

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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MARY K. JONES, Individually and on Behalf	:	Civil Action No. 1:10-cv-03864-AKH
of All Others Similarly Situated,	:	
	:	<u>CLASS ACTION</u>
Plaintiff	:	
vs.	:	PLAINTIFFS' LOCAL RULE 56.1
	:	RESPONSE TO DEFENDANT IAN C.
PFIZER INC., et al.,	:	READ'S STATEMENT OF UNDISPUTED
	:	MATERIAL FACTS
Defendants.	:	
_____	X	

Plaintiffs Stichting Philips Pensioenfonds and Mary K. Jones, on behalf of Pfizer Inc. (“Pfizer” or the “Company”) investors, respectfully submit the following Response to Defendant Ian C. Read’s Statement of Undisputed Material Facts.

1. Undisputed.

2. Disputed. From August 15, 2006 through the end of the Class Period (January 19, 2006 to January 23, 2009), Ian C. Read (“Read”) was a member of Pfizer’s Executive Leadership Team (“ELT”).<sup>1</sup> The ELT’s time and decision-making responsibilities focused on, among other things, operating plans and “[m]atters with material enterprise-wide significance – *e.g.*, risk and reputation matters.”<sup>2</sup> As a member of the ELT, Read was responsible for review and approval of the Company’s communications to investors in Securities and Exchange Commission (“SEC”) filings and press releases (Read also to take the lead on assessing “statements to the investment community”).<sup>3</sup> As a member of the ELT, Read was responsible for approving settlements greater than \$100 million or in cases involving unusual significance.<sup>4</sup> Independent of his role on the ELT, Read was further responsible for reviewing and commenting on the entirety of the Company’s SEC filings before its filing with the SEC and dissemination to the investment community.<sup>5</sup> Between

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<sup>1</sup> Ex. 225 at WESTLOCK\_JONES\_046487; Ex. 202. All “Ex. \_\_\_” references herein are exhibits attached to the Declaration of Henry Rosen in Support of Plaintiffs’ Memorandum of Law in Opposition to Pfizer, Inc.’s and the Individual Defendants’ Motions for Summary Judgment, submitted herewith, unless otherwise noted. Unless otherwise noted, all emphasis is added and citations are omitted.

<sup>2</sup> Ex. 202 at KPMG-PFIZ-DS 037983.

<sup>3</sup> Ex. 202 at KPMG-PFIZ-DS 037988-91, 997; Ex. 452 at PFE-JONES 00032754-56.

<sup>4</sup> Ex. 202 at KPMG-PFIZ-DS 037986.

<sup>5</sup> *See, e.g.*, Exs. 200, 201; *see also* Rule 56.1 Statement of Undisputed Facts in Support of Defendant Frank D’Amelio’s Motion for Summary Judgment (Dkt. No. 263) (“D’Amelio SUF”), ¶11.

December 12, 2005 and December 15, 2008, Read regularly attended and presented during Audit Committee meetings.<sup>6</sup>

3. Disputed. Plaintiffs dispute this fact for the reasons set forth in Plaintiffs' Response to Read's Undisputed Fact No. 2, which is incorporated by reference herein.

4. Disputed. Plaintiffs agree that the January 26, 2009 disclosure did not contain the words "Lyrica" and "Geodon." However, the disclosure addressed the settlement of the Bextra investigation and "other open investigations."<sup>7</sup> Lyrica and Geodon were two of the other open investigations.<sup>8</sup> The \$2.3 billion settlement in principle with the Department of Justice ("DOJ") encompassed resolution of the government's investigation into the off-label promotion of Geodon, Lyrica and Zyvox.<sup>9</sup> Pfizer's January 26, 2009 disclosure of the resolution of the DOJ investigation was a materialization of the concealed Class Period risks associated with Pfizer's illegal off-label promotion of the Company's pharmaceutical products, including Bextra, Geodon, Lyrica and Zyvox.<sup>10</sup> Prior to January 26, 2009, Pfizer knew the settlement encompassed Geodon, Lyrica and Zyvox, but chose not to name those drugs in its January 26, 2009 earnings press release.<sup>11</sup>

5. Disputed. Plaintiffs allege that Read controlled Pfizer, which made numerous misleading statements about Bextra, the government's Bextra investigation and the settlement of that

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<sup>6</sup> See Exs. 420, 426; *see also* Ex. 57 (Levin Depo.) at 288:9-289:12.

<sup>7</sup> See Statement of Undisputed Facts in Support of Pfizer's Motion for Summary Judgment (Dkt. No. 248) ("Pfizer's SUF"), ¶123.

<sup>8</sup> See *id.*, ¶113.

<sup>9</sup> See *id.*

<sup>10</sup> See Ex. 4 (Feinstein Report), ¶¶29-32, 126.

<sup>11</sup> See Ex. 273 PFE-JONES00103058-89.

investigation. Plaintiffs also allege Read had ultimate authority over Pfizer's Class Period false and misleading statements.<sup>12</sup>

6. Disputed. Read had numerous conversations with outside and in-house counsel between early 2004 and January 26, 2009 concerning the status of the government investigations.<sup>13</sup> Several of those communications were between Read, counsel and Read's co-defendants.<sup>14</sup> Several of those communications reflect communications and presentations made regarding the government investigations.<sup>15</sup> As a member of the ELT, Read was responsible for approving settlements greater than \$100 million or in cases involving unusual significance.<sup>16</sup>

7. Disputed. The Complaint alleges that plaintiffs commenced this class action following Pfizer's disclosure it would be forced to pay a record \$2.3 billion in criminal and civil fines and penalties arising out of the DOJ's investigation into the Company's illegal, off-label promotion of pharmaceutical products including Bextra, Geodon, Lyrica and Zyvox. AC, ¶1.

8. Undisputed.

9. Undisputed.

10. Undisputed.

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<sup>12</sup> See Dkt. No. 71, ¶¶153, 159.

<sup>13</sup> See, e.g., December 8, 2006 Compliance Pre-Read Memo from Lankler to Read (discussing August 2006 meeting with DOJ regarding Bextra allegations); see also Ex. 447 (compilation of privilege log entries concerning government investigations) at PFE-JONES 00026830, 34, 35, 71, 6927, 6987, 6988, 7003, 7006, 7030, 7521, 7527; Ex. 442 (same) at PFE-JONES 00025994, 6023; Ex. 443 (same) at PFE-JONES 00026115; Ex. 448 (same) at PFE-JONES 0027635, 640, 683; Ex. 444 (same) at PFE-JONES 00026137; Ex. 445 (same) at PFE-JONES 00026243; Ex. 446 (same) at PFE-JONES 00026338, 357, 360, 458, 691, 696, 700, 702, 735, 736, 737, 740, 741, 781, 789, 801.

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> See Ex. 202 at KPMG-PFIZ-DS 037983-84.

11. Undisputed.

12. Undisputed.

13. Disputed. From August 15, 2006 through the end of the Class Period, Read was a member of Pfizer's ELT.<sup>17</sup> The ELT's time and decision-making responsibilities focused on, among other things, operating plans and "matters with material enterprise-wide significance – e.g., risk and reputation matters . . . ."<sup>18</sup> As a member of the ELT, Read was responsible for review and approval of the Company's communications to investors in SEC filings and press releases (Read also to take the lead on assessing "statements to the investment community . . . .").<sup>19</sup> As a member of the ELT, Read was responsible for approving settlements greater than \$100 million or in cases involving unusual significance.<sup>20</sup> Independent of his role on the ELT, Read was further responsible for reviewing and commenting on the entirety of the Company's SEC filings before their filing with the SEC and dissemination to the investment community.<sup>21</sup> Between December 12, 2005 and December 15, 2008, Read regularly attended and presented during Audit Committee meetings.<sup>22</sup>

Read attended the December 18, 2006 Audit Committee meeting and reported how he was going to address significant weaknesses in the Company's ability to comply with U.S. healthcare law.<sup>23</sup> Evidence of the healthcare compliance issues Read was addressing is demonstrated by IA

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<sup>17</sup> Ex. 225 at WESTLOCK\_JONES\_046487; Ex. 202.

<sup>18</sup> Ex. 202 at KPMG-PFIZ-DS 037983.

<sup>19</sup> Ex. 202 at KPMG-PFIZ-DS 037997; Ex. 452 at PFE-JONES 00032754-56.

<sup>20</sup> Ex. 202 at KPMG-PFIZ-DS 037986.

<sup>21</sup> See, e.g., Exs. 200-201; see also D'Amelio SUF, ¶11.

<sup>22</sup> See Ex. 426 PFE DERIV A 00001413-16; Ex. 420 at PFE DERIV A 00001295-98; see also Ex. 57 (Levin Depo.) at 288:9-289:12.

<sup>23</sup> See Ex. 155 at KPMG-PFIZ-DS 017942.

audit reports issued in 2005. For example, on April 7, 2005, Corporate Internal Audit (“IA”) issued a report entitled “U.S. Field Force Travel & Entertainment New York Headquarters.”<sup>24</sup> It was reported that gifts to physicians by Pfizer sales representatives during detailing sessions “could result in a fine or penalty to Pfizer.”<sup>25</sup> IA gave this audit the lowest possible audit rating, *i.e.*, unsatisfactory.<sup>26</sup> On December 16, 2005, IA issued a report entitled “U.S. Sales Force - Call Notes and E-Mails New York Headquarters.”<sup>27</sup> IA concluded that the call notes and emails evidenced that products were not being promoted for “indicated use(s) [and] could lead to the perception that the purpose of the visit was to promote the product for use beyond its approved indications.”<sup>28</sup> IA gave this audit the lowest possible audit rating, *i.e.*, unsatisfactory.<sup>29</sup> Evidence of the healthcare compliance issues Read was addressing is further demonstrated by additional IA audit reports issued in 2006. On May 22, 2006, IA issued an unsatisfactory rating for the audit regarding Marketing Promotional Speaker Programs (noting “failure to adequately train speakers . . . increases the risk off-label content at speaker programs” and “not all contracts included FDA requirements to speak on label”).<sup>30</sup> On October 3, 2006, IA issued an unsatisfactory Rating for the audit Advisory Boards and Consultant Payments (noting “inappropriate payments to healthcare professionals, which could be

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<sup>24</sup> Ex. 101.

<sup>25</sup> Ex. 101 at PFE DERIV 00075595.

<sup>26</sup> Ex. 101 at PFE DERIV 00075592.

<sup>27</sup> Ex. 103.

<sup>28</sup> Ex. 103 at KPMG-PFIZ- DS 007301.

<sup>29</sup> Ex. 103 at KPMG-PFIZ- DS 007294.

<sup>30</sup> Ex. 107 at PFE DERIV 00075214, 211.

perceived as attempts to influence the prescribing habits of physicians”).<sup>31</sup> On October 18, 2006, IA issued an unsatisfactory rating in an internal audit memo regarding Promotional Expenses and Promotions Funds: Remediation Status (noting control weaknesses remained un-remediated for a year).<sup>32</sup> During the December 18, 2006 Audit Committee meeting, Read informed members that “there have been a number of unsatisfactory internal audits and reviews in areas such as speaker programs, advisory boards and consultant payments as well as field force travel and entertainment that have contributed” to a significant deficiency rating.<sup>33</sup> Read informed the Audit Committee “I will work . . . to ensure that aggressive actions are taken to improve the control and compliance environment in the US organization.”<sup>34</sup>

14. Disputed. Plaintiffs dispute this fact for the reasons set forth in Plaintiffs’ Response to Read’s Undisputed Fact No. 13, which is incorporated by reference herein.

15. Disputed. Plaintiffs dispute this fact for the same reasons set forth in Plaintiffs’ Response to Read’s Undisputed Fact No. 13, which is incorporated by reference herein. In addition, on June 20, 2007, Read informed the Audit Committee that the “[r]eputational impact” on Pfizer for being caught promoting the Company’s drugs for unapproved uses in the U.S. “is arguably among the greatest exposures facing the company.”<sup>35</sup>

16. Undisputed.

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<sup>31</sup> Ex. 108 at PFE DERIV 00075180; Ex. 114 at PFE DERIV 01064279.

<sup>32</sup> Ex. 109 at PFE DERIV 00077631.

<sup>33</sup> Ex. 155 at KPMG-PFIZ-DS 017942.

<sup>34</sup> Ex. 155 at KPMG-PFIZ-DS 017942.

<sup>35</sup> Ex. 380 at PFE DERIV 00003792.

17. Disputed. Plaintiffs dispute this fact for the reasons set forth in Plaintiffs' Response to Read's Undisputed Fact No. 2, which is incorporated by reference herein.

18. Disputed. Plaintiffs dispute this fact for the reasons set forth in Plaintiffs' Response to Read's Undisputed Fact No. 2, which is incorporated by reference herein.

19. Disputed. Read had numerous conversations with outside and in-house counsel between early 2004 and January 26, 2009 concerning the status of the government investigations.<sup>36</sup> Several of those communications were between Read, counsel and Read's co-defendants.<sup>37</sup> Several of those communications reflect communications and presentations made regarding the government investigations, including between and by Lankler.<sup>38</sup> In December 2006, the Company's Assistant General Counsel, Lankler, informed Read of the August and September 2006 meetings, during which the DOJ presented evidence demonstrating Pfizer's "off-label promotion of Bextra and the Company's interactions with physicians in the form of advisory boards, mentorships, continuing medical education and publication strategies."<sup>39</sup>

20. Undisputed.

21. Undisputed.

22. Disputed. Plaintiffs dispute this fact for the reasons set forth in Plaintiffs' Response to Read's Undisputed Fact No. 2, which is incorporated by reference herein.

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<sup>36</sup> See Ex. 447 (compilation) at PFE-JONES 00026830, 34, 35, 71, 6927, 6987, 6988, 7003, 7006, 7030, 7521, 7527; Ex. 442 (compilation) at PFE-JONES 00025994, 6023; Ex. 443 (compilation) at PFE-JONES 00026115; Ex. 448 (compilation) at PFE-JONES 0027635, 640, 683; Ex. 444 (compilation) at PFE-JONES 00026137; Ex. 445 (compilation) at PFE-JONES 00026243; Ex. 446 (compilation) at PFE-JONES 00026338, 357, 360, 458, 691, 697, 700, 702, 735, 736, 737, 740, 741, 781, 789, 801.

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> Ex. 434 at PFE DERIV A 00004035.

23. Disputed. Plaintiffs dispute this fact for the reasons set forth in Plaintiffs' Response to Read's Undisputed Fact No. 13, which is incorporated by reference herein.

24. Disputed. Plaintiffs dispute this fact for the reasons set forth in Plaintiffs' Response to Read's Undisputed Fact No. 2, which is incorporated by reference herein.

25. Disputed. Plaintiffs dispute this fact for the reasons set forth in Plaintiffs' Response to Read's Undisputed Fact No. 2, which is incorporated by reference herein.

26. Undisputed.

27. Undisputed.

28. Disputed. Plaintiffs dispute this fact for the reasons set forth in Plaintiffs' Response to Read's Undisputed Fact No. 13, which is incorporated by reference herein.

29. Undisputed.

30. Undisputed.

31. Undisputed.

32. Undisputed.

33. Undisputed.

34. Disputed. Disputed. Plaintiffs agree that Read made statements regarding sales revenue for Geodon and Lyrica on January 22, 2007, March 5, 2008 and September 22, 2008. Plaintiffs agree that Investor Relations distributed materials to Read in advance of earnings calls and analyst conferences. However, to the extent that Read implies that Investor Relations employees had more information regarding Pfizer's sales revenue and earnings than Read, who was the President of WPO, the purported fact is inaccurate. For example, after becoming President of WPO in August 2006, Read was a member of Pfizer's ELT and regularly attended ELT meetings with Kindler,

D'Amelio and Waxman.<sup>40</sup> In his capacity as a member of the ELT, Read was also responsible for developing Pfizer's communication strategy to investors, including in SEC filings and press releases.<sup>41</sup> Declaration of Joseph G. Petrosinelli in Support of Pfizer's Motion for Summary Judgment ("Petrosinelli Decl."), Ex. N-2 does not support the assertion Read relied on any particular advice or that Read's public statements were vetted by anybody prior to being made.

In addition, Defendants have expressly denied relying on any counsel other than Block or Fox for their defense in this case<sup>42</sup> (consistent with that denial, defendants successfully shielded Investigations Counsel from discovery), so defendants may not invoke or rely on Investigations Counsel, including relying on anyone who relied on Investigations Counsel.<sup>43</sup> Plaintiffs incorporate by reference Plaintiffs' Motion for Partial Summary Judgment, which was filed November 14, 2014. Neither Dennis Block ("Block") nor Lawrence Fox ("Fox") assessed critical portions of Pfizer's legal proceedings disclosure and the Statement of Financial Accounting Standards No. 5 ("FAS 5") reserve decisions: the strengths or weaknesses of the Government's<sup>44</sup> case<sup>45</sup> or Pfizer's defenses,<sup>46</sup>

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<sup>40</sup> See Ex. 342 at KPMG-PFIZ-DS 057398-99; Ex. 202; Ex. 208.

<sup>41</sup> See Ex. 202 at KPMG-PFIZ-DS at 037983.

<sup>42</sup> Dkt. No. 172 at 25; July 19, 2013 Hearing Transcript at 12:1-2; Dkt. No. 246 at 1, 5.

<sup>43</sup> Plaintiffs incorporate by reference Plaintiffs' Motion to Partial Summary Judgment, filed November 14, 2014, and Plaintiffs' Memorandum of Law in Opposition to Pfizer Inc.'s and the Individual Defendants' Motions for Summary Judgment, filed concurrently herewith.

<sup>44</sup> "Government" refers to the DOJ and/or the Health & Human Services Office of Inspector General ("OIG").

<sup>45</sup> Ex. 37 (Block Depo.) at 34:1-22, 104:15-23; Ex. 49 (Fox Depo.) at 32:11-18, 60:17-22, 90:12-20, 224:22-225:6.

<sup>46</sup> Ex. 37 (Block Depo.) at 104:6-23; Ex. 49 (Fox Depo.) at 86:13-19, 90:12-20.

whether a loss or conviction was probable, or whether such loss was reasonably estimable.<sup>47</sup> Moreover, defendants withheld from Block and Fox critical evidence concerning the Bextra Investigation,<sup>48</sup> including call notes,<sup>49</sup> documents that corroborated a *qui tam* relator's claims,<sup>50</sup> Bextra-related documents that Pfizer employees had attempted to delete or alter,<sup>51</sup> sales force survey results<sup>52</sup> and employee interview memoranda.<sup>53</sup> Instead, all information and input regarding the Bextra Investigation came from Investigations Counsel.<sup>54,55</sup> For example:

Block and Fox were never among Pfizer's most informed attorneys as to the facts concerning the Bextra Investigation, nor as to assessing such facts legally.<sup>56</sup>

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<sup>47</sup> Ex. 37 (Block Depo.) at 33:7-25, 34:1-22, 35:4-11, 36:15-24, 39:3-41:12, 71:13-25, 142:18-143:2; Ex. 49 (Fox Depo.) at 43:17-45:7, 76:15-19, 80:5-21, 90:21-91:8.

<sup>48</sup> "Bextra Investigation" refers to the Government's investigation concerning Pfizer's misbranding (*i.e.*, off-label promotion) of Bextra, which was paralleled by Pfizer's internal investigation, led by Covington & Burling LLP ("Covington"). Ex. 57 (12/10/13 Levin Depo.) at 231:9-16; Ex. 54 (10/10/14 Kindler Depo.) at 20:19-21:4; Ex. 68 (10/16/14 Waxman Depo.) at 32:18-20.

<sup>49</sup> Ex. 37 (Block Depo.) at 76:5-23, 144:21-145:4; Ex. 49 (Fox Depo.) at 60:3-22, 61:3-11.

<sup>50</sup> Ex. 54 (10/10/14 Kindler Depo.) at 34:19-24, 35:18-36:10; Ex. 60 (9/19/14 McKinnell Depo.) at 60:7-10; Ex. 37 (Block Depo.) at 128:14-21.

<sup>51</sup> Ex. 37 (Block Depo.) at 59:14-60:6, 230:21-231:8; Ex. 49 (Fox Depo.) at 49:9-23.

<sup>52</sup> Ex. 37 (Block Depo.) at 54:8-22, 56:2-11; Ex. 49 (Fox Depo.) at 97:11-18, 211:16-212:1.

<sup>53</sup> Ex. 37 (Block Depo.) at 54:8-22, 56:2-11, 105:3-13, 230:21-231:8; Ex. 49 (Fox Depo.) at 13:2-8, 49:9-50:16, 66:3-6.

<sup>54</sup> "Investigations Counsel" refers to Pfizer's counsel who were involved in the Bextra Investigation, including, but not limited to, Covington and in-house counsel Douglas Lankler ("Lankler"), Carlton Wessel ("Wessel") and Gary Giampetruzzi ("Giampetruzzi").

<sup>55</sup> Ex. 37 (Block Depo.) at 36:15-24, 104:15-23, 168:18-169:15; Ex. 49 (Fox Depo.) at 44:24-45:7, 47:2-7, 60:17-22, 61:25-62:7, 87:11-88:14, 222:21-225:6; Ex. 68 (10/16/14 Waxman Depo.) at 20:15-21.

<sup>56</sup> Ex. 55 (Lankler Depo.) at 92:23-97:21.

Block never personally and professionally assessed nor advised defendants that Pfizer had substantial defenses to the Bextra Investigation.<sup>57</sup>

Fox never independently determined or advised defendants that Pfizer had substantial defenses to the Bextra Investigation.<sup>58</sup>

Neither Block nor Fox made an assessment or advised defendants as to the strengths and weaknesses of Pfizer's defenses or of the Government's case.<sup>59</sup>

Neither Block nor Fox made an assessment or advised defendants as to the probability of a criminal conviction in or losses from the Bextra Investigation, or whether the loss from the Bextra Investigation was reasonably estimable.<sup>60</sup>

Block and Fox deferred to, and relied upon, Pfizer's Investigation Counsel to assess the Bextra Investigation including the strengths and weaknesses of Pfizer's defenses or of the Government's case, the probability of a criminal conviction in or losses from the Bextra Investigation, or whether the loss from the Bextra Investigation was reasonably estimable.<sup>61</sup>

Neither Block nor Fox made an assessment or advised defendants as to the facts and circumstances surrounding the Bextra Investigation in connection to Pfizer's FAS 5 determination.<sup>62</sup>

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<sup>57</sup> Ex. 37 (Block Depo.) at 104:6-23.

<sup>58</sup> Ex. 49 (Fox Depo.) at 86:13-19, 90:12-20.

<sup>59</sup> Ex. 37 (Block Depo.) at 104:15-23, 168:18-169:15; Ex. 49 (Fox Depo.) at 32:11-18, 60:17-22, 90:12-20, 224:22-225:6.

<sup>60</sup> Ex. 37 (Block Depo.) at 32:16-34:22, 35:4-11, 36:15-24, 37:14-24, 39:3-41:12, 71:13-25, 142:18-143:2; Ex. 49 (Fox Depo.) at 44:24-45:7, 76:15-19, 80:5-21, 90:21-91:8.

<sup>61</sup> Ex. 37 (Block Depo.) at 36:15-24, 39:10-41:5, 104:15-23, 168:18-169:15; Ex. 49 (Fox Depo.) at 44:24-45:7, 47:2-7, 60:17-22, 61:25-62:7, 87:11-88:14, 222:21-225:6; Ex. 68 (10/16/14 Waxman Depo.) at 20:15-21.

<sup>62</sup> Ex. 37 (Block Depo.) at 33:7-25, 36:15-24, 40:16-41:5; Ex. 49 (Fox Depo.) at 43:17-45:7, 80:5-21, 90:21-91:8.

Defendants did not seek or receive advice from Block regarding the propriety of representing that Pfizer had “substantial defenses” to the Bextra Investigation while omitting reference to any, let alone all, of the following in their SEC filings: Pfizer’s awareness that its sales representatives had, in fact, promoted Bextra off-label; the internal Bextra-related documents that were exhibits to Kopchinski’s Complaint; the results from Pfizer’s Bextra-related sales force surveys; the internal Bextra-related documents that Pfizer’s District Manager instructed Pfizer’s sales representatives to alter or delete; the Bextra-related call notes of the Pfizer sales representatives who were involved in the attempted alteration and destruction of internal Bextra-related documents; the admissions of the Pfizer sales representatives who were involved in the attempted alteration and destruction of internal Bextra-related documents; the admissions of other Pfizer employees interviewed by Pfizer’s Investigation Counsel; or the Bextra-related call notes quoted, summarized and/or analyzed in the Government’s presentations to Pfizer and its Investigation Counsel.<sup>63</sup>

Defendants did not seek or receive advice from Fox regarding the propriety of representing that Pfizer had “substantial defenses” to the Bextra Investigation while omitting reference to any, let alone all, of the following in their SEC filings: the internal Bextra-related documents that were exhibits to Kopchinski’s Complaint; the results from Pfizer’s Bextra-related sales force surveys; the internal Bextra-related documents that Pfizer’s District Manager instructed Pfizer’s sales representatives to alter or delete; the Bextra-related call notes of the Pfizer sales representatives who were involved in the attempted alteration and destruction of internal Bextra-related documents; the admissions of the Pfizer sales representatives who were involved in the attempted alteration and destruction of internal Bextra-related documents; the admissions of other Pfizer employees

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<sup>63</sup> Ex. 37 (Block Depo.) at 104:15-23; Ex. 55 (Lankler Depo.) at 108:2-10; Ex. 58 (9/23/14 Levin Depo.) at 39:25-40:24, 43:11-44:1, 99:19-100:4, 113:10-114:10, 115:6-116:2; Ex. 54 (10/10/14 Kindler Depo.) at 31:10-32:8; Ex. 68 (10/16/14 Waxman Depo.) at 16:2-14, 20:15-21, 38:13-23.

interviewed by Pfizer's Investigation Counsel; or the Bextra-related call notes quoted, summarized and/or analyzed in the Government's presentations to Pfizer and its Investigation Counsel.<sup>64</sup>

Neither Block nor Fox has ever worked as a criminal law prosecutor or a criminal defense attorney.<sup>65</sup>

Neither Block nor Fox was familiar with the elements of a misbranding offense.<sup>66</sup>

Neither Block nor Fox was familiar with elements or application of *respondeat superior* liability.<sup>67</sup>

Debarment from participation in any federal health care program is mandatory if a company is convicted of a felony relating to health care fraud or controlled substances, and any such debarment would apply to all of the company's products.<sup>68</sup>

Fox incorrectly believed that debarment was not automatic for a felony conviction and that even if a company is debarred from federal health benefits programs, such debarment would be limited to the product that triggered the debarment.<sup>69</sup>

Fox incorrectly understood the terms grand jury "target" and grand jury "subject" to be interchangeable.<sup>70</sup>

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<sup>64</sup> Ex. 49 (Fox Depo.) at 90:12-20; Ex. 55 (Lankler Depo.) at 107:22-108:1; Ex. 58 (9/23/14 Levin Depo.) at 39:25-40:24, 43:11-44:1, 99:19-100:4, 113:10-114:10, 115:6-116:2; Ex. 54 (10/10/14 Kindler Depo.) at 31:10-32:8; Ex. 68 (10/16/14 Waxman Depo.) at 16:2-14, 20:15-21.

<sup>65</sup> Ex. 37 (Block Depo.) at 13:12-14:6, 14:13-15:10; Ex. 49 (Fox Depo.) at 35:21-36:12.

<sup>66</sup> Ex. 37 (Block Depo.) at 16:6-17:8; Ex. 49 (Fox Depo.) at 37:10-38:14.

<sup>67</sup> Ex. 37 (Block Depo.) at 232:20-233:12; Ex. 49 (Fox Depo.) at 36:13-37:9.

<sup>68</sup> 42 U.S.C. §1320a-7.

<sup>69</sup> Ex. 49 (Fox Depo.) at 130:7-15, 218:21-219:5.

<sup>70</sup> Ex. 49 (Fox Depo.) at 106:3-23.

No one ever informed Block that certain Pfizer sales representatives promoted Bextra for general acute and surgical pain, both of which were off-label indications.<sup>71</sup>

Pfizer and its Investigation Counsel always represented to Block that Pfizer's sales representatives had not promoted Bextra off-label.<sup>72</sup> In fact, from February 2002 through April 2005, Pfizer promoted Bextra for uses that were not within Bextra's FDA-approved label, including (a) for general acute pain, (b) for pre-operative and post-operative surgical pain and (c) as opioid-sparing in the context of surgery;<sup>73</sup> Pfizer promoted Bextra at dosages higher than the FDA-approved dosages of 10 mg once a day for OA and RA and 20 mg twice daily as needed for PD;<sup>74</sup> Pfizer introduced Bextra into interstate commerce for the treatment of acute pain, surgical pain, other unapproved uses and at unapproved dosages even though it lacked adequate directions for such uses and dosages;<sup>75</sup> Pfizer promoted Bextra with an intent to defraud or mislead;<sup>76</sup> certain members of Pfizer's sales force promoted Bextra with false and misleading claims, including that Bextra had no dose proportional increase in hypertension and edema;<sup>77</sup> certain members of Pfizer's sales force submitted to their supervisors false, fake medical requests indicating that physicians had requested

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<sup>71</sup> Ex. 37 (Block Depo.) at 49:16-50:20, 56:21-58:9, 63:25-64:4; Ex. 58 (9/23/14 Levin Depo.) at 24:12-16.

<sup>72</sup> Ex. 37 (Block Depo.) at 50:5-20, 232:3-12.

<sup>73</sup> Ex. 240 at 51:10-17.

<sup>74</sup> Ex. 240 at 51:17-18.

<sup>75</sup> Ex. 240 at 51:19-21.

<sup>76</sup> Ex. 240 at 51:22-23.

<sup>77</sup> Ex. 240 at 52:1-4.

off-label information when, in fact, they had not, and medical information letters regarding such off-label uses and/or dosages were sent to those physicians.<sup>78</sup>

No one provided Block or Fox a copy of Kopchinski's Complaint or any of the internal Pfizer documents that were exhibits to it.<sup>79</sup>

No one ever provided Block or Fox the internal documents that Pfizer's sales representatives had attempted to delete or alter.<sup>80</sup>

No one provided Block or Fox with redacted or unredacted copies of the interview memoranda of the Pfizer employees involved in the attempted deletion and alteration of Bextra-related documents.<sup>81</sup>

No one provided Block or Fox copies of the results of Bextra-related surveys of Pfizer's sales force, nor any of the revelations from the surveys.<sup>82</sup>

No one provided Block or Fox copies of any call notes, or summaries or analyses of any call notes, including the call notes that the Government quoted, referenced, summarized and/or analyzed in its August and September 2006 presentations to Pfizer and its Investigation Counsel.<sup>83</sup>

No one provided Block or Fox copies of any of the interview memoranda from the Bextra Investigation.<sup>84</sup>

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<sup>78</sup> Ex. 240 at 52:5-9.

<sup>79</sup> See Ex. 54 (10/10/14 Kindler Depo.) at 34:19-24; Ex. 60 (9/19/14 McKinnell Depo.) at 60:7-10; Ex. 37 (Block Depo.) at 128:14-21.

<sup>80</sup> Ex. 37 (Block Depo.) at 59:14-60:1, 230:21-231:8; Ex. 49 (Fox Depo.) at 49:9-23.

<sup>81</sup> Ex. 37 (Block Depo.) at 54:8-22, 56:2-11, 105:3-13, 230:21-231:6; Ex. 49 (Fox Depo.) at 13:2-8, 49:9-50:16, 66:3-6.

<sup>82</sup> See Ex. 37 (Block Depo.) at 54:8-22, 56:2-11; Ex. 49 (Fox Depo.) at 97:11-18, 211:16-212:1.

<sup>83</sup> Ex. 37 (Block Depo.) at 76:5-23, 144:21-145:4; Ex. 49 (Fox Depo.) at 60:3-22, 61:3-11.

Neither Block nor Fox received access to any of Pfizer's Investigation Counsel's written work product concerning the Bextra Investigation.<sup>85</sup>

No one disclosed to Block or Fox any estimates of the number of Bextra prescriptions written for off-label uses or the amount of Pfizer's gain from the off-label promotion of Bextra.<sup>86</sup>

35. Disputed. While revenue from sales of Geodon grew slightly from 2009 to 2010, there were at least two price increases in May 2008 and August 2009.<sup>87</sup> Further, Defendants have adduced no evidence demonstrating that Geodon sales were not affected by the Company being forced to cease and desist its illegal promotional activities or by FDA approval of Geodon for an additional indication.

36. Disputed. While Lyrica's revenue has grown, Defendants have not provided evidence to demonstrate the growth was not a result of price increases.<sup>88</sup> Further, Defendants have adduced no evidence demonstrating that Lyrica sales were not affected by the Company being forced to cease and desist its illegal promotional activities.

37. Undisputed.

38. Undisputed.

39. Undisputed.

40. Undisputed.

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<sup>84</sup> Ex. 37 (Block Depo.) at 54:8-22, 56:2-11, 105:3-13; Ex. 49 (Fox Depo.) at 13:2-8, 53:23-54:14, 211:16-212:1.

<sup>85</sup> Ex. 55 (Lankler Depo.) at 101:1-11; Ex. 37 (Block Depo.) at 54:8-22; Ex. 49 (Fox Depo.) at 97:11-18.

<sup>86</sup> Ex. 37 (Block Depo.) at 69:6-15, 73:21-74:16; Ex. 49 (Fox Depo.) at 74:22-80:4.

<sup>87</sup> Ex. \_\_\_ PFE DERIV 01044201-3.

<sup>88</sup> Ex. 416 at PFE DERIV 01012775.

41. Disputed. Plaintiffs dispute this fact for the reasons set forth in Plaintiffs' Response to Read's Undisputed Fact No. 4, which is incorporated by reference herein.

42. Disputed. Important market participants, including financial analysts and financial media outlets, focused on the \$2.3 billion resolution of the DOJ's investigation in the immediate aftermath of its announcement on January 26, 2009. For example, 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 . . . ."<sup>89</sup> Cowen and Company reported "Pfizer incurred a fourth quarter charge of \$2.3B for allegations of past off-label promotional practices concerning Bextra . . . ."<sup>90</sup> *Id.*<sup>90</sup> BMO stated "[r]eported EPS of \$0.04 included \$0.61 in charges including a \$0.34 charge related to legal settlements."<sup>91</sup> *Id.*<sup>91</sup> Numerous financial news outlets also addressed the \$2.3 billion settlement. On January 26, 2009, a *Dow Jones Newswires* article reported "fourth-quarter net income plunged 90% on \$2.3 billion in litigation charges."<sup>92</sup> The same day, *The Wall Street Journal Health Blog* disseminated an article entitled "Pfizer Takes \$2.3B Charge Tied to Bextra Probe."<sup>93</sup> Similarly, on January 27, 2009, *The Wall Street Journal* issued an article entitled "Pfizer Sets \$2.3 Billion

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<sup>89</sup> Ex. 4 (Feinstein Report), ¶109.

<sup>90</sup> Ex. 4 (Feinstein Report), ¶109.

<sup>91</sup> Ex. 4 (Feinstein Report), ¶109.

<sup>92</sup> Smith Declaration in Support of Opposition to Defendants' Motion to Exclude Plaintiffs' Expert Steven Feinstein, Ex. 2.

<sup>93</sup> Smith Declaration in Support of Opposition to Defendants' Motion to Exclude Plaintiffs' Expert Steven Feinstein, Ex. 7.

Settlement – Agreement with U.S. Tied to Alleged Off-Label Marketing of Painkiller Bextra.”<sup>94</sup> 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.”<sup>95</sup>

43. Disputed. Plaintiffs agree that Pfizer did not publicly announce that the DOJ settlement included the off-label promotion of Geodon, Lyrica and Zyvox until September 2009. However, plaintiffs’ loss causation and damages expert has opined that all inflation attributable to defendants’ Class Period false and misleading statements, which concealed the risks regarding the DOJ’s investigation into the Company’s off-label promotional activities, dissipated on January 26, 2009.<sup>96</sup> In addition, plaintiffs dispute this fact for the reasons set forth in Plaintiffs’ Response to Read’s Undisputed Fact No. 4, which is incorporated by reference herein.

44. Disputed. Plaintiffs agree Pfizer did not restate its financials. Plaintiffs also agree that Geodon sales were slightly higher after the Class Period than before and that Lyrica revenue has more than doubled since 2008. Defendants, however, have adduced no evidence demonstrating that Lyrica and Geodon sales were not affected by the Company being forced to cease and desist its illegal promotional activities.

45. Disputed. Plaintiffs dispute this fact for the reasons set forth in Plaintiffs’ Response to Read’s Undisputed Fact No. 4, which is incorporated by reference herein.

46. Undisputed.

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<sup>94</sup> Smith Declaration in Support of Opposition to Defendants’ Motion to Exclude Plaintiffs’ Expert Steven Feinstein, Ex. 17.

<sup>95</sup> Smith Declaration in Support of Opposition to Defendants’ Motion to Exclude Plaintiffs’ Expert Steven Feinstein, Ex. 11.

<sup>96</sup> Ex. 4 (Feinstein Report), ¶¶126, 132, 143-49.

47. Undisputed.

48. Disputed. Plaintiffs dispute this fact for the reasons set forth in Plaintiffs' Response to Read's Undisputed Fact No. 13, which is incorporated by reference herein.

DATED: November 26, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2014, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

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

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**Case Number:** [1:10-cv-03864-AKH](#)  
**Filer:** Mary K. Jones  
Stichting Philips Pensioenfonds

**Document Number:** [301](#)

#### Docket Text:

**RESPONSE in Opposition to Motion re: [256] MOTION for Summary Judgment . Plaintiffs' Local Rule 56.1 Response to Defendant Ian C. Read's Statement of Undisputed Material Facts. Document filed by Mary K. Jones(on behalf of all others similarly situated), Stichting Philips Pensioenfonds. (Smith, Trig)**

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