Pfizer made that disclosure, investors could have come to the conclusion that a settlement amount for the DOJ investigation would substantially exceed the initial reserve the Company should have made.

> A. . . . ***[My] report*** goes through a very lengthy narrative of the history of the company over the class period and ***spells out how misleading statements and misrepresentations maintained the concealment of the really germane fact, which is, that the company was engaged in off-label marketing***.
>
> So, I mean, you – the first half of [my] report is all about that.
>
> * * *
>
> Q. And please listen to my question Professor Feinstein [question read back].
>
> * * *
>
> A. The analysis has to fit the facts of the case. I describe the facts of the case. This analysis fits the facts of the case. Because of the kinds of statements that were made, a constant inflation ribbon is compelled –
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> * * *
>
> Q. . . . You would agree that what you're trying to model is not the amount that was paid. It was the difference between what the Plaintiffs contend should have been the reserve and what ultimately was paid.
>
> * * *
>
> A. My answer to that is no. What I'm trying to model is the difference between what the company stock was trading at and what it would have been trading at had there been full information . . . disclosed.

Feinstein Depo. at 108:16-116:4; *see Comcast Corp. v. Behrend*, _U.S._, 133 S. Ct. 1426, 1433 (2013) (holding that damage estimates need not be exact, but must be consistent with plaintiff's theory of liability).

As Dr. Feinstein testified, the use of a constant inflation ribbon is reasonable and appropriate because it fits facts of this case. Pfizer concluded before the Class Period even began that it would be forced to settle with the DOJ and, thus, materialization of that concealed risk was a virtual certainty. *See* Regan Report at 16-19. Defendants knew how damages were estimated for the criminal off-label promotion of Neurontin and should have applied that knowledge for the purpose of fairly apprizing investors of the risks associated with the DOJ investigation. *Id*. at Exhibit 2. ***Here***, ***Pfizer should have taken a minimum of a $1.0 billion accrual in January 2006 and should***

have accurately described the nature of the government case. *See id*. Pfizer, however, never did. Throughout the Class Period, Pfizer failed to even inform investors that the focus of the DOJ's investigation concerned the off-label promotion of the Company's pharmaceutical products. Further, the DOJ had been threatening Pfizer with criminal indictment during the Class Period, which would have been the equivalent of a corporate death penalty (Pfizer lamenting the "mere indictment of Pfizer . . . could result in Pfizer's exclusion from federal health care programs [and] could very well inflict serious harm on the future operations of the compan[y] and innocent shareholders"). *See* Smith Decl., Ex. 27 at PFE-JONES 00007064. Rather than disclose these risks, however, Pfizer misleadingly assured investors that Pfizer's financial position would never be affected by the DOJ's investigation. Based on Dr. Feinstein's opinions and the record, a reasonable jury could find that had defendants appropriately disclosed a minimum $1.0 billion charge, accurately described the nature of the DOJ's case – at any time during the Class Period – the Company's stock price would have dropped by $1.26 per share. Accordingly, application of a constant inflation ribbon in this case is reasonable and appropriate. *Vivendi*, 634 F. Supp. 2d at 358-59, 370-71 & n.6; *Liberty Media Corp., LMC v. Vivendi Universal, S.A.*, 923 F. Supp. 2d 511, 525 (S.D.N.Y. 2013).

In addition, defendants' suggestion concerning damages – *i.e.*, it has to be estimated with the same precision as one would hope for when calculating safety tolerances of a nuclear reactor – finds no basis in the law. *See* Defs.' Mem. at 22. Once liability has been established, the jury may determine the amount of damages by a just and reasonable estimate. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-63 (1931); *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir. 1983). The jury is not required to calculate damages with mathematical precision; a verdict is appropriate if there is sufficient evidence from which to intelligently estimate damages. *Rowe v. Maremont Corp.*, 850 F.2d 1226, 1243 (7th Cir. 1988); *see*

Story Parchment, 282 U.S. at 563 ("[W]hile the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate."). Accordingly, when calculating damages, a degree of uncertainty is acceptable. *See MCI*, 708 F.2d at 1161 ("[T]he Supreme Court has been willing to accept a degree of uncertainty in the calculation of damages . . . .").

In *Liberty Media*, the same argument defendants make here concerning the requisite precision of damages was squarely rejected. In that case, defendants contended that because plaintiffs' expert reached the same amount of inflation based on two different sets of misstatements in the "Class" and "Liberty" trials, his opinions concerning damages must have been imprecise and unreliable. *Liberty Media*, 923 F. Supp. 2d at 525. The Court, however, rejected defendants' argument, noting "Vivendi's challenge is without merit [because] the damages analysis did not depend on the assumption that every misrepresentation by Vivendi could be independently monetized and subtracted from Liberty's damages . . . . [Plaintiffs' expert] calculated the damages Liberty suffered as a result of this inflation by analyzing the declines in Vivendi's stock price on the nine days during which the market responded to the materialization of the hidden . . . risk." *Id.* It is undisputed that Dr. Feinstein has followed and reasonably applied the same approach in this case. Defendants, moreover, have identified no case law stating that the methodology employed by Dr. Feinstein is unacceptable.

In further support of their argument that Dr. Feinstein improperly relied on the constant inflation ribbon methodology, defendants place heavy reliance on Judge Swain's cursory May 21, 2014 order in *In re Pfizer Inc. Sec. Litig*, No. 04 Civ. 9866 (LTS) (HBP), 2014 WL 2136053 (S.D.N.Y. May 21, 2014). *See* Defs.' Mem. at 11-13. The only similarity between *In re Pfizer* and

this case, however, is the name of the corporate defendant. As an initial matter, defendants have failed to provide the Court with the factual background necessary to place Judge Swain's ruling in context. Prior to excluding the expert in *In re Pfizer*, Judge Swain granted summary judgment in favor of defendants on two of seven curative disclosure dates and dismissed statements made by Pharmacia (a company acquired by Pfizer). *See In re Pfizer Inc. Sec. Litig.*, 936 F. Supp. 2d 252, 267-68, 270-71 (S.D.N.Y. 2013). ***After*** issuing a detailed summary judgment opinion, the expert was afforded an opportunity to supplement his opinions to address Judge Swain's rulings. In doing so, however, the expert estimated damages "even higher than what he originally calculated." Smith Decl., Ex. 28 at 1. Critically, the expert admitted that he failed to provide any explanation for his supplemental opinions on damages despite being afforded two opportunities to do so. *See* Smith Decl., Ex. 29 at 2, 6 ("again, the Supplemental Report did not specifically explain" the expert's new conclusions). Thereafter, on May 21, 2014, Judge Swain precluded plaintiffs' loss causation and damages expert from testifying at trial because, despite being given multiple opportunities, he "proffered no explanation" for his supplemental opinions on damages. *See Pfizer*, 2014 WL 2136053.

Indeed, the differences between this case and *In re Pfizer* are glaring. First, Dr. Feinstein has provided defendants and this Court explanations for each and every one of his opinions. Defendants may not like those explanations, but they cannot say that Dr. Feinstein failed to disclose them. *See* Feinstein Report, ¶¶153-257; Feinstein Depo. at 126:11-127:7, 127:18-128:11, 176:19-175:9, 187:24-188:24, 204:11-23. Second, plaintiffs allege a single curative disclosure date – January 26, 2009 – not seven dates as was the case in *In re Pfizer*. Accordingly, Judge Swain's principle reason for excluding the expert – *i.e.*, there was "no explanation" for the 9.7% parallel "stock inflation reduction attributable to the two excluded disclosure events" – has no bearing here. *See Pfizer*, 2014

WL 2136053, at *1. Third, defendants are placing the cart before the horse. This Court has not dismissed a single one of plaintiffs' alleged misstatements. Even if the Court were so inclined, Dr. Feinstein has explained that, given the facts here, it would have no impact on his estimate of per share inflation because each of defendants' alleged misstatements concealed the risks associated with the DOJ investigation. *See* Feinstein Depo. at 126:11-127:7, 127:18-128:11, 176:19-175:9, 187:24-188:24, 204:11-23.

1. Dr. Feinstein Has Reliably Isolated Damages Associated with Fraud-Related Factors

Dr. Feinstein has bolstered the usefulness of his opinions by estimating the price impact of both fraud and non-fraud factors. To make a showing of damages proximately caused by defendants' conduct, plaintiffs' have produced sufficient evidence to allow a jury to "ascribe some rough proportion of the whole loss" to the alleged fraud. *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 158 (2d Cir. 2007); *see also Vivendi*, 634 F. Supp. 2d at 365 (plaintiffs should disaggregate "some rough percentage of the declines from losses resulting from other, non-fraud-related events") (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342-43 (2005); *Lattanzio*, 476 F.3d at 158).

Based on Dr. Feinstein's event study analysis and his consideration of relevant evidence and data, he estimated that the announcement of the $2.3 billion resolution of the DOJ investigation accounted for $0.34 of plaintiffs' $1.26 per share economic losses. Feinstein Report, ¶¶229-238. Dr. Feinstein also estimated additional damages due to reputational impact – here, $0.92 per share – attributable to the announcement of the resolution of the DOJ investigation. *See id*., ¶¶252-256. Dr. Feinstein based his estimate of per share reputational damages on a range of facts, including: (i) Pfizer's January 26, 2009 announcement that it was forfeiting $2.3 billion in assets; (ii) Pfizer's January 26, 2009 concession that it would pay $2.3 billion in connection with the DOJ's

investigation of illegal off-label promotion; (iii) the negative impact to Pfizer's future earnings because it was forced to curtail its illegal off-label promotion; and (iv) Pfizer would incur additional costs in the future to conform and augment its healthcare compliance programs to remain in good graces of federal regulators (*e.g.*, instituting a host of operational changes to comply with a fourth Corporate Integrity Agreement to be enforced by the Office of Inspector General). *See id.*, ¶¶229-256.

In estimating the $0.92 per share in reputational damages, moreover, Dr. Feinstein relied on widely-accepted research in the field of financial economics. *Id.*, ¶252 n.193. This is precisely what is expected with an expert opinion. *See In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 2d 230, 284 (E.D.N.Y. 2007) (the basis for an expert's testimony should follow from research conducted independent of the case at hand). Specifically, Dr. Feinstein relied on the methodology articulated by Karpoff, Lee and Martin ("Karpoff") in 2008, in an article entitled "The Costs to Firms Cooking the Books." Feinstein Report, ¶252 n.193. Karpoff's model, thoroughly tested and based on years of empirical data, holds that "for each dollar a firm misleadingly inflates its market value, on average, it loses this dollar when its misconduct is revealed, plus an additional $2.71, due to reputational loss.'" *Id.*, ¶252. Defendants concede that Karpoff's article was peer reviewed and published in the *Journal of Financial and Quantitative Analysis*, an academic journal of stellar reputation. *See* Lehn Depo. at 144:3-12. Dr. Feinstein brought his considerable professional experience and judgment to bear in concluding that application of Karpoff's model was appropriate under the set of facts presented here. *See* Feinstein Report, Exhibit-2. Defendants have not identified a single academic or legal criticism of Karpoff's model after it was published.[12] *See* Lehn

[12] Defendants appear to rely on *In re Rezulin Prods. Liab. Litig.*, 369 F. Supp. 2d 398 (S.D.N.Y. 2005), for the proposition that Rule 702 requires exclusion of an expert's opinion based on an untested academic theory. *See* Defs.' Mem. at 23. At issue in *Rezulin* was whether a drug caused

Depo. at 144:3-12. Defendants, moreover, present no alternative model that would more precisely estimate the reputational losses associated with the revelation of a multi-billion-dollar financial fraud.[13] As such, Dr. Feinstein's reliance upon and application of the Karpoff model was reliable and reasonable. *See, e.g.*, *Beastie Boys v. Monster Energy Co.*, 983 F. Supp. 2d 354, 363 (S.D.N.Y. 2014) (finding expert's opinion was based on sufficiently reliable academic research to be admissible under Rule 702).[14]

Defendants wrongly argue that Dr. Feinstein "misapplies" and "mangles" Karpoff's model.[15] Defs.' Mem. at 22. For instance, defendants assert that Karpoff's model does not apply in this case because plaintiffs' claims do not involve allegations of financial fraud. *Id*. at 23. That argument is predicated on a self-serving re-writing of plaintiffs' allegations. Plaintiffs ***do*** allege that defendants materially "cooked" Pfizer's financial statements during the Class Period by failing to disclose an

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liver injury and the literature relied on by the expert merely hypothesized that it could. *Rezulin*, 369 F. Supp. 2d at 423 n.157. In precluding the expert's testimony, Judge Kaplan emphasized the theory in the article "never has been tested" and "never has been published or subjected to peer review" and "appears to have no acceptance outside this litigation." *Id.* at 423. In contrast, here it is undisputed that Karpoff's model was subject to rigorous statistical testing, peer reviewed, published in a highly respected academic journal and has been repeatedly cited by academics since publication. *See, e.g.*, Smith Decl., Ex. 30 (EBSCO printout showing Karpoff's model referenced by academics at least 46 times). As such, *Rezulin* is inapposite.

[13] *See, e.g.*, *Zyprexa*, 489 F. Supp. 2d at 285 ("It is worth noting in this respect that defendants' experts have a less demanding task, since they have no burden to produce models or methods of their own; they need only attack those of plaintiffs' experts. Contradiction is to be expected and is often unresolvable without trial.").

[14] Defendants argue that because Karpoff's model "has never been accepted" in a published legal opinion as a basis for estimating reputational loss damages, Dr. Feinstein's methodology must be unreliable. *See* Defs.' Mem. at 2. The requirement under Rule 702, however, is "the testimony is the product of reliable principles and methods." Fed. R. Evid. 702. Indeed, defendants have failed to identify any case in which the methodology has been ***rejected*** by any court.

[15] It is defendants and their expert who misunderstand the application of Karpoff's model. Specifically, Dr. Lehn admitted his report erred in criticizing Dr. Feinstein for failing to disaggregate the "class action effect" when applying Karpoff's model to the facts of this case. *See* Lehn Depo. at 149:6-20. Dr. Lehn has corrected his report to address that misunderstanding.

estimated range of loss, as well as failing to accrue for a loss, that would have informed investors of concealed risks related to the DOJ investigation. *Compare* Dkt. No. 71, ¶¶78-80 (alleging in detail defendants' alleged misstatements concerning the Company's financial results throughout the Class Period), *with* Defs.' Mem. at 23 (Pfizer "did not engage in financial misrepresentations").[16] Karpoff's model is designed to address instances where a fraud involving financial disclosures is revealed and, thus, Dr. Feinstein reasonably concluded the model fits the facts and allegations in this case. Accordingly, defendants' arguments merely relate to Dr. Feinstein's application of an accepted methodology, which may be best tested by "'[v]igorous cross-examination [and] presentation of contrary evidence.'" *See Beastie Boys*, 983 F. Supp. 2d at 363 (quoting *Daubert*, 509 U.S. at 596).

Defendants next fault Dr. Feinstein's opinion on the ground that "the Karpoff model fails to accurately predict the magnitude of the stock movement" in any case in which other pharmaceutical companies have announced settlements with the DOJ. *See* Defs.' Mem. at 23 & n.49. There is no evidence in the record to support that contention. Defendants rely on their expert's, Dr. Lehn's, analysis of an October 2008 announcement made by Eli Lilly regarding a settlement with the DOJ. *See* Lehn Report, ¶¶113-115. Notably, he applied the Karpoff model only to Eli Lilly, but to no other comparative company in his analysis. *Id.*, ¶¶110-120. Defendants' expert also ignored key facts that render his Eli Lilly analysis (and critique of the Karpoff model) utterly useless. In the Eli Lilly situation, *The New York Times* publicly disseminated Eli Lilly internal documents evidencing that company's wide-spread off-label conduct in December 2006, nearly two years ***before*** the

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[16] Defendants' argument is particularly suspect in light of the fact that they retained an accounting expert to opine on Pfizer's financial disclosures and opine that plaintiffs' expert had no reasonable basis to conclude that Pfizer's Class Period financial statements were materially misstated. Further, as defendants are fully aware, the authoritative Generally Accepted Accounting Principles concerning the adequacy of Pfizer's legal proceedings disclosures is titled "Statement of ***Financial*** Accounting Standards No. 5." Smith Decl., Ex. 31.

supposed disclosure in October 2008 that Dr. Lehn chose to analyze. *See* Smith Decl., Ex. 32. In immediate response to *The New York Times'* December 2006 disclosure, Eli Lilly lost over $3.0 billion in market capitalization due to the reputational impact of the company's illegal conduct. *See* Smith Decl., Ex. 33.[17] Therefore, Dr. Lehn's musings about how the Karpoff model would fail to properly estimate Eli Lilly's stock drop are simply the product of looking at the wrong disclosure date. Here, the relevant disclosure was on January 26, 2009, and, as with Eli Lilly, that disclosure resulted in significant reputational damages.

Defendants' final critique of Dr. Feinstein's estimate of reputation-related class-wide damages is based on the following straw man argument: (i) "[r]eputation is the view held of one by others in the relevant community"; (ii) "analysts are that relevant community"; and (iii) because no analysts mentioned a reputational penalty, no such penalty must have occurred. *See* Defs.' Mem. at 23-24. The flaw in this argument is readily apparent. Just because no analyst commented on reputational issues, does not mean investors were not seriously concerned with the reputational impact on Pfizer. Indeed, investors are a critical part of the "relevant community" (not just analysts) and the major institutional investor that was deposed in this case – BlackRock – testified that it would have placed a lower fundamental value on Pfizer's stock price if it had reason to believe that the integrity of management was in question. *See* Smith Decl., Ex. 34 (May 16, 2012 Deposition of Daniel Hanson ("Hanson Depo.")) at 160:8-20. BlackRock testified that its view of management would have further eroded, as well as its fundamental valuation of Pfizer's stock price, if it had reason to believe the Company did not have sufficient internal controls to prevent continued illegal promotional conduct. *See id.* at 161:25-163:13. BlackRock added that it would have further

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[17] Dr. Lehn, did not do his own research for his report. *See* Lehn Depo. at 173:7-15. Apparently, his support team simply missed the prior disclosures regarding Eli Lilly and the associated $3.0 billion loss. *See id.* at 233:10-236:24. Therefore, he (and defendants) got it wrong.

devalued Pfizer's stock price had it known the Company understated the financial risk investors faced in light of the DOJ's investigation into the Company's illegal off-label conduct. *Id.* Dr. Feinstein relied on this testimony in issuing his opinions. Defendants' expert, however, ignored it because he was not even provided a copy of the transcript. *See* Lehn Depo. at 272:23-275:8.

2. Dr. Feinstein Has Reliably Disaggregated All Non-Fraud-Related Factors

In providing a reliable estimate of class-wide damages, a damages expert often will disaggregate "some rough percentage of the decline[] from losses resulting from other, non-fraud-related events." *Vivendi*, 634 F. Supp. 2d at 365. Dr. Feinstein has done just that, reliably estimating the price impact of all non-fraud-related factors. *See* Feinstein Report, ¶¶150-255. As noted above, Dr. Feinstein has not simply assumed that all of the stock price decline on January 26, 2009 was due to the fraud, but reliably estimated plaintiffs' damages to be $1.26 out of the total $1.90 negative residual drop of Pfizer's stock price. Moreover, Dr. Feinstein has reasonably and reliably estimated what portions of the $1.90 per share negative return were due to non-fraud related factors. That is, he has reliably disaggregated plaintiffs' fraud-related damages consistent with controlling law.

In disaggregating the eight non-fraud-related factors, Dr. Feinstein opined that $0.22 of Pfizer's stock price decline on January 26, 2009 was attributable to the Company's announcement of a 50% dividend cut. *See id.*, ¶205. In reaching his opinion, Dr. Feinstein relied on widely accepted, tested, peer-reviewed and published academic literature that models the price impact of changes in dividend policies when announced by public companies. *Id.*, ¶¶199-203. Dr. Feinstein brought his considerable experience to bear in forming the professional judgment that the academic literature that he relied on fit the facts of this case and, thus, was appropriate. *Id.*, Exhibit-2. Defendants do not dispute, moreover, that the academic research Dr. Feinstein relied upon is tested, peer-reviewed and published. In addition, Dr. Feinstein relied on considerable evidence and data relevant to this

case in forming his opinions, including Pfizer's internal and external statements, analyst reports, institutional investor trading data between January 23 and January 30, 2009 and news reports concerning the Company's January 26, 2009 announcement of a dividend cut. *See* Feinstein Report, ¶¶183-198; *see also In re Xerox Corp. Sec. Litig.*, 746 F. Supp. 2d 402, 406-13 (D. Conn. 2010) (recognizing that an expert may use defendants' internal and external statements relating to losses to disaggregate confounding factors).

Defendants advance a singular attack on Dr. Feinstein's application of the methodology concerning the dividend cut, arguing the academic text and linear equation used by Dr. Feinstein "is not generally accepted among economists." *See* Defs.' Mem. at 24-25. That is wrong. In support, defendants cite only to the testimony of their expert and, even here, misstate the record. Defendants claim that Dr. Lehn testified that the Amhud and Li study "is not generally accepted among economists." Defs.' Mem. at 24 & n.51 (MacDonald Decl., Ex. U at 266:23-269:22). A reading of the cited testimony, however, reveals Dr. Lehn made no such assertion (rather he claimed Dr. Feinstein's application of the accepted academic research was too "simplistic"). *Id.* Further, defendants cite to no academic or texts or legal authority to support their baseless assertion that the methodology developed by Amhud and Li is not accepted by economists. Nor could they. *See* Smith Decl., Ex. 30 (EBSCO database showing Amhud and Li to have been cited at least 39 times by academics in the relevant field).

Defendants say that Dr. Feinstein's methodology would lead to an "absurd" result, noting an analyst report referencing the dividend cut had "'clearly angered some'" investors. Defs.' Mem. at 24-25. What defendants do not seem to realize is that Dr. Feinstein does ***not*** opine that the announced dividend cut had positively impacted Pfizer's stock price. Rather, Dr. Feinstein estimated that the dividend cut caused $0.22 – nearly 12% – of the stock price decline on January 26,

2009. Defendants generally argue "[t]he effect of the dividend cut almost certainly would be pronounced" (*id.* at 24), but neither they nor their expert have come forward with any evidence concerning what that "pronounced" number should be or whether it is more or less than the $0.22 per share estimated by Dr. Feinstein. *See* Lehn Depo. at 92:14-93:11 (acknowledging he did not estimate the per share price impact of the dividend cut and did not intend to offer that opinion at trial). At most, defendants merely disagree with Dr. Feinstein's estimate of the price impact of the dividend cut. That, however, is irrelevant to the question of admissibility under Rule 702. *See Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp.*, No. 04 Civ. 7369 (LTS) (HBP), 2006 U.S. Dist. LEXIS 51869, at *21-*23 (S.D.N.Y. July 28, 2006) (holding defendant's objections to the application of the academic literature and underlying methodology only go to weight of testimony); *McCullock*, 61 F.3d at 1044 (same).

Defendants offer a thin critique of Dr. Feinstein's estimation of the price impact of the Wyeth merger, contending he only relied on news sources and earlier "more speculative reports" in support of his opinion. *See* Defs.' Mem. at 4. What defendants' argument ignores is that on January 23, 2009, three days ***before*** the Pfizer-Wyeth disclosure date at issue in this case, various news sources confirmed the deal was virtually a lock at a price approaching $70 billion and that it was positive news for Pfizer investors. Prior to the markets opening on January 23, 2009, *The Wall Street Journal* reported that Pfizer was "'in talks to acquire rival drug maker Wyeth in a deal that could be valued at more than $60 billion.'" Feinstein Report, ¶102. The same day, *Dow Jones* reported the market viewed the Wyeth acquisition as good news despite the obvious risk to the dividend, "'with Pfizer shares rising 1.4% to $17.45 and Wyeth shares jumping about 13% to $43.74'" on January 23, 2009. *Id.*, ¶105 ("WSJ: Pfizer Seen Paying $65B-$70B To Buy Wyeth – Sources"). CNBC reported the deal could come as early as Monday, January 26, 2009. *Id.*, ¶104. Indeed, Dr. Feinstein

relied on ample evidence to support his opinion that the Wyeth merger did not have a negative impact on Pfizer's stock price, including Goldman Sachs' January 23, 2009 note to investors: "'Removing Pfizer from Americas Sell List [] was predicated on our view that there is pressure building on management . . . to make a bold move and to do it as soon as the market would welcome it. The possible combination of Wyeth described in today's WSJ would be just such a move.'" *Id.*, ¶105. Defendants would have the Court believe that investors viewed the Wyeth merger as positive news on January 23, 2009, but then viewed it as negative news just three days later.[18] That makes little sense, but defendants may confront Dr. Feinstein with evidence supporting that argument at trial.

As noted above, Dr. Feinstein estimated the per share price impact of the remaining non-fraud factors as follows: (i) $0.06 for strengthening of the U.S. Dollar; (ii) $0.00 for increased pension expenses; (iii) $0.00 for the credit agency announcements; (iv) $0.00 for lower interest income; (v) $0.34 for increased effective tax rate; and (vi) $0.00 for Wyeth's 4Q08 and FY 2008 financial results. By their general silence, defendants concede that Dr. Feinstein's methodology in disaggregating these non-fraud-related factors is reliable.

3. Plaintiffs Are Not Required to Apportion Damages on a Defendant-by-Defendant Basis

Last, defendants contend Dr. Feinstein's damage estimate is unreliable because it does not apportion damages to each defendant based on when they were employed during the Class Period.

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[18] *See, e.g.*, Smith Decl., Ex. 35 ("Merger Model Update, 4Q Review," Deutsche Bank, January 26, 2009) ("In our view, PFE's acquisition of [Wyeth] is a sound strategic and financial move . . . ."); Smith Decl., Ex. 36 ("PFE Agrees to Acquire Wyeth, Reports 4Q Results, Cuts Dividend," Hilliard Lyons, January 27, 2009 ("The combination appears attractive in the long term. Adding Wyeth provides much needed revenue for Pfizer as the Lipitor patent expiration approaches."); *see also* Hanson Depo. at 80:14-16 ("I do recall having a favorable view ahead of the Wyeth – the pending acquisition of Wyeth.").

See Defs.' Mem. at 13. Defendants, however, cite to no legal authority requiring such a calculation; and, for good reason. 15 U.S.C. §78u-4(f) states that defendants are jointly and severally liable should a jury find they acted intentionally in making their misleading statements. On the other hand, should a jury find that defendants acted recklessly, it will be able to apportion liability to each individual defendant based on which false statements they made. 15 U.S.C. §78u-4(f); *see also Liberty Media*, 923 F. Supp. 2d at 531 (acknowledging that a jury need only make a reasonable estimate in awarding damages).

V. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court deny defendants' motion to exclude the testimony of Dr. Feinstein in its entirety.

DATED: November 26, 2014

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
MICHAEL J. DOWD
HENRY ROSEN
TRIG R. SMITH
JASON A. FORGE
RYAN A. LLORENS
IVY T. NGO

s/ TRIG R. SMITH

TRIG R. SMITH

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)
miked@rgrdlaw.com
henryr@rgrdlaw.com
trigs@rgrdlaw.com
jforge@rgrdlaw.com
ryanl@rgrdlaw.com
ingo@rgrdlaw.com

ROBBINS GELLER RUDMAN
& DOWD LLP
SAMUEL H. RUDMAN
58 South Service Road, Suite 200
Melville, NY 11747
Telephone: 631/367-7100
631/367-1173 (fax)
srudman@rgrdlaw.com

ROBBINS GELLER RUDMAN
& DOWD LLP
WILLOW E. RADCLIFFE
DANIEL J. PFEFFERBAUM
MATTHEW S. MELAMED
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)
willowr@rgrdlaw.com
dpfefferbaum@rgrdlaw.com
mmelamed@rgrdlaw.com

Lead Counsel for Plaintiffs

CERTIFICATE OF SERVICE

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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 26, 2014.

s/ TRIG R. SMITH
TRIG R. SMITH

ROBBINS GELLER RUDMAN
& DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101-8498
Telephone: 619/231-1058
619/231-7423 (fax)

E-mail: trigs@rgrdlaw.com

Mailing Information for a Case 1:10-cv-03864-AKH

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Michael Scott Bailey**
  michael.bailey@skadden.com
- **Sidney Bashago**
  sidney.bashago@dpw.com
- **Sheila L. Birnbaum**
  sheilabirnbaum@quinnemanuel.com
- **George Anthony Borden**
  gborden@wc.com
- **Kevin Anthony Burke**
  kaburke@sidley.com,nyefiling@sidley.com,efilingnotice@sidley.com
- **Michael Barry Carlinsky**
  michaelcarlinsky@quinnemanuel.com,brantkuehn@quinnemanuel.com,jomairecrawford@quinnemanuel.com
- **Lauren Kristina Collogan**
  lcollogan@wc.com
- **Keir Nicholas Dougall**
  kdougall@dougallpc.com
- **Michael Joseph Dowd**
  miked@rgrdlaw.com,e_file_sd@rgrdlaw.com,tome@rgrdlaw.com,e_file_sf@rgrdlaw.com
- **Alexander C Drylewski**
  alexander.drylewski@skadden.com
- **Charles S. Duggan**
  charles.duggan@dpw.com,ecf.ct.papers@davispolk.com
- **Steven M.. Farina**
  sfarina@wc.com
- **Jason A. Forge**
  jforge@rgrdlaw.com,tholindrake@rgrdlaw.com,e_file_SD@rgrdlaw.com
- **Ross Bradley Galin**
  rgalin@omm.com,mochoa@omm.com,neverhart@omm.com,lisachen@omm.com
- **Gary John Hacker**
  ghacker@skadden.com
- **James R. Harper**
  coljamesrharper@me.com
- **Howard E. Heiss**
  hheiss@omm.com,#nymanagingattorney@omm.com
- **Paul T. Hourihan**
  phourihan@wc.com
- **James M. Hughes**
  jhughes@motleyrice.com,kweil@pacernotice.com,mgruetzmacher@motleyrice.com,erichards@motleyrice.com,kweil@motleyrice.com
- **Jay B. Kasner**
  jkasner@skadden.com
- **Joe Kendall**
  administrator@kendalllawgroup.com,jkendall@kendalllawgroup.com,hlindley@kendalllawgroup.com

- **Brant Duncan Kuehn**
  brantkuehn@quinnemanuel.com
- **Leigh R. Lasky**
  lasky@laskyrifkind.com
- **Hamilton Philip Lindley**
  hlindley@deanslyons.com,mgoens@deanslyons.com
- **Ryan A. Llorens**
  ryanl@rgrdlaw.com,nbear@rgrdlaw.com,kirstenb@rgrdlaw.com
- **Amanda M. MacDonald**
  amacdonald@wc.com
- **Lori McGill**
  lorialvinomcgill@quinnemanuel.com
- **Matthew Melamed**
  mmelamed@rgrdlaw.com
- **Donald Alan Migliori**
  dmigliori@motleyrice.com
- **Eugene Mikolajczyk**
  genem@rgrdlaw.com
- **Seema Mittal**
  smittal@wc.com
- **Cynthia Margaret Monaco**
  cmonaco@cynthiamonacolaw.com,cmmonaco@gmail.com
- **Juliana Newcomb Murray**
  juliana.murray@davispolk.com,ecf.ct.papers@davispolk.com
- **Scott D. Musoff**
  smusoff@skadden.com,david.carney@skadden.com
- **Danielle Suzanne Myers**
  dmyers@rgrdlaw.com
- **William H. Narwold**
  bnarwold@motleyrice.com,vlepine@motleyrice.com,ajanelle@motleyrice.com
- **Ivy T. Ngo**
  ingo@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Joseph G. Petrosinelli**
  jpetrosinelli@wc.com
- **Willow E. Radcliffe**
  willowr@rgrdlaw.com,ptiffith@rgrdlaw.com
- **Joseph F. Rice**
  jrice@motleyrice.com
- **Darren J. Robbins**
  e_file_sd@rgrdlaw.com
- **Daniel Prugh Roeser**
  droeser@goodwinprocter.com
- **Henry Rosen**
  henryr@rgrdlaw.com,dianah@rgrdlaw.com
- **David Avi Rosenfeld**
  drosenfeld@rgrdlaw.com,e_file_ny@rgrdlaw.com,e_file_sd@rgrdlaw.com

- **James P. Rouhandeh**
  james.rouhandeh@dpw.com,ecf.ct.papers@davispolk.com
- **Samuel Howard Rudman**
  srudman@rgrdlaw.com,e_file_ny@rgrdlaw.com,mblasy@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Stuart Michael Sarnoff**
  ssarnoff@omm.com
- **William E. Schurmann**
  wschurmann@wc.com
- **Trig Randall Smith**
  trigs@rgrdlaw.com,e_file_sd@rgrdlaw.com,nhorstman@rgrdlaw.com
- **Jennifer Lynn Spaziano**
  jen.spaziano@skadden.com
- **Richard Mark Strassberg**
  rstrassberg@goodwinprocter.com,nymanagingclerk@goodwinprocter.com
- **Mitchell M.Z. Twersky**
  mtwersky@aftlaw.com
- **John K. Villa**
  jvilla@wc.com

Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

Daniel E. Hill
Kendall Law Group, LLP
3232 McKinney Avenue
Suite 700
Dallas, TX 75204

Catherine J. Kowalewski
Robbins Geller Rudman & Dowd LLP (San Diego)
655 West Broadway
Suite 1900
San Diego, CA 92101

Jamie J. McKey
Kendall Law Group, LLP
3232 McKinney Avenue
Suite 700
Dallas, TX 75204

David C. Walton
Robbins Geller Rudman & Dowd LLP (SANDIEGO)
655 West Broadway
Suite 1900
San Diego, CA 92101

Regan Karstrand

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Alexander C Drylewski alexander.drylewski@skadden.com

Amanda M. MacDonald amacdonald@wc.com

Brant Duncan Kuehn brantkuehn@quinnemanuel.com

Charles S. Duggan charles.duggan@dpw.com, ecf.ct.papers@davispolk.com

Cynthia Margaret Monaco cmonaco@cynthiamonacolaw.com, cmmonaco@gmail.com

Daniel Prugh Roeser droeser@goodwinprocter.com

Danielle Suzanne Myers dmyers@rgrdlaw.com

Darren J. Robbins e_file_sd@rgrdlaw.com

David Avi Rosenfeld drosenfeld@rgrdlaw.com, e_file_ny@rgrdlaw.com, e_file_sd@rgrdlaw.com

Donald Alan Migliori dmigliori@motleyrice.com

Eugene Mikolajczyk genem@rgrdlaw.com

Gary John Hacker ghacker@skadden.com

George Anthony Borden gborden@wc.com

Hamilton Philip Lindley hlindley@deanslyons.com, mgoens@deanslyons.com

Henry Rosen henryr@rgrdlaw.com, dianah@rgrdlaw.com

Howard E. Heiss hheiss@omm.com, #nymanagingattorney@omm.com

Ivy T. Ngo ingo@rgrdlaw.com, e_file_sd@rgrdlaw.com

James M. Hughes jhughes@motleyrice.com, erichards@motleyrice.com, kweil@motleyrice.com, kweil@pacernotice.com, mgruetzmacher@motleyrice.com

James P. Rouhandeh james.rouhandeh@dpw.com, ecf.ct.papers@davispolk.com

James R. Harper coljamesrharper@me.com

Jason A. Forge jforge@rgrdlaw.com, e_file_SD@rgrdlaw.com, tholindrake@rgrdlaw.com

Jay B. Kasner jkasner@skadden.com

Jennifer Lynn Spaziano jen.spaziano@skadden.com

Joe Kendall administrator@kendalllawgroup.com, hlindley@kendalllawgroup.com, jkendall@kendalllawgroup.com

John K. Villa jvilla@wc.com

Joseph F. Rice jrice@motleyrice.com

Joseph G. Petrosinelli jpetrosinelli@wc.com

Juliana Newcomb Murray juliana.murray@davispolk.com, ecf.ct.papers@davispolk.com

Keir Nicholas Dougall kdougall@dougallpc.com

Kevin Anthony Burke kaburke@sidley.com, efilingnotice@sidley.com, nyefiling@sidley.com

Lauren Kristina Collogan lcollogan@wc.com

Leigh R. Lasky lasky@laskyrifkind.com

Lori McGill lorialvinomcgill@quinnemanuel.com

Matthew Melamed mmelamed@rgrdlaw.com

Michael Barry Carlinsky michaelcarlinsky@quinnemanuel.com, brantkuehn@quinnemanuel.com, jomairecrawford@quinnemanuel.com

Michael Joseph Dowd miked@rgrdlaw.com, e_file_sd@rgrdlaw.com, e_file_sf@rgrdlaw.com, tome@rgrdlaw.com

Michael Scott Bailey michael.bailey@skadden.com

Mitchell M.Z. Twersky mtwersky@aftlaw.com

Paul T. Hourihan phourihan@wc.com

Richard Mark Strassberg rstrassberg@goodwinprocter.com, nymanagingclerk@goodwinprocter.com

Ross Bradley Galin rgalin@omm.com, lisachen@omm.com, mochoa@omm.com, neverhart@omm.com

Ryan A. Llorens ryanl@rgrdlaw.com, kirstenb@rgrdlaw.com, nbear@rgrdlaw.com

Samuel Howard Rudman srudman@rgrdlaw.com, e_file_ny@rgrdlaw.com, e_file_sd@rgrdlaw.com, mblasy@rgrdlaw.com

Scott D. Musoff smusoff@skadden.com, david.carney@skadden.com

Seema Mittal smittal@wc.com

Sheila L. Birnbaum sheilabirnbaum@quinnemanuel.com

Sidney Bashago sidney.bashago@dpw.com

Steven M.. Farina sfarina@wc.com

Stuart Michael Sarnoff ssarnoff@omm.com

Trig Randall Smith trigs@rgrdlaw.com, e_file_sd@rgrdlaw.com, nhorstman@rgrdlaw.com

William E. Schurmann wschurmann@wc.com

William H. Narwold bnarwold@motleyrice.com, ajanelle@motleyrice.com, vlepine@motleyrice.com

Willow E. Radcliffe willowr@rgrdlaw.com, ptiffith@rgrdlaw.com

1:10-cv-03864-AKH Notice has been delivered by other means to:

Catherine J. Kowalewski

Robbins Geller Rudman & Dowd LLP (San Diego)
655 West Broadway
Suite 1900
San Diego, CA 92101

Daniel E. Hill
Kendall Law Group, LLP
3232 McKinney Avenue
Suite 700
Dallas, TX 75204

David C. Walton
Robbins Geller Rudman & Dowd LLP (SANDIEGO)
655 West Broadway
Suite 1900
San Diego, CA 92101

Jamie J. McKey
Kendall Law Group, LLP
3232 McKinney Avenue
Suite 700
Dallas, TX 75204

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