UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiff,

– v. –

PFIZER INC., et al.,

Defendants.

Case No. 10-cv-03864 (AKH)

ECF Case

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Defendants filed summary judgment motions demonstrating that Plaintiffs cannot establish the scienter element of their fraud claims. One basis for those motions is the complete lack of any evidence of fraudulent intent. In addition, Defendants demonstrated that the undisputed record shows that two experienced securities lawyers—Dennis Block and Larry Fox—advised Defendants that Pfizer's disclosures fully complied with the securities laws, and Defendants relied on that advice in good faith. Plaintiffs responded to these motions in part by filing their own motion, styled as one for "partial summary judgment," relating to the issue of scienter. The Court should deny Plaintiffs' motion for several independent reasons.

First, there is no legal basis upon which Plaintiffs can move for summary judgment on the ***issue*** of Defendants' good faith reliance on counsel,[1] which is part of the record evidence negating scienter. Summary judgment motions are properly directed to claims or defenses, not issues or record evidence. Thus, even if this Court were to deny Defendants' summary judgment motions on the grounds that Plaintiffs have raised a genuine issue of fact as to scienter, or that the evidence of good faith reliance on counsel is not dispositive of Defendants' intent, there is no basis to preclude Defendants from offering this evidence at trial to rebut Plaintiffs' allegations. *See infra* at 21-23.

Second, Defendants have not waived their right to rely on Messrs. Block and Fox, nor have they invoked—as Plaintiffs suggest—the advice of their ***government investigations counsel*** as to securities disclosures. Under the stipulated limited waiver of Pfizer's attorney-client privilege, which Plaintiffs negotiated and which the Court endorsed in a binding order,

[1] References to "Defendants" in the context of their reliance on the advice of securities disclosure counsel are intended to refer only to reliance for the period of time during the Class Period that a particular individual Defendant was employed at Pfizer.

Pfizer produced every scrap of paper that Pfizer's ***securities disclosure counsel***—*i.e.*, Messrs. Block and Fox—sent and received concerning the Department of Justice investigation, including communications between and among them and Pfizer's government investigations counsel. During discovery, and contrary to the parties' agreement and the Court's order, Plaintiffs repeatedly argued that Pfizer should be required to expand its waiver to include legal advice received not only as to the company's securities disclosures, but also as to the underlying government investigation. The Court properly rejected that argument every time Plaintiffs made it and should do so again. Pfizer has done nothing to waive its privilege as to the government investigation. All of the documents relied upon by Defendants either (1) were never privileged in the first place (such as the Covington & Burling "white paper" submitted to the government in 2007 or the Covington & Burling audit response letters provided to KPMG throughout the Class Period) or (2) are within the four corners of the waiver agreed upon by the parties and endorsed by the Court. Thus, the Court's prior rulings were and are correct, and Plaintiffs' latest effort to re-litigate this issue should be rejected. *See infra* at 23-27.

Third, the disclosure that is the primary focus of Plaintiffs' motion is a single, non-actionable statement from one portion of Pfizer's SEC filings, which they mischaracterize as an assurance that Pfizer would not be forced to agree to a large settlement with the government, such as the one announced on January 26, 2009. The full text of the statement, however, makes clear that Pfizer faced precisely this risk:

> Litigation is inherently unpredictable, and excessive verdicts do occur. Although we believe we have substantial defenses in these matters, ***we could in the future incur judgments or enter into settlements of claims that could have a material adverse effect on our results.***

This warning is not actionable as a matter of law, and therefore Plaintiffs' argument concerning the advice Defendants received about it is a moot point. *See infra* at 27-28.

Fourth, the record is uncontroverted that Messrs. Block and Fox advised that the disclosures Plaintiffs challenge, including the warning quoted above, complied with the securities laws, and that Defendants relied on that advice. Every witness asked in deposition—including the Pfizer executives who signed the disclosures, the Pfizer employees involved in compiling the disclosures, and perhaps most importantly Messrs. Block and Fox themselves—so testified. Plaintiffs' effort to confuse the issue, by claiming that Defendants actually relied on government investigations lawyers, not disclosure lawyers, for advice on the adequacy of the disclosures is nonsensical and flatly contradicted by the record. Plaintiffs cite cases where lawyers testified they were not asked for advice on the matter at issue, or did not give the advice. The exact opposite is true here: Messrs. Block and Fox not only confirmed they were asked for and gave advice that Pfizer's disclosures were appropriate, but also reaffirmed that they continue to stand by their advice today, notwithstanding Plaintiffs' hindsight-driven criticisms. *See infra* at 29-36.

Fifth, the record is likewise undisputed that Defendants provided Messrs. Block and Fox all information—including all facts, correspondence, legal briefs, status reports, and whatever else they requested—material to their advice concerning the company's disclosure of the Bextra investigation. The record also demonstrates that Defendants relied on this process and believed that they had received informed advice. Plaintiffs' baseless accusation that Defendants "hid" material facts from disclosure counsel is, again, inconsistent with all the testimony from the Pfizer employees involved in the process and, most importantly, the testimony of Messrs. Block and Fox. Plaintiffs also argue that Messrs. Block and Fox were not criminal lawyers, and did not interview witnesses, review underlying documents, or attend meetings with prosecutors—basically, that they did not represent the company in the Bextra investigation—but of course that

is not the role of disclosure counsel. Disclosure lawyers need not (and simply cannot) know every detail relating to all legal matters disclosed in a company's Form 10-K—for Pfizer, there were dozens of such matters—but rather need to be informed of facts that would be material to their advice. Messrs. Block and Fox testified that they were aware of all such facts. *See infra* at 36-41.

Sixth, what matters for purposes of establishing lack of scienter is whether Defendants genuinely and in good faith believed their counsel were informed of all material facts, and that Defendants acted on that belief. Plaintiffs cannot support their arguments with improper insinuations that anyone withheld information from Messrs. Fox and Block. In fact, all the testimony is to the contrary. That alone defeats Plaintiffs' motion and demonstrates why ***Defendants*** are entitled to summary judgment. *See infra* at 41-43.

In all events, Plaintiffs' criticism of one warning in Pfizer's SEC filings cannot justify the sweeping relief they seek: precluding Defendants from raising the advice they received from Messrs. Block and Fox as to all remaining portions of Pfizer's disclosures concerning the Department of Justice investigation, and excluding all non-privileged evidence concerning government investigations counsel's work. Plaintiffs do not address the abundant evidence that Defendants sought advice from disclosure counsel whenever a material development occurred in the investigation, that government investigations counsel provided information relevant to such advice, and that Defendants cleared the disclosures every single quarter of the Class Period with Messrs. Fox and Block. Plaintiffs cannot erase disclosure counsel's involvement in those decisions based on arguments relating solely to a different statement in Pfizer's disclosures. *See infra* at 44-46.

Finally, as to the FAS 5 reserve decisions that Plaintiffs challenge, Defendants relied on Pfizer's independent auditors at KPMG, who advised that Pfizer's reserving decisions with respect to the Bextra investigation complied with GAAP. Plaintiffs were provided all documents to or from KPMG related to that advice, and the record shows that Defendants had a good faith belief that KPMG, like Messrs. Block and Fox, received all the information needed for its audits. *See infra* at 46-49.

For all of these reasons, Plaintiffs' motion should be denied.

BACKGROUND

I. The Government Investigations of Bextra and Other Products and Pfizer's Disclosures.

A. The Disclosures at Issue.

In 2004, the Department of Justice informed Pfizer that it was investigating the company's marketing practices concerning Bextra.[2] The government's inquiry, much later, expanded to several other Pfizer medications.[3] Plaintiffs allege that Defendants made misleading statements—or omitted information necessary to make existing statements not misleading—about the government investigation, which the company resolved in January 2009.[4]

Pfizer's SEC filings during the Class Period contained numerous disclosures that addressed the company's pending legal proceedings. In Item 1A of its 2005 Form 10-K (the first filing of the Class Period), which is titled "Risk Factors and Cautionary Factors That May Affect Future Results," Pfizer listed "Legal Proceedings" and warned its investors:

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[2] October 30, 2014 Rule 56.1 Statement of Undisputed Facts in Support of Pfizer's Motion for Summary Judgment ¶ 51 (hereinafter "SUF").

[3] SUF ¶ 84.

[4] *See generally* First Am. Compl. The Class Period for this case is January 16, 2006 to January 23, 2009. *Id.* at 1.

> We and certain of our subsidiaries are involved in various patent, product liability, consumer, commercial, securities, environmental and tax litigations and claims; government investigations; and other legal proceedings . . . . ***Litigation is inherently unpredictable, and excessive verdicts do occur.*** Although we believe we have substantial defenses in these matters, ***we could in the future incur judgments or enter into settlements of claims that could have a material adverse effect on our results of operations in any particular period***.[5]

The company repeated this warning in the introductory language of the "Legal Proceedings and Contingencies" section of its 2005 Financial Report.[6] These warnings were generally applicable to all of the company's various pending legal proceedings and were not specific to, nor were written in response to, the Bextra investigation.

Five pages later in its 2005 Financial Report, Pfizer provided a description of particular pending government investigations, in a section titled "Government Investigations and Requests for Information":

> Like other pharmaceutical companies, we are subject to extensive regulation by national, state and local government agencies in the U.S. and in other countries in which we operate. As a result, we have interactions with government agencies on an ongoing basis. The principal pending investigations and requests for information by government agencies are as follows:
>
> . . . .
>
> In 2003 and 2004, we received requests for information and documents concerning the marketing and safety of Bextra and Celebrex from the Department of Justice and a group of state attorneys general.[7]

[5] SUF ¶ 65 (emphases added).

[6] December 8, 2014 Defendants' Counterstatement of Material Facts and Reply to Plaintiffs' Statement of Undisputed Facts ¶ 75 (hereinafter "CS").

[7] SUF ¶ 67.

As the Bextra investigation unfolded and throughout the Class Period, Pfizer updated this disclosure several times.[8]

Pfizer repeatedly warned investors that the Department of Justice investigation, along with all other government investigations, could result in:

- an "excessive verdict[]" because "[l]itigation is inherently unpredictable";[9]
- "judgments or . . . settlements of claims that could have a material adverse effect on our results of operations in any particular period";[10]
- "civil and criminal sanctions";[11]
- "criminal charges and fines and/or civil penalties";[12] and
- "the payment of a substantial fine and/or civil penalty."[13]

Plaintiffs' core contention is that these disclosures failed to warn investors adequately that Pfizer might resolve the Department of Justice investigation as it ultimately did, through a settlement that required Pfizer to pay a substantial fine. As reflected by the plain language above, however, and further explained in Defendants' summary judgment motions, these disclosures warned of precisely the type of resolution that occurred, and were adequate as a matter of law.[14]

[8] SUF ¶¶ 11-16, 63, 70-71, 90, 94-96, 104.

[9] SUF ¶ 65.

[10] SUF ¶ 65.

[11] SUF ¶ 64.

[12] SUF ¶ 71.

[13] SUF ¶ 104.

[14] *E.g.*, Memorandum of Law in Support of Pfizer's Motion for Summary Judgment at 38-55; *see also* Reply Memorandum of Law in Support of Pfizer's Motion for Summary Judgment at 3–11, 21–26.

B. Pfizer's Inside and Outside Disclosure Counsel Advised Defendants on Whether and How To Disclose Information Regarding the Investigation.

When Pfizer learned of the Department of Justice investigation, the company retained experienced government investigations counsel at Covington & Burling to conduct an internal investigation and to respond to the government's requests for information.[15] The company also assigned in-house litigation counsel to oversee Covington's work; chief among them were Douglas Lankler and Carlton Wessel, both former federal prosecutors.[16] These lawyers—along with others retained as the investigation continued over a period of years (collectively, "government investigations counsel")—advised Pfizer in responding to the Department of Justice.[17]

Separate and apart from the company's strategy in responding to the government, Pfizer had to determine whether and how to disclose the investigation in its SEC filings. For that task, Defendants relied on the judgment of its two veteran securities lawyers: in-house disclosure counsel Larry Fox, and outside disclosure counsel Dennis Block, then of the law firm Cadwalader Wickersham & Taft LLP.[18] Together, Messrs. Fox and Block had more than 75 years of experience advising public corporations on their disclosure obligations under the securities laws.[19] Mr. Fox managed the comprehensive process Defendants had developed to produce its disclosure of its pending legal proceedings.[20] He advised Defendants that every

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[15] SUF ¶ 52; CS ¶ 76.

[16] SUF ¶¶ 7, 69; CS ¶ 76.

[17] SUF ¶¶ 52, 54, 56, 69, 74-75, 92, 98, 102, 107; CS ¶ 76.

[18] SUF ¶¶ 1-4, 6-14, 16, 18, 20-25, 62-63, 70-71, 76-77, 90-91, 94-96, 99-100, 104, 108-109; CS ¶¶ 77-85.

[19] SUF ¶¶ 2-3.

[20] The process is described in more detail in the October 30, 2014 Memorandum in Support of Pfizer's Motion for Summary Judgment. *See* Mem. at 5-9; SUF ¶¶ 1-16, 18-20.

disclosure during the Class Period, including those Plaintiffs challenge here, complied with the securities laws.[21]

Throughout the Class Period, Defendants also relied on Mr. Block—who this Court has recognized as a "first-rate lawyer in the securities field" upon whom Defendants had "a right to rely"[22]—to review Pfizer's disclosures and advise whether they conformed to the securities laws.[23] To this end, Mr. Block received a copy of the draft Legal Proceedings disclosure every quarter and provided his advice on appropriate edits, both orally and in handwritten comments provided to Mr. Fox.[24] Those handwritten comments, which Plaintiffs received as part of the Company's negotiated privilege waiver, demonstrate that Mr. Block personally reviewed, considered, edited and approved the Department of Justice investigation disclosure in every quarter of the Class Period.[25] In addition to providing comments, Mr. Block formally certified in writing that each filing during the Class Period complied with the securities laws.[26]

During discovery Plaintiffs deposed Pfizer's CEOs and CFOs who signed the disclosures at issue; lawyers, accountants, and other Pfizer personnel who were involved in Pfizer's extensive process for creating its disclosures; and Messrs. Block and Fox. Every witness testified that when it came to the company's disclosures, including the warnings provided to investors regarding the potential consequences of its legal proceedings (and the Bextra investigation disclosures specifically), Defendants sought and relied upon legal advice from Messrs. Fox and Block. Dr. Henry McKinnell, Pfizer's CEO from 2001 to July 2006, testified:

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[21] SUF ¶¶ 2, 25; CS ¶ 77, 79-85.

[22] July 19, 2013 Hr'g Tr. 27:7-14.

[23] SUF ¶¶ 3-4, 10-14, 16, 22; CS ¶¶ 78, 80-86.

[24] SUF ¶¶ 4, 10-14, 16, 22.

[25] SUF ¶¶ 12-14, 16, 63, 71.

[26] SUF ¶ 22.

"If it's a matter of disclosure . . . the legal opinion came internally from Larry Fox, who was specifically in charge of disclosure matters, and Dennis Block, an outside attorney who advised the company . . . on securities disclosure issues . . . and had done so for 25 or more years."[27] His successor as CEO, Jeffrey Kindler, likewise confirmed that he "rel[ied] in good faith on the advice of Mr. Block and Mr. Fox" and that these "professional securities attorneys carefully reviewed what we were disclosing and the judgments that we were making and gave us their expert opinion that we were complying both with the laws and regulations."[28] All of the other witnesses confirmed this point,[29] including most notably Messrs. Block and Fox:

> **Mr. Fox**: "[O]ur [government investigations] attorneys and outside counsel, of course, conduct the investigations . . . . [O]ur internal lawyers then inform me and our outside disclosure counsel, Dennis, appropriately so we can make informed disclosure judgments."[30]
>
> **Mr. Block**: "[My role] was just giving comments on what I understood was a fair disclosure of what they were trying to disclose. And sometimes I would ask questions. Sometimes I'd pick up the phone and call Larry and/or he'd pick up the phone and call me, and we'd talk about how to accurately, adequately and appropriately disclose the given case."[31]

This division of labor—on the one hand, retaining government investigations counsel to advise on the company's defenses in the Bextra investigation, and, on the other hand, relying upon securities disclosure counsel to advise on the company's disclosure obligations—is commonplace for large corporations. Indeed, Plaintiffs' own proffered disclosures expert, Edward Buthusiem, testified that his former employer, GlaxoSmithKline ("GSK"), followed a

[27] CS ¶ 80.

[28] CS ¶ 81.

[29] CS ¶¶ 77, 80-86.

[30] CS ¶ 85.

[31] CS ¶ 85.

virtually identical process.[32] Mr. Buthusiem acknowledged that disclosure lawyers are not expected to be—and could not be—experts in the many legal issues encountered by large corporations or be personally involved in all of the many legal matters such companies face. To provide informed disclosure advice, disclosure counsel instead received the relevant information from "the internal and external counsels handling the matter."[33] Like Messrs. Block and Fox, Mr. Buthusiem did not review trial transcripts or exhibits,[34] patent office filings or challenges,[35] or letter requests from the government.[36] He nonetheless agreed that "senior executives at [GSK] were relying upon [his] skills as a lawyer to get comfort that the securities disclosures were appropriate," and that "it was reasonable for the senior executives at GSK . . . to take comfort from the fact that a lawyer such as [him]self" and "outside disclosure counsel" both reviewed and approved the disclosures.[37] This is exactly what happened at Pfizer.

This Court's Order governing the scope of Pfizer's limited privilege waiver, to which Plaintiffs agreed, reflects the same distinction between securities disclosure counsel and litigation counsel. During the discovery process, Pfizer offered to waive the attorney-client privilege as to the legal advice it received regarding the adequacy of its legal proceedings disclosures concerning the Department of Justice investigation. Plaintiffs accepted this offer. Consistent with the parties' agreement, the Court limited the boundaries of Pfizer's waiver to

[32] CS ¶ 93. In fact, GSK hired outside government investigations counsel—including some of the same lawyers who advised and defended Pfizer in the Bextra investigation, such as Ethan Posner at Covington and Brien O'Connor at Ropes & Gray—to conduct internal investigations and respond to the government. CS ¶ 94. Meanwhile, Mr. Buthusiem, a securities lawyer with no criminal law experience, and an outside disclosure counsel also with no criminal law experience, advised GSK regarding whether and how to disclose legal proceedings in its public filings. CS ¶ 95.

[33] CS ¶ 95.

[34] CS ¶ 95.

[35] CS ¶ 95.

[36] CS ¶ 95.

[37] CS ¶ 96.

securities disclosure advice from disclosure counsel, and not ***litigation advice*** from government investigation counsel. Specifically, the Court ordered that:

> 1. By relying on communications from attorneys in connection with (i) ***legal advice regarding Pfizer's legal proceedings disclosures concerning the government investigations*** that culminated in the $2.3 billion settlement announced on January 26, 2009 and memorialized in the Settlement Agreement between the United States Department of Justice and Pfizer Inc. (the "Government Investigations") and (ii) legal advice regarding Pfizer's FAS 5 reserves in connection with potential losses arising out of the Government Investigations (together, the "Waived Subjects"), Pfizer will be deemed to have waived the attorney-client privilege as to the Waived Subjects.
>
> 2. ***The waiver does not extend to any other subject other than the Waived Subjects.***[38]

Pursuant to this Order, Pfizer produced every document to or from Messrs. Block and Fox—including all communications to or from government investigations counsel—sent for the purpose of obtaining securities disclosure advice, as well as the actual advice Messrs. Block and Fox gave. In total, Pfizer produced more than 7,000 pages of documents pursuant to this Order.[39] In addition, Pfizer permitted deposition questioning of its lawyers on the otherwise-privileged topic of communications between the government investigations lawyers and disclosure counsel.[40] ***Nothing was withheld on this subject***. What Pfizer did not produce, as expressly agreed and as reflected in the limited waiver, were the files of its government investigations counsel, reflecting their work product and litigation advice on the underlying Department of Justice investigation.

Defendants' Amended Answer confirms that their defense covers securities disclosure counsel, not government investigations counsel:

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[38] Rule 502(d) Order, Jan. 18, 2013, Rec. Doc. 150 (emphases added); CS ¶ 117.

[39] CS ¶ 118.

[40] CS ¶ 119.

> Pursuant to Pfizer's limited subject-matter waiver of its attorney client privilege, as governed by the Rule 502(d) Order entered by the Court on January 18, 2013, Defendants acted at all times in good faith and with reasonable care, and ***they reasonably relied upon, among other things, advice of outside and inside counsel regarding the legal proceedings disclosures*** concerning (i) the government investigations that culminated in the $2.3 billion settlement announced on January 26, 2009, and (ii) Pfizer's FAS 5 reserves to take into account any potential losses arising out of those government investigations.[41]

C. The Court Repeatedly Denied Plaintiffs' Efforts To Expand the Scope of Pfizer's Limited Waiver of Privilege.

Notwithstanding Pfizer's production of all relevant documents to and from Messrs. Block and Fox, Plaintiffs attempted repeatedly to reach beyond the scope of the agreed waiver to obtain privileged communications between Pfizer and its government investigations counsel. Without fail, the Court denied these attempts to expand the parties' agreement and transform Pfizer's waiver of its ***securities disclosure*** advice—*i.e.*, the advice it received from Messrs. Block and Fox regarding the propriety of what it said and did not say in its SEC filings—into a waiver of its ***litigation*** advice. At the July 19, 2013 status hearing, for instance, Plaintiffs made this argument not once but three times:

> Mr. Rosen: First of all, your Honor, under the law, if you're going to rely on counsel, you're entitled to all advice that you received.
>
> The Court: ***That's not true.***
>
> Mr. Rosen: And we get to test whether they passed that on to him to see whether he relied in good faith.
>
> The Court: ***That's not true.*** You're entitled to everything that the client was told. ***You're entitled to everything that Pfizer was told by the lawyer and you can test what the lawyer knew and what he said because it's a good faith defense.*** But ***you can't test***

[41] Am. Answer at 26 (emphasis added). Pfizer noted that the assertion of this defense "does not assume the burden of proof on any issue as to which applicable law places the burden on Plaintiffs." *Id.* at 24.

> ***everything that may be down the channel of communication that the lawyer may never have seen.***[42]

Plaintiffs continued to insist that Pfizer was required to turn over documents from its government investigations counsel: "They have to give us what advice they received from their lawyers regarding the government investigation."[43] The Court again rejected Plaintiffs' argument, stating, "I don't agree. ***You don't test what's down the chain. Whatever Block used or considered, you're entitled to have***."[44] Plaintiffs asked a third time for "discovery directed towards the outside law firms that represented Pfizer during the investigation in order to test what advice was given to them so that we can test whether they relied on Mr. Block in good faith," and the Court yet again sustained Pfizer's objection.[45]

D. Messrs. Fox and Block Received the Information Needed To Render Their Disclosure Advice.

To render their advice on the company's disclosures, Messrs. Block and Fox obtained information on all of the company's pending legal proceedings from the in-house litigation counsel responsible for overseeing those matters.[46] With regard to government investigations in particular, Messrs. Block and Fox participated in quarterly and *ad hoc* update meetings or calls with Pfizer's in-house government investigations counsel, *i.e.*, Messrs. Lankler or Wessel, and occasionally communicated with outside government investigations counsel.[47] The purpose of these "extended conversations" was to "educate" disclosure counsel "about the status of the litigation" and to "get [the government investigations lawyers'] view on likely outcomes,

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[42] July 19, 2013 Hr'g Tr. 10:5-16 (emphases added).

[43] *Id.* at 10:25-11:2 (emphasis added).

[44] *Id.* at 11:3-5 (emphasis added).

[45] *Id.* at 19:2-9.

[46] SUF ¶¶ 7-10, 70, 76, 90, 94, 99, 108-109; CS ¶¶ 97, 99-103, 107-110.

[47] SUF ¶¶ 7-10, 70, 76, 90, 94, 99, 108-109; CS ¶¶ 97, 99-103, 107-110.

potential risks, and the like."[48] Indeed, Mr. Fox has already answered the basic question Plaintiffs pose in this motion:

> Q. Were you always comfortable that Mr. Block, as well as yourself, had all the information that you needed to provide Pfizer with informed advice?
>
> . . . .
>
> A. Yes.[49]

When disclosure counsel wanted more information, they could and did ask for it. As Mr. Fox testified, "To the extent we had questions, we would ask them. We drilled down until we were comfortable."[50] Allen Waxman, Pfizer's general counsel from August 2006 to March 2008, "direct[ed] the team to provide Mr. Fox, Mr. Block with materials they needed to do their jobs."[51] As Mr. Waxman explained, his "general approach . . . was if Larry Fox want[ed] information, you provide[d] it to him," and Mr. Waxman both "encourage[d] Larry to make sure he asked whatever questions he wanted to ask, whenever he wanted to ask them" and informed Pfizer's lawyers—including the company's government investigations counsel—that disclosure counsel had "a very critical function and everybody should cooperate with him."[52] Mr. Kindler testified that he required "Mr. Lankler, together with outside counsel, to keep Mr. Block and Mr. Fox ***fully informed of the state of these investigations*** and what they were finding in order that Mr. Block and Mr. Fox could advise us on our securities disclosures."[53] All of the witnesses

[48] SUF ¶ 8.

[49] CS ¶ 98.

[50] SUF ¶ 8.

[51] CS ¶ 99.

[52] CS ¶ 99.

[53] CS ¶ 99 (emphasis added).

who testified on this subject agreed with this description, and none suggested that information had been withheld from Messrs. Block or Fox.[54]

This process worked. Throughout the course of the Department of Justice investigation, Messrs. Block and Fox were kept abreast of its status, including the government's theories and core allegations against Pfizer.[55] Moreover, in their updates from government investigations counsel, they learned of many of the things that Plaintiffs assert they did not know. For example, they knew that the company's internal investigation had found some instances of Bextra marketing conduct that violated Pfizer's policies against off-label promotion.[56] As for the call notes Plaintiffs highlight, Mr. Fox testified that he understood the "net result of the call notes" because that was precisely "the type of information that, to the extent of any moment, would have been provided to Dennis Block and me by our [government investigations] attorneys."[57] Similarly, Messrs. Block and Fox were aware that a Pfizer sales employee had attempted to destroy documents and that Pfizer had self-reported that individual to the government.[58]

Messrs. Block and Fox used these updates to evaluate the potential need to supplement the company's securities disclosures.[59] When asked about the company's general warning regarding litigation risks—that, despite its belief that it had "substantial defenses," it could enter into a settlement with a material adverse effect on the company's operations—Mr. Fox testified

[54] CS ¶ 99-100.

[55] SUF ¶ 9; CS ¶ 101.

[56] CS ¶ 102.

[57] CS ¶ 103.

[58] CS ¶ 107.

[59] SUF ¶¶ 7-10, 76, 108-109; CS ¶¶ 77-79, 85-87, 89, 90, 92, 109.

that that statement was consistent with the "regular updates provided to me and to Dennis Block by our litigators and our [government investigations] attorneys."[60] As Mr. Fox put it,

> My role and Dennis' role was to speak about the matter with our [government investigations] counsel, to have them brief us, to have the opportunity to ask questions, which indeed we did, and ***then to either say this or not say this***, depending on what we heard.[61]

In other words, Messrs. Block and Fox—not the companies' litigators—advised the company on whether "to either say . . . or not say" statements in its Legal Proceedings disclosures, including the warning language upon which Plaintiffs largely base their motion.[62] Both Mr. Fox and Mr. Block felt that this disclosure was appropriate and that it accurately "reflect[ed] the information that we received."[63] Both disclosure counsel also pointed out that the statement was part of a series of warnings meant "to alert the investing public that we believe we have substantial defenses; but, nevertheless, there could be judgments, there could be settlements, litigation is unpredictable,"[64] and that notwithstanding Pfizer's belief that it had "very strong defenses to the case," the investigation "could result in a substantial fine."[65]

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[60] CS ¶¶ 89-90. Mr. Fox also recalled that Pfizer's self-reporting of this matter was "a far cry from saying that supports a government case that . . . this was pervasive" and "the fact that there were . . . isolated incidents of off-label promotion does not mean that we did not have substantial defenses to this matter. We did have substantial defenses." CS ¶ 102. Plaintiffs misattribute certain statements made in the plea colloquy as admissions that *Pfizer* had promoted Bextra for off-label uses and with an intent to defraud or mislead, as if those facts were undeniable from the outset of the investigation. Pls.' Br. at 15. As the document itself demonstrates, however, *Pharmacia & Upjohn Company*—not Pfizer, but one of its subsidiaries—admitted that conduct. *See* Pls.' Ex. 26, at 51:10-52:9. In addition, that Pharmacia eventually conceded that there was a factual basis for its plea, as part of a resolution of the matter, does not mean that Pfizer never had substantial defenses. On the contrary, as Pfizer's lead government investigations counsel Brien O'Connor testified, Pfizer continued to dispute the government's view of the case and as late as January 2009 was offering to litigate the case in a variety of ways. SUF ¶¶ 74, 75, 103, 107, 108, 112.

[61] CS ¶ 89 (emphasis added).

[62] CS ¶¶ 77-85, 89-90.

[63] CS ¶ 90.

[64] CS ¶ 90.

[65] Block Dep. at 183:21-184:5.

Significantly, although Plaintiffs deposed both Mr. Block and Mr. Fox and confronted them with the facts that they allege were hidden from them, ***both continue to stand by their advice***. Mr. Block testified that he believed Pfizer "probably made more robust and transparent disclosure than anybody," and continues to hold that view today:

> Q. [Plaintiffs' counsel] has asked you a number of questions today and shown you some documents. Is there anything that he's said to you today or shown you today that changes your view as to the appropriateness of Pfizer's disclosures during the class period?
>
> A. No.[66]

Similarly, Mr. Fox testified:

> Q. Were you always comfortable during the class period that the legal proceedings disclosures were appropriate, adequate and in compliance with the securities laws?
>
> A. Yes.
>
> Q. Sitting here today, do you believe that the company's litigation proceedings disclosures during the class period complied with the securities laws?
>
> A. I do.[67]

II. Pfizer's FAS 5 Reserving Judgments During the Class Period.

As with its securities disclosures, Pfizer evaluated its loss contingencies every quarter during the Class Period to determine whether a reserve was required under Financial Accounting Standard No. 5 ("FAS 5"), which requires a company to accrue a reserve only when a loss is both "probable" and "reasonably estimable."[68] In consultation with Pfizer's outside auditor KPMG, Pfizer's Controller, Loretta Cangialosi, was principally responsible for ensuring that the company's FAS 5 reserves complied with GAAP.[69] Ms. Cangialosi received monthly updates on

[66] SUF ¶ 23.

[67] SUF ¶ 25.

[68] SUF ¶ 30.

[69] SUF ¶ 31.

potentially material litigation matters, including government investigations, and she and her colleagues in the Controller's group also participated in quarterly reserve reviews attended by KPMG and government investigations counsel.[70] Like Messrs. Block and Fox, she and KPMG also received *ad hoc* updates from government investigations counsel in response to developments in the investigations.[71]

KPMG participated in the FAS 5 reserve judgments, and independently concluded in writing each quarter that Pfizer's accrual determination was reasonable.[72] KPMG received information on the government investigation from multiple sources, including in written communications Plaintiffs have received in discovery, such as quarterly letters from Pfizer's general counsel summarizing the company's significant litigation;[73] Covington & Burling's internal investigation workplan;[74] the 75-page white paper Covington presented to the government detailing the company's substantial defenses, along with another defense memoranda;[75] and the audit response letters Covington sent to KPMG concluding that a loss from the Bextra investigation was not "probable."[76] After receiving all of this information from Pfizer's counsel, KPMG concluded at each reporting period that it concurred with Pfizer's determination that the Bextra investigation did not trigger a reserve obligation under FAS 5. Contemporaneous documents attest to this conclusion,[77] and testimony bears it out. When asked

[70] SUF ¶ 32.

[71] SUF ¶ 33; *see also id.* ¶ 34.

[72] CS ¶ 112.

[73] SUF ¶¶ 51, 53, 70, 71, 73, 76; CS ¶¶ 113-114.

[74] Pls.' Ex. 59; *see also* CS ¶¶ 113-114.

[75] CS ¶¶ 113-114.

[76] SUF ¶¶ 42, 79; CS ¶¶ 113-114.

[77] SUF ¶ 39; *see also id.* ¶¶ 35, 37, 40, 41, 49, 81-82.

at their depositions, KPMG's audit partners re-affirmed their judgment that no reserve was required throughout the Class Period, and the fact that they had so advised Defendants.[78]

Mr. Block, as securities disclosure counsel, did not make the company's FAS 5 reserving decisions. However, he did provide Defendants advice regarding the FAS 5 standard and how it applied to the Department of Justice investigation, and the record establishes that he participated in a number of discussions with Pfizer personnel and KPMG on this subject.[79] Mr. Block also edited two memoranda—the first in October 2007, the second in January 2009—summarizing the company's conclusion that no reserve was needed.[80] Consistent with the judgment made by Pfizer's internal accountants and its outside auditors, the October 2007 memorandum concluded that any loss from the Bextra investigation was not reasonably estimable due to the fact that the government was "still outlining its theories and ha[d] not made any demand" and Pfizer was "in the process of outlining our defenses to the government's potential case."[81] Subsequent settlement negotiations failed to produce an agreement for some time and, as late as January 2009, Mr. Block noted that "the uncertainty over whether the matter can be settled and at what amount," coupled with the fact that the government had not indicated it was "willing to settle the matter for an amount in a range and other conditions of settlement that Pfizer would accept," meant that the loss was not reasonably estimable.[82]

Defendants have asserted throughout this litigation that they relied in good faith on the accountants' FAS 5 judgments, and as such Plaintiffs cannot demonstrate scienter. Plaintiffs were on notice of this defense throughout discovery; indeed, they were the ones to subpoena

[78] SUF ¶ 46.

[79] SUF ¶¶ 40, 43, 80; CS ¶ 115.

[80] SUF ¶¶ 40, 43; CS ¶ 116.

[81] CS ¶ 116.

[82] CS ¶ 116.

documents from KPMG.[83] On December 6, 2012, for example, Plaintiffs noted in a letter that "defendants will be asserting reliance on the advice of professionals in this action, including attorneys and accountants," as to "disclosure of . . . legal proceedings" and "the adequacy of internal controls and FAS 5 reserves."[84] On March 8, 2013, Plaintiffs' counsel even told the Court: "[D]efendants have asserted the reliance on their auditor defense for purposes of their legal proceeding disclosures, and the FAS 5 disclosures in the class period, Pfizer financial statement."[85] Plaintiffs have had ample opportunity, and have availed themselves of that opportunity, to question witnesses on this topic,[86] and have received all communications from Pfizer's government investigations lawyers to KPMG.

ARGUMENT

I. PLAINTIFFS CANNOT OBTAIN SUMMARY JUDGMENT ON THE ISSUES OF DEFENDANTS' RELIANCE ON ADVICE OF COUNSEL AND GOOD FAITH.

As an initial matter, Plaintiffs cannot properly move for summary judgment on the "issues" of Defendants' reliance on counsel or auditors and good faith, because those matters negate the element of scienter that is Plaintiffs' burden to prove. Scienter is a necessary element of every 10b-5 action, *see Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 168 (2d Cir. 2000), and a defendant's good-faith reliance on the advice of professionals, including in particular counsel, negates scienter. *See Howard v. SEC*, 376 F.3d 1136, 1147 n.19 (D.C. Cir. 2004) (internal

[83] Plaintiffs' September 2011 subpoena specifically requested KPMG to produce documents related to Pfizer's "litigation reserve or accrual for litigation." *See* CS ¶ 120.

[84] CS ¶ 122. At the same time Plaintiffs received Defendants' Amended Answer, Pfizer's counsel reiterated to Plaintiffs' counsel in a cover letter accompanying that filing that "KPMG's audits and reviews negate two elements of Plaintiffs' prima facie case—namely, that Pfizer made any material misstatement or omission and that Defendants acted with scienter." CS ¶ 124.

[85] CS ¶ 123. Similarly, at the July 7, 2014 hearing regarding expert discovery, Plaintiffs' counsel noted that certain experts were necessary because "defendants have asserted a reliance on counsel and reliance on their auditors defenses in the case." CS ¶ 115 & n.218.

[86] CS ¶ 125.

quotation marks omitted); *id.* at 1147 ("[R]eliance on the advice of counsel need not be a formal defense; it is simply evidence of good faith, a relevant consideration in evaluating a defendant's scienter."); *see also Hadar v. Concordia Yacht Builders, Inc.*, 886 F. Supp. 1082, 1089 (S.D.N.Y. 1995) ("A defense is not affirmative where it merely negates an element of the plaintiff's prima facie case.") (internal quotation marks omitted). The defense instead serves as a powerful "green" flag demonstrating a defendant's lack of scienter. *Howard*, 376 F.3d at 1147. As a result, any suggestion that Defendants did not adequately plead the defense, or that it can be "stricken," is meritless. *See* Fed. R. Civ. P. 8(c)(1) (requiring a party to "affirmatively state any avoidance or affirmative defense").

Plaintiffs ask for "summary judgment" on these issues in an attempt to preclude Defendants from putting forward evidence that is highly relevant to their intent—the "green" flag of Defendants' reliance upon securities disclosure advice from Messrs. Fox and Block and accounting advice from KPMG. But, because advice of counsel is a factor relevant to the scienter element of Plaintiffs' claim, Plaintiffs cannot seek to preclude evidence on that subject under the guise of a motion for summary judgment. *See* Fed. R. Civ. P. 56(a) (providing for summary judgment only as to a "claim or defense" or a "part" (*i.e.*, an element) of a claim or defense); *cf. In re State Street Bank & Trust Co. Fixed Income Funds Inv. Litig.*, 772 F. Supp. 2d 519, 546 n.18 (S.D.N.Y. 2011) ("[B]ecause superseding cause is just one part of the proximate causation doctrine and not an affirmative defense, partial summary judgment . . . would be inappropriate on this issue, as causation is just one element of State Street's liability in this case."); *Rasmussen v. City of New York*, 766 F. Supp. 2d 399, 404 (E.D.N.Y. 2011) ("Although Rule 56 allows a party to seek summary judgment on part of a claim, the reference to 'part' is best understood as relating to either the entirety of liability, or damages, or at least a discrete

element of damages. ***It does not permit elimination of particular facts from the jury's consideration.***" (emphasis added) (citation omitted)).

In any event, to the extent advice of counsel can be construed as a defense as to which Defendants have a burden of proof, Defendants have met their burden for the reasons articulated in Part IV *infra*. Disclosure counsel were informed of all facts concerning the Bextra investigation material to their advice, and Defendants relied in good faith on disclosure counsel's informed judgment that Pfizer's disclosures were adequate under the securities laws. Thus, even if the Court accepted the flawed legal premise underlying Plaintiffs' motion, the Court could not grant summary judgment in their favor on any aspect of their motion.

II. DEFENDANTS DID NOT WAIVE THE RIGHT TO SHOW GOOD FAITH RELIANCE ON SECURITIES DISCLOSURE COUNSEL.

Plaintiffs advance another flawed procedural argument: that Defendants waived their right to rely on disclosure advice from Messrs. Block and Fox because Pfizer did not waive its attorney-client privilege as to its government investigations counsel and the advice they provided the company on the underlying Department of Justice investigation. Plaintiffs imply that Defendants have selectively invoked government investigations counsel's privileged materials and that any mention of government investigations counsel should be "stricken." Pls.' Br. at 36. Plaintiffs' position flies in the face of the parties' negotiated agreement, the Court's Order governing the scope of the waiver, and the Court's multiple prior decisions on this subject. The Court's January 18, 2013 Order established the scope of the limited waiver Pfizer made—which covered all "legal advice regarding Pfizer's legal proceedings disclosures concerning the government investigations"[87]—in order to show its reliance on Messrs. Block and Fox. Plaintiffs agreed that there would be no waiver of the privilege with respect to government investigations

[87] CS ¶ 117.

counsel, and instead accepted thousands of previously-privileged documents from the files of Messrs. Block and Fox.

But when Plaintiffs reviewed this evidence, they did not like what they saw—the documents reflect (1) the clear advice of Messrs. Block and Fox that the disclosures were adequate, and (2) Defendants' good faith in relying on that advice. So Plaintiffs changed course, and claimed (as they do again now) they were entitled to a broader waiver of privilege. Each time, the Court rejected Plaintiffs' position. At a July 19, 2013 hearing, for example, Plaintiffs insisted that they were entitled to discovery of the privileged communications of government investigations counsel, regardless of whether those communications occurred when Defendants sought or obtained disclosure advice from Messrs. Block and Fox.[88] The Court rejected the argument and drew a clear distinction between securities disclosure advice—as to which Pfizer has waived privilege and for which it has produced all responsive documents and allowed all relevant questions of its disclosure attorneys—and litigation advice. As the Court explained, Plaintiffs were entitled to "[w]hatever Block used or considered," but not to "test what's down the chain" or to "test everything . . . that the [disclosure] lawyer may never have seen."[89]

The Court's decisions were correct and consistent with the established principle that a waiver extends only to "the same subject matter." Fed. R. Evid. 502(a)(2); *see also Pritchard v. Cnty. of Erie*, 546 F.3d 222, 229 (2d Cir. 2008); *Bulow v. Bulow*, 828 F.2d 94, 102-03 (2d Cir. 1987). Because advice on securities disclosures addresses a different subject from advice on the conduct of the government investigation, reliance on counsel for one does not affect a waiver of

[88] Indeed, the cases Plaintiffs cite now—such as *Markowski*, *Bank Brussels Lambert v. Credit Lyonnais*, *Arista Records*, and *Bilzerian*—are precisely the same cases they cited to the Court as part of their unsuccessful argument that they were entitled to discover government investigations counsel's privileged materials. *See* Joint Letter at 7, 9, July 9, 2013, Rec. Doc. 172.

[89] July 19, 2013 Hr'g Tr. 11:3-5.

privilege as to the other. *See, e.g.*, *SEC v. Reserve Mgmt. Co.*, Nos. 09 MD 2011, 09 Civ. 4346, 2012 WL 4774834, at *3 (S.D.N.Y. Sept. 12, 2012) (waiver was properly limited to counsel who had provided advice at issue and could not reach company's bankruptcy counsel when "Defendants' advice of counsel defense does not rely on any advice provided by" bankruptcy counsel); *In re Broadcom Corp. Sec. Litig.*, No. SA CV 01275GLTMLGX, 2005 WL 1403513, at *2 (C.D. Cal. Apr. 7, 2005) ("[S]ince the purported reliance on counsel extends only to the issue of the Defendants' knowledge of the legality and accuracy of [the corporation's] public statements, the waiver should be deemed to extend only to those communications relating to the public statements at issue. Plaintiffs are entitled to no more."), *aff'd*, 2005 WL 1403508 (C.D. Cal. May 10, 2005).

Plaintiffs have received all discovery to which they were entitled pursuant to the agreed-upon waiver of privilege. They have received all communications to and from Messrs. Block and Fox concerning the disclosure of the Department of Justice investigation, including communications between and among them and the company's government investigations counsel. Plaintiffs had the opportunity to ask Messrs. Block and Fox about what they learned from government investigations counsel, and Plaintiffs availed themselves of that opportunity. Plaintiffs also deposed Mr. Lankler, Pfizer's in-house government investigations counsel, as well as Brien O'Connor, one of Pfizer's lead outside counsel for the Bextra investigation. The record is replete with documents and testimony concerning Mr. Fox's or Mr. Block's frequent interactions with these lawyers.[90] Thus, Plaintiffs' statement that Defendants "shielded from plaintiffs all discovery related to any attorney not named Block or Fox," Pls.' Br. at 38, is

[90] CS ¶ 119. Where Pfizer did interpose a privilege objection, it was to questions concerning investigation counsel's litigation advice to Pfizer or disclosure counsel's other work for Pfizer.

demonstrably false. They have no basis for asserting that Defendants have waived any defense, and the Court should (again) reject this argument.

Separately, Plaintiffs have no basis whatsoever for requesting that the Court "preclude defendants from . . . referring to [government investigations counsel's] involvement in the Bextra Investigation," Pls.' Br. at 35-36, on a waiver theory or any other ground. Plaintiffs complain that Pfizer's motion for summary judgment refers to government investigations counsel 99 times, but those references all occur in the context of explaining the course of the Department of Justice investigation and government investigations counsel's role in updating Messrs. Fox and Block as to the key facts of the investigation—all facts that have been the subject of discovery. In other words, Defendants refer to government investigations counsel because of their role in the factual background of the case, not as part of any defense that government investigations counsel themselves provided disclosure advice.

Plaintiffs refuse to acknowledge this distinction and instead rely on inapposite authority, such as *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, in which a magistrate judge of this Court concluded that a privilege waiver had occurred because of the selective disclosure of, and reliance upon, privileged communications as part of an advice-of-counsel defense. *See* Nos. 93 Civ. 5298 et al., 1998 WL 567862, at *1 (S.D.N.Y. Sept. 3, 1998). The basic principle underlying this line of cases is that a party cannot disclose privileged communications to support its position and then shield those same communications from scrutiny. Here, in contrast, there is no sword-and-shield issue. This is not a case, as Plaintiffs suggest, where Defendants have selectively introduced privileged materials from outside the record, or where Defendants have relied on one lawyer's disclosure advice while shielding from discovery another lawyer's disclosure advice. When Defendants have cited to documents or testimony referencing

government investigations counsel, all of that evidence has been subject to discovery either because it (1) was ***never privileged*** in the first place; or (2) was subject to Pfizer's limited privilege waiver as to disclosure counsel's legal advice regarding Pfizer's disclosures of the Department of Justice investigation.

To give concrete examples, Defendants have discussed Covington's November 2007 white paper,[91] which summarized the company's substantial defenses to the government's allegations. As a legal brief provided to the government, of course, the white paper was never a privileged document, and it was produced to Plaintiffs in December 2011, well before the limited privilege waiver was executed. Moreover, Pfizer provided the white paper to KPMG, and thus Plaintiffs received a second copy of it from KPMG.[92] Defendants have also cited Covington's presentations to the government,[93] Covington's audit response letters to KPMG,[94] and the company's letters to KPMG summarizing significant litigation.[95] The common characteristics of all of these documents is that, although they involve government investigations counsel in some way, they all either were never privileged or fell within the waiver encompassed by the Court's Order. Most importantly, ***they all were produced to Plaintiffs***.[96] Thus, there can be no basis to bar Defendants from using these pieces of evidence to demonstrate the fact that Defendants believed, and acted on the belief, that the company had substantial defenses.

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[91] SUF ¶¶ 74-76; CS ¶ 106.

[92] CS ¶ 121.

[93] *See* SUF ¶ 54.

[94] *See* SUF ¶¶ 42, 79.

[95] *See, e.g.*, SUF ¶¶ 51, 53, 70, 71, 73, 76.

[96] CS ¶ 121.

III. THE "ALTHOUGH WE BELIEVE WE HAVE SUBSTANTIAL DEFENSES" WARNING CANNOT BE USED TO PRECLUDE DEFENDANTS' RELIANCE ON PROFESSIONALS DEFENSE.

Plaintiffs' motion fares no better when one turns to the substance of their arguments. Plaintiffs' entire argument is predicated on the assertion that Defendants falsely assured investors in Pfizer's Form 10-K that the company had "substantial defenses" to the Department of Justice investigation when it did not, and thus investors were misled into thinking the investigation would not result in a large settlement. The plain language of the statement, however, answers Plaintiffs' argument. The full text—which appears not in the specific Bextra investigation disclosure, or even in the Government Investigations section, but rather in the introductory language to the Legal Proceedings and Contingencies section—is:

> Litigation is inherently unpredictable, and excessive verdicts do occur. ***Although*** we believe we have substantial defenses in these matters, ***we could in the future incur judgments or enter into settlements of claims that could have a material adverse effect on our results of operations in any particular period***.[97]

Plaintiffs cannot use Pfizer's clear warning that it ***could*** enter into substantial settlements to support a claim that Pfizer assured investors that it would ***not*** do so. As set forth in Pfizer's summary judgment motion, this statement could never have misled any reader into thinking that Pfizer could not incur a large loss such as the one it announced on January 26, 2009.[98] This is particularly true given that, in addition to this general warning applicable to all of the company's legal proceedings, Pfizer also warned its investors that its government investigations could result in "criminal charges and fines and/or civil penalties"[99] and that the Bextra investigation in

[97] CS ¶ 75.

[98] Memorandum in Support of Pfizer's Motion for Summary Judgment at 44.

[99] SUF ¶ 71.

particular could result in "the payment of a ***substantial*** fine and/or civil penalty."[100] Because the "although we believe we have substantial defenses" language could never give rise to liability, Plaintiffs' attempt to strike any defenses with respect to it must be rejected.

IV. DEFENDANTS RELIED ON MESSRS. BLOCK AND FOX IN GOOD FAITH.

A. Defendants Relied on Messrs. Block and Fox, Not the Company's Government Investigations Counsel, To Advise on Disclosures.

The heart of Plaintiffs' motion is a fundamental mischaracterization of the role of Messrs. Block and Fox. The motion claims they were "scapegoats" chosen by Defendants to review Pfizer's disclosures regarding the Bextra investigation, Pls.' Br. at 1; to the contrary, they were the company's longtime disclosure lawyers, each of whom served in that role for many years before and after the Class Period. Over the years they advised on hundreds of disclosure matters—not simply those relating to legal proceedings—and even as to legal proceedings they advised on disclosure requirements for many dozens of legal matters, ranging from environmental to intellectual property to antitrust to products liability to government investigations and more.[101] The Bextra investigation was simply one of those matters.

As with all of Pfizer's other legal proceedings before, during, and after the Class Period, Pfizer and its executives relied on Messrs. Block and Fox to draft, review, discuss, edit, and approve the disclosure of the Bextra investigation.[102] And they did so. The record is replete with emails, calendar entries, records of phone calls, handwritten markups, and extensive deposition testimony, demonstrating that all of the disclosures at issue—including the one that serves as the linchpin for Plaintiffs' motion—were crafted and approved by Messrs. Block and

[100] SUF ¶ 104 (emphasis added).

[101] CS ¶ 86.

[102] SUF ¶¶ 1-4, 6-14, 16, 18, 20-25, 62-63, 70-71, 76-77, 90-91, 94-96, 99-100, 104, 108-109; CS ¶¶ 77-86, 89-90, 92.

Fox.[103] In order to advise Defendants as to whether and how to disclose the Bextra investigation, Messrs. Block and Fox did what every responsible disclosure lawyer must do: they communicated extensively with the litigators representing Pfizer in the underlying investigation to get an understanding of the matter. Those oral and written communications—***all*** of which were the subject of discovery—contained not simply factual information, but also the litigators' judgments regarding the investigation, including potential claims, evaluations of the strength of the case and the company's defenses, and the possible outcomes.[104]

Confronted with this record, Plaintiffs revert to a strategy that they tried (and that the Court repeatedly rejected) during discovery. They argue that, notwithstanding the testimony of all involved in the process, Defendants did not rely on Messrs. Block and Fox "for the accuracy of the 'substantial defenses'" statement in the SEC filings, but rather relied on Pfizer's government investigations counsel for that portion of the disclosure language. Pls.' Br. at 24. As they did before, and do again now, Plaintiffs attempt to conflate legal advice regarding ***securities disclosures***, which would of course be provided by ***securities disclosure counsel***, with legal advice provided by litigators regarding the underlying litigation (here, the Bextra investigation). *See id.* at 25 ("[D]efendants did not seek Block or Fox's advice about whether Pfizer had substantial defenses to the Bextra Investigation or their assessment of the strengths and weaknesses of the Government's case."). As any lawyer who has ever represented a large public corporation knows, securities disclosure counsel do not typically offer litigation advice and litigators do not typically offer securities disclosure advice; it is commonplace to retain separate counsel for those separate functions. That is the division of labor to which Pfizer's

[103] SUF ¶¶ 1-4, 6-14, 16, 18, 20-25, 62-63, 70-71, 76-77, 90-91, 94-96, 99-100, 104, 108-109.

[104] SUF ¶¶ 7-10; CS ¶¶ 77-79, 97-103, 107-110.

disclosure counsel testified, and so did Plaintiffs' own securities disclosure expert.[105] And that is exactly what Defendants did. Defendants have never relied, either in practice or in its defense of this case, on government investigations counsel to render securities disclosure advice.

The record instead shows, unsurprisingly, that Defendants relied on the company's government investigations counsel (Covington & Burling and Ropes & Gray) to advise them on how to respond to the Department of Justice's requests and positions in the Bextra investigation, whether and what defenses Pfizer might have if the government decided to litigate the matter, and other litigation-related issues. In contrast, Defendants relied on Messrs. Block and Fox for advice on an entirely different legal issue, namely, what do the securities laws require as to whether and how to disclose the Bextra investigation in the company's SEC filings? For example, Pfizer relied on Covington & Burling and Ropes & Gray to advise, as a substantive ***litigation*** matter, what defenses Pfizer might have to the Bextra investigation,[106] but Defendants sought and relied upon the advice of Messrs. Block and Fox regarding what the ***securities disclosures*** should say about the investigation.[107] As Mr. Fox testified, he and Mr. Block—not the company's litigation counsel—advised the company on whether "to either say . . . or not say" any statement in its Legal Proceedings disclosures.[108] And as to the "although we believe we have substantial defenses" language in particular, Mr. Fox confirmed that the legal advice he and Mr. Block provided (*i.e.*, that this language applied accurately to the Bextra investigation) was "the result of regular updates provided to me and to Dennis Block by our litigators" in their quarterly conference calls and interim updates, and "reflects the information that we received

[105] CS ¶¶ 76-79, 91, 93-96.

[106] CS ¶¶ 76, 80-84, 86, 91.

[107] CS ¶¶ 77-86, 89-90, 92.

[108] CS ¶ 89.

during those updates."[109] The overall purpose of this warning, as Mr. Fox noted, was "to alert the investing public that we believe we have substantial defenses; but, nevertheless, there could be judgments, there could be settlements, litigation is unpredictable."[110]

Every witness who was asked confirmed Mr. Fox's testimony.[111] For example, when asked about the "although we believe we have substantial defenses" warning, Mr. Kindler (the company's CEO for the majority of the Class Period) testified that "[t]he words in this disclosure are the product of an extensive review and process involving inside and outside counsel, the end result of which was for Mr. Fox and Mr. Block to recommend the appropriate language to put in the filing, consistent with our obligations to make appropriate disclosures."[112] Dr. Henry McKinnell, the company's previous CEO, stated unequivocally, "If it's a matter of disclosure, . . . the legal opinion came internally from Larry Fox, who was specifically in charge of disclosure matters, and Dennis Block, an outside attorney who advised the company . . . on securities disclosure issues . . . and had done so for 25 or more years," and that "based on the collective judgment that there were substantial defenses, that then affects the disclosure. And that's where I relied on Dennis and Larry." Similarly, Alan Levin, the company's CFO early in the Class Period, explained that the "although we believe we have substantial defenses" warning, along with every other part of the company's Legal Proceedings disclosures, was

> a product of discussions that our disclosure counsel have had with the people who are responsible for various legal matters. Those people who are responsible for these matters have a basis to

[109] CS ¶ 89.

[110] CS ¶ 90. Mr. Block concurred, describing Pfizer's disclosures as "very robust and transparent" because they informed investors of the existence of the Bextra investigation, that Pfizer was "trying to resolve it," believed it had "very strong defenses to the case," and acknowledged nonetheless that the investigation "could result in a substantial fine." CS ¶¶ 90.

[111] CS ¶¶ 77-86, 89-90, 92.

[112] CS ¶ 81.

> conclude that we had substantial defenses with regard to these matters. The disclosure counsel satisfies itself based on those conversations as part of its drafting of disclosures.[113]

As Mr. Levin made clear, "the use of that term ['substantial'] would have been the subject of discussion between our disclosure counsel and the various counsel who were responsible for the different legal matters"; then disclosure counsel, "based on their conversations with investigations or other legal counsel . . . , would have formed a view on the appropriate disclosure."[114] Similarly, Mr. Waxman, the general counsel, testified that "Dennis Block was our principal outside disclosure counsel," and

> I would have relied upon him—as the company relied . . . we all would have relied upon him for the validity of including this statement in our disclosure. So while he was not the one doing the firsthand analysis . . . of the defenses, he would have been involved in discussions . . . to assess was that fair and accurate and adequate disclosure. So I would have relied upon him for that.[115]

The witness testimony on this score is unanimous.[116]

Plaintiffs offer deposition excerpts in which witnesses stated the obvious fact that they did not rely on Messrs. Block and Fox for ***litigation*** advice, as if those excerpts establish that Defendants did not look to Messrs. Block and Fox for ***securities disclosure*** advice. Plaintiffs cite, for instance, Mr. Waxman's testimony that "Mr. Block was not our principal ***government investigations counsel***,"[117] and Mr. Kindler's testimony that he "did not look to" Messrs. Block or Fox to advise him "regarding the strengths or weaknesses of Pfizer's defenses to the

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[113] CS ¶ 82.

[114] CS ¶ 82.

[115] CS ¶¶ 84. Mr. Waxman similarly identified Mr. Fox as "our principal inside counsel for securities disclosures," and noted that the "substantial defenses" language is something "certainly he would have passed upon." CS ¶¶ 84.

[116] CS ¶¶ 77-86.

[117] Pls.' Br. at 14 (emphasis added).

government's investigation."[118] What Plaintiffs do not cite is the consistent distinction between litigation advice and securities disclosure advice, drawn by these very same witnesses: "[Mr. Fox and Mr. Block] evaluated the implications of our investigations for purposes of securities law disclosure. They did not do the former, which is to say conduct the investigations themselves."[119]

Plaintiffs place heavy emphasis on one isolated excerpt from Mr. Levin's deposition, where Plaintiffs asked him to identify the counsel on which he relied for "your defense," and he responded "Covington & Burling." *See* Pls.' Br. at 2-3, 13. What Plaintiffs fail to point out is that in the deposition, when Mr. Levin was asked a question that properly focused on ***securities disclosure*** advice, he testified:

> Q. So with regard to Pfizer's securities disclosures which are at issue in this case, which counsel are you relying upon in connection with the reliance of counsel defense that [Plaintiffs' counsel] was asking you about?
>
> A. So securities disclosures would be our disclosure counsel, and that would be Larry Fox internally and Dennis Block . . . on the external side.[120]

Mr. Levin reiterated, when questioned by Plaintiffs' counsel again on this issue, that Mr. Block was the "securities lawyer whom we relied on with respect to disclosure,"[121] and that he "was relying on both Dennis as well as Larry Fox to have the appropriate conversations with inside and outside investigation counsel so that they could in turn draft disclosures."[122] Plaintiffs

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[118] Pls.' Br. at 13.

[119] CS ¶ 91; *see also* CS ¶¶ 80-81, 85, 86.

[120] CS ¶ 82.

[121] CS ¶ 83.

[122] CS ¶ 83. This is consistent with Mr. Levin's answer in his earlier deposition in this matter, in which he identified Mr. Fox and Mr. Block as the counsel upon whom the company relied for disclosures advice. *See* CS ¶ 83 & n.138.

cannot use one snippet of Mr. Levin's testimony to manufacture a genuine dispute regarding which counsel Defendants are relying upon for disclosures advice. Defendants do not argue, and have never argued, that they are invoking disclosure advice given by Covington & Burling.

Plaintiffs' final argument about the "although we believe we have substantial defenses" warning is that because Messrs. Block and Fox are not government investigations lawyers, they were unqualified to offer advice on the appropriateness of this language. *See* Pls.' Br. at 27. In Plaintiffs' view, Messrs. Block and Fox needed to be criminal lawyers and, moreover, should have replicated the work of the company's litigators, in order to advise Defendants on the company's disclosure obligations concerning the Bextra investigation. Plaintiffs' position would effectively demand that a securities disclosure counsel for a major corporation have expertise in and personally participate in hundreds of legal matters—in areas as diverse as antitrust, intellectual property, products liability, environmental regulation, and government investigations, and across the multiple countries and legal regimes in which a company operates. As Mr. Fox noted, this task would be impossible for any securities disclosure counsel,[123] and the law does not require it. Plaintiffs' theory turns the world on its head, faulting Messrs. Block and Fox for doing exactly what securities disclosure counsel are retained to do—receive information about subjects that might trigger a disclosure obligation from the individuals who are experts in those areas, and then advise their client on the appropriate disclosure.

Even Plaintiffs' own proffered disclosures expert, Mr. Buthusiem, disagrees with Plaintiffs. Mr. Buthusiem, who served as securities disclosures counsel at GSK, noted that he is "not a criminal lawyer," and that his company's outside disclosure counsel (like Messrs. Block and Fox) was a securities lawyer—not a specialist in criminal law, antitrust, intellectual property,

[123] CS ¶ 91.

products liability, or environmental matters.[124] As Mr. Buthusiem went on to explain, he relied on "meetings with all the subject matter experts" to keep him informed, and did not review documents such as court filings or trial exhibits in most instances.[125] Notwithstanding the fact that he did not have the expertise of his company's litigators or personally examine the record in each matter, Mr. Buthusiem agreed that "senior executives at [GSK] were relying upon [his] skills as a lawyer to get comfort that the securities disclosures were appropriate," and that "it was reasonable for the senior executives at GSK . . . to take comfort from the fact that a lawyer such as [him]self" and "outside disclosure counsel" both reviewed and approved GSK's disclosures.[126]

B. Messrs. Block and Fox Were Informed About All Aspects of the Bextra Investigation Material to Their Advice.

Defendants directed that securities disclosure counsel were to be "fully informed of the state of these investigations and what they were finding in order that Mr. Block and Mr. Fox could advise" on the propriety of the company's disclosures.[127] Plaintiffs attempt to argue that, notwithstanding these instructions, Messrs. Block and Fox were insufficiently informed of the Department of Justice investigation such that Defendants cannot rely on their advice. Pls.' Br. at 25-26, 28-30.

Here again, Plaintiffs argue that the law requires the impossible—that securities disclosure counsel, for a corporation that discloses dozens of legal matters every quarter, must learn every conceivable fact and review all potentially relevant evidence about all of those matters in order to render disclosure advice. The law is to the contrary: "So long as the primary

[124] CS ¶ 95.

[125] CS ¶ 95.

[126] CS ¶ 96.

[127] CS ¶ 99.

facts which a lawyer would think pertinent are disclosed, or the client knows the lawyer is aware of them, the predicate for an advice-of-counsel defense is laid." *United States v. DeFries*, 129 F.3d 1293, 1309 (D.C. Cir. 1997). What matters is not whether disclosure counsel receives every scrap of paper generated over the course of a years-long government investigation but whether they learn the material facts and so can provide informed advice. *See Hernon v. Revere Copper & Brass, Inc.*, 494 F.2d 705, 707-08 (8th Cir. 1974) ("[I]f there is no material contradiction in the evidence that advice of counsel was relied upon after all ***material*** facts and circumstances had been disclosed by defendant, the court should rule . . . as a matter of law." (emphasis added)); *Jock v. Ransom*, No. 7-05-cv-1108, 2007 WL 1879717, at *7 (N.D.N.Y. June 28, 2007) (advice of counsel requires "a full and accurate report to his attorney of all ***material*** facts which the defendant knew" (emphasis added) (internal quotation marks omitted)); *see also United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1195 (2d Cir. 1989) (quoting approvingly a jury instruction stating the defendant must have "fully and honestly laid all ***material*** facts of which he has knowledge before the lawyer" (emphasis added)).

The undisputed record shows that Messrs. Block and Fox learned all facts material to their evaluation of Pfizer's disclosure obligations concerning the Department of Justice investigation, including the basis for Pfizer's belief that it had substantial defenses but that the investigation could nonetheless result in substantial criminal or civil fines and penalties. The two had "extended conversations" every quarter—and sometimes more frequently—with the company's government investigations lawyers.[128] They had ample opportunity to, and did, ask questions, were never denied access to any information they requested, and "drilled down until

[128] SUF ¶ 8; CS ¶¶ 97, 99-103, 107-110.

[they] were comfortable"[129] that they were in a position to provide "informed disclosure judgments."[130] Pfizer's senior management directed everyone that "if Larry Fox wants information, you provide it to him"; that Mr. Fox was "encourage[d]" to ask "whatever questions he wanted to ask, whenever he wanted to ask them"; and that government investigations counsel was required "to keep Mr. Block and Mr. Fox ***fully informed of the state of these investigations*** and what they were finding in order that Mr. Block and Mr. Fox could advise us on our securities disclosures."[131] These communications with government investigations counsel were how Messrs. Block and Fox kept themselves informed of Pfizer's "major meetings" with the government, the "key findings of the internal investigation," the government's "assessment of the case,"[132] and significant events such as the expansion of the investigation to cover additional products.[133] As part of these conversations, Messrs. Block and Fox also learned of the company's defense efforts and verified from their conversations that Pfizer and its government investigations counsel did in fact believe the company had strong defenses.[134]

Plaintiffs point to particular pieces of evidence in the Department of Justice investigation—which involved the production of millions of pages of documents over many years—that Messrs. Block and Fox did not review, cobbling together myopic details to argue that as a broad matter, these counsel were uninformed. Bizarrely, Plaintiffs even assert at one point that "[t]he incompleteness of defendants' disclosure to Block and Fox is exacerbated by the fact

[129] SUF ¶¶ 7-8.

[130] CS ¶ 85.

[131] CS ¶ 99 (emphasis added).

[132] SUF ¶ 9.

[133] SUF ¶ 90. Plaintiffs claim Mr. Block was not informed that the company had found some instances of off-label promotion by company employees. Pls.' Br. at 3, 16. As explained below, *infra* at 40, that is not what Mr. Block testified. Mr. Fox confirmed that he and Mr. Block were informed of these findings. CS ¶ 102.

[134] CS ¶ 90.

that . . . defendants did disclose it to the Government," Pls.' Br. at 29, as if securities disclosure counsel are uninformed unless they perform a first-level document review of every page of a company's document production before providing advice on whether or how to disclose the matter.[135] As the record demonstrates, Messrs. Block and Fox obtained whatever material they needed to ensure themselves they were giving informed disclosure advice, including the findings of the company's internal investigation and the import of documents such as call notes.[136] This is more than the law requires. *See DeFries*, 129 F.3d at 1308-09 ("No client ever tells his or her lawyer every single fact that a good lawyer probes before giving advice. Indeed, clients do not typically even know which facts a lawyer might think relevant. (That is, in part, why they consult lawyers.)"). Again, Plaintiffs cannot square their current position with the opinion of their own proffered disclosures expert, Mr. Buthusiem, who when he was at GSK (like Pfizer's disclosure counsel) relied on information conveyed to him by others and, for many legal proceedings, did not review original source documents.[137]

Boxed in by the record, Plaintiffs try to change it. They twist a snippet of deposition testimony from Mr. Block regarding when he learned that some Pfizer employees had promoted Bextra off-label ("I wouldn't know how to answer that question because I could say, in full honesty, never"). Pls.' Br. at 3, 16. But Plaintiffs fail to mention the very next question and answer, where Mr. Block went on to say, "There were instances where I was aware that the government thought there was a possibility of ***misbranding***" and that, "most Pfizer personnel that I talked to, particularly legal people, swore up and down. And the outside lawyers who

[135] In the Bextra investigation, for instance, Covington ultimately produced millions of pages of documents. SUF ¶ 55.

[136] SUF ¶¶ 7-10, 70, 76, 90, 94, 99, 108-109; CS ¶¶ 97, 100-103, 107-110.

[137] CS ¶ 95-96.

participated believed strongly that there was no ***misbranding*** and that there was very, very strong defenses to the allegations."[138] Mr. Block thus clearly distinguished between off-label promotion—which, on its own, does not constitute a crime—and "misbranding," which is a particular criminal offense under federal law and has several requirements of proof beyond off-label promotion. Indeed, the November 2007 white paper, which set forth Pfizer's defenses to a misbranding charge, makes this exact point: that, regardless of whether there were instances of off-label promotion in the sales force, there was no misbranding offense because the government could not prove the other elements of that crime, such as intent to defraud.[139]

The cases Plaintiffs cite are distinguishable—they involve situations in which either the client did not seek the advice at issue, or the lawyer did not give it, or both. Thus in *SEC v. Meltzer*, there was no "indication that counsel advised [defendant] that the conduct was appropriate." 440 F. Supp. 2d 179, 189 (E.D.N.Y. 2006). In *SEC v. Scott*, the counsel on whom defendant sought to rely was not even aware of the underlying events—a series of stock purchases that were omitted from a prospectus—regarding which defendant claimed he had sought counsel's advice. *See* 565 F. Supp. 1513, 1534-35 (S.D.N.Y. 1983). Moreover, as in *Meltzer*, the defendant had not shown that he ever "asked for, received and acted on the advice of counsel," *id.* at 1534, and on the contrary his lawyer testified that he could not recall "ever being asked for his opinion about the purchases," *id.* at 1535. In *United States v. Curtis*, meanwhile, the court found that the defendant "fraudulently concealed" key information from his attorney. *See* 769 F.3d 271, 276 (5th Cir. 2014). In short, all of Plaintiffs' cases involve factual circumstances in which it was readily apparent that the defendant's claim to have consulted an

[138] Pls.' Ex. 22, at 49:23-25, 50:15-20 (emphases added).

[139] *See* Oct. 30, 2014 Petrosinelli Decl. Ex. C-4 (KPMG-PFIZ-DS 033924 at 033938-64) (Nov. 28, 2007 Covington & Burling brief).

attorney was simply false or where the defendant had actively concealed information from counsel. In contrast, Messrs. Block and Fox testified without dispute that they were asked for advice on how to disclose the Bextra investigation, they obtained all material facts to inform them, they gave the advice, Defendants relied on it, and they stand by it today:

> Q. [Plaintiffs' counsel] has asked you a number of questions today and shown you some documents. Is there anything that he's said to you today or shown you today that changes your view as to the appropriateness of Pfizer's disclosures during the class period?
>
> [Dennis Block]. No.[140]

Similarly, Mr. Fox testified:

> Q. Were you always comfortable during the class period that the legal proceedings disclosures were appropriate, adequate and in compliance with the securities laws? . . . .
>
> A. Yes. . . . .
>
> Q. Sitting here today, do you believe that the company's litigation proceedings disclosures during the class period complied with the securities laws?
>
> A. I do.[141]

C. Defendants Believed in Good Faith that Messrs. Block and Fox Were Adequately Informed.

Pfizer had in place a rigorous process in which disclosure counsel received regular updates from Pfizer's litigators so that they could provide informed disclosure advice. Thus, Plaintiffs' after-the-fact identification of immaterial facts that Messrs. Block and Fox were unable to recall during their depositions cannot defeat the conclusion that Defendants, particularly the individual Defendants, believed in good faith that they were receiving fully informed disclosure advice from disclosure counsel.

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[140] SUF ¶ 23.

[141] SUF ¶ 25.

Courts "ha[ve] cautioned against finding that a defendant, ***particularly a nonlawyer defendant***, did not rely on counsel because they did not disclose all possibly relevant facts." *SEC v. Prince*, 942 F. Supp. 2d 108, 142 (D.D.C. 2013) (emphasis added); *see also SEC v. Steadman*, 967 F.2d 636, 642-43 (D.C. Cir. 1992) (reversing a district court's finding of scienter when there was no evidence that defendant, who was not a practicing lawyer, "actually knew the opinion was wrong or was reckless in relying on it"). Moreover, since advice of counsel is not an affirmative defense when used to rebut an opponent's obligation to demonstrate intent, evidence concerning advice of counsel remains admissible in a trial even when a party fails to "establish all the elements of the formal defense." *See United States v. Gorski*, No. 12-10338-FDS, --- F. Supp. 2d ----, 2014 WL 3818111, at *10 (D. Mass. Aug. 1, 2014) ("For example, a defendant might testify that he negligently . . . failed to provide a complete set of facts to the lawyer . . . . That would not qualify for an advice-of-counsel defense in the formal sense, nonetheless; such evidence ***would surely be admissible on the issue of defendant's state of mind***." (emphasis added)).

Here, Defendants understood that all litigation counsel were to keep Messrs. Block and Fox fully informed and although certain of the individual Defendants had no direct involvement in the process of updating disclosure counsel, they trusted that those responsible for the process would ensure that it functioned properly.[142] Even the Defendants with legal backgrounds were executives within the company and delegated to others the task of meeting with and updating disclosure counsel.[143] Similar to *Prince*, the in-house lawyers responsible for that task provided to Messrs. Block and Fox a summary of the facts, and then answered all of disclosure counsel's

[142] CS ¶¶ 99, 111.

[143] CS ¶ 111.

questions.[144] There is "no evidence that at any time any employee of [Pfizer] failed to provide information requested by" Messrs. Block or Fox. *Prince*, 942 F. Supp. 2d at 142. On the contrary, it was Defendants' understanding that disclosure counsel "had access to any and all information that they required to make their judgments," even if they were not always "a participant in those meetings" between disclosure counsel and government investigations counsel.[145]

Nor is there evidence in the record that Messrs. Fox or Block thought they were uninformed as to material facts. As Mr. Fox testified when asked directly:

> Q. Were you always comfortable that Mr. Block, as well as yourself, had all the information that you needed to provide Pfizer with informed advice?
>
> . . . .
>
> A. Yes.[146]

Under these facts, Defendants, and particularly the individual Defendants, have fully satisfied any burden they might have to demonstrate their good-faith reliance on counsel's advice.

D. Plaintiffs' Claims that Pfizer Failed To Accuse Itself of Wrongdoing Fail as a Matter of Law.

Plaintiffs go on to argue that Pfizer did not disclose in its SEC filings certain types of documents from the Bextra investigation—such as the underlying qui tam complaint, call notes, documents that four lower-level employees attempted to delete, and memoranda of the litigators' interviews of certain employees—and that Messrs. Block and Fox could not properly have advised regarding the propriety of the disclosures without viewing these materials themselves.

[144] SUF ¶¶ 7-10; CS ¶¶ 90, 97-100.

[145] CS ¶ 111.

[146] CS ¶ 98.

Pls.' Br. at 28-30. As described above, securities disclosure counsel need not know all facts, review all documents, or otherwise immerse themselves in all details of the underlying legal matters at issue in order to render informed disclosures advice. But in addition, as a matter of law, a company has no duty under the securities laws "to accuse itself of wrongdoing," *In re Citigroup Inc. Sec. Litig.*, 330 F. Supp. 2d 367, 377 (S.D.N.Y. 2004), *aff'd sub nom. Albert Fadem Trust v. Citigroup Inc.*, 165 F. App'x 928 (2d Cir. 2006), or "to speculate or disclose uncharged, unadjudicated wrongdoings or mismanagement," *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225(RJS), 2012 WL 4471265, at *31 (S.D.N.Y. Sept. 28, 2012) (internal quotation marks omitted), *aff'd*, 752 F.3d 173 (2d Cir. 2014); *see also In re Morgan Stanley Tech. Fund Sec. Litig.*, 643 F. Supp. 2d 366, 377 (S.D.N.Y. 2009) (companies have "no duty to accuse themselves of unproven, allegedly illegal policies"), *aff'd*, 592 F.3d 347 (2d Cir. 2010). Thus, the fact that Messrs. Block and Fox did not ask for or receive these types of underlying documents is irrelevant to their securities disclosures advice; indeed, the fact that they did not request such materials, despite having free rein to do so, proves that, as any competent disclosure counsel would have recognized, the securities laws do not require disclosure of these documents.

V. PLAINTIFFS CANNOT JUSTIFY THE SWEEPING RELIEF THEY SEEK.

Yet another problem with Plaintiffs' motion is that, although it focuses on a general prefatory warning that applied to all Pfizer legal proceedings during the Class Period, it does not address the clear, unambiguous advice Defendants received from Messrs. Block and Fox as to the Government Investigations section of the SEC filings or the actual Bextra investigation disclosure itself—disclosures which, tellingly, they never quote in their motion. Plaintiffs nonetheless ask this Court for sweeping, overbroad relief: the exclusion of any mention of any lawyer's work on behalf of Pfizer, including both Messrs. Block and Fox's disclosure advice and the role of government investigations counsel in both defending the company and keeping

Messrs. Block and Fox informed about the status of those defense efforts. But they have no argument for why this Court should erase from the record the many examples where Defendants sought the advice of its disclosure counsel with respect to specific disclosure decisions. Here are some notable examples, many of which Plaintiffs assiduously avoid addressing in their motion.

First, when KPMG suggested the addition of the phrase "marketing and safety" to describe the Department of Justice investigation, Pfizer obtained confirmation that disclosure counsel agreed with the addition.[147]

Second, when Pfizer received two subpoenas in 2007 requesting documents related to Lyrica, Geodon, and Zyvox, Pfizer again turned to disclosure counsel to evaluate whether the company was obligated to disclose those subpoenas or products by name. Disclosure counsel advised that the company did not need to disclose the subpoenas or the product names since those investigations were in the early stages, and Pfizer followed this advice.[148]

Third, when Pfizer received a "target letter" from the government in February 2008, Pfizer reported the development within days to Messrs. Block and Fox to determine whether the receipt altered the company's disclosure obligations. Disclosure counsel advised that no changes were necessary.[149]

Fourth, when the government provided Pfizer copies of the qui tam complaints (which Plaintiffs cite in their motion), Mr. Lankler immediately directed Mr. Wessel to "make sure that Dennis [Block] remains comfortable with our disclosures on these[.] Now that they are being

[147] CS ¶ 92.

[148] SUF ¶ 90. In an email documenting this advice, Mr. Fox explained that he, Mr. Block, and Mr. Wessel had a conference call when the subpoenas were served and "decided that we didn't know enough to determine that this was a material matter that had to be disclosed." SUF ¶ 91.

[149] SUF ¶¶ 94-96.

unsealed, do we need to have more disclosure?"[150] Mr. Block advised that no changes to the disclosures were needed.[151]

Thus, both testimony and the contemporaneous documents demonstrate precisely the reliance on disclosure counsel that Plaintiffs seek to erase from the record. Although Plaintiffs have suggested throughout discovery that Pfizer should not have used the term "marketing"; that Pfizer should have named the products subject to the 2007 subpoenas; and that Pfizer should have disclosed events such as the target letter and the allegations of the qui tam complaints, Plaintiffs have not attempted to, and cannot, challenge the legitimacy of Defendants' lack-of-scienter defense with regard to those alleged omissions. Thus, Plaintiffs cannot justify the sweeping relief they seek—the wholesale preclusion of Defendants' disclosure counsel's advice—based on the single warning statement cited in their motion.

VI. THE RECORD IS UNDISPUTED THAT DEFENDANTS RELIED ON KPMG, IN GOOD FAITH, FOR ADVICE REGARDING FAS 5 RESERVES.

A. Defendants Have Not Claimed that They Relied on Messrs. Block or Fox To Determine the Company's FAS 5 Reserves.

Plaintiffs suggest that Defendants are asserting they relied upon Messrs. Block and Fox to determine whether a FAS 5 loss contingency reserve was required for the Department of Justice investigation. Pls.' Br. at 30-33. This is inaccurate. Mr. Block participated in the process by which Pfizer and KPMG, its independent auditor, evaluated the adequacy of Pfizer's reserves[152]—but, ultimately, the reserve was an accounting judgment for which Defendants

[150] CS ¶ 109.

[151] CS ¶ 109.

[152] For example, Mr. Block advised the company as to how the components of FAS 5 applied in the context of the Department of Justice investigation. CS ¶ 115. This evidence—including his testimony, as well as several memoranda edited by Mr. Block documenting the contemporaneous conclusions of Pfizer's Finance personnel and the company's lawyers—was within the scope of Pfizer's waiver and thus produced to Plaintiffs. It is unquestionably relevant to the company's good-faith belief that it reached the correct reserving decision.

relied on Pfizer's internal Finance personnel and KPMG. Because Plaintiffs' only argument on this issue, at least as it pertains to Mr. Block, is based on a misinterpretation of Defendants' position, the argument should be rejected.

B. Defendants Have Not Waived the Right To Show Good Faith Reliance on KPMG.

As noted above, *supra* Part I.A, good faith reliance on auditors is not an affirmative defense. *Cf. Howard*, 376 F.3d at 1147-48 & n.19. Thus, Plaintiffs' assertion that "Defendants have not pled a reliance-on-auditors/accountants defense," Pls.' Br. at 36, is irrelevant. More importantly, it is disingenuous to imply that Plaintiffs were unaware of this defense. Plaintiffs requested and began receiving KPMG documents related to Pfizer's "litigation reserve or accrual for litigation" at the outset of discovery in 2011.[153] The parties corresponded about the defense multiple times in 2012 and 2013,[154] and Plaintiffs themselves advised the Court of the Defendants' reliance on KPMG in March 2013.[155] Further, Plaintiffs questioned multiple witnesses regarding their reliance on KPMG.[156] Any suggestion that they have been taken unawares is meritless.

Plaintiffs' half-hearted argument that the defense was waived because "KPMG's 'advice' was based on input from Investigations Counsel" is a non sequitur. As they did for securities disclosure counsel, Pfizer's in-house and outside litigation counsel relayed quarterly updates—both in meetings and through letters describing the primary facts of the company's most significant litigation matters—to Pfizer's internal accountants and to KPMG.[157] All of those

[153] CS ¶¶ 120-21.

[154] *See* CS ¶¶ 122, 124.

[155] CS ¶ 123 & n.221.

[156] CS ¶ 125.

[157] SUF ¶¶ 7, 32, 33, 37-38, 70, 76; CS ¶ 113-114.

documents have been produced to Plaintiffs. For example, KPMG received documents from Covington attesting to the findings of the company's internal investigation concerning the Bextra investigation, including that the "HQ directive and training is to promote only on-label."[158] Covington also provided to KPMG a copy of the November 2007 white paper;[159] in the last year of the Class Period, KPMG expressly cited Pfizer's strong disagreements with the government as set forth in the white paper as among the reasons why a loss reserve was inappropriate.[160] Further supporting KPMG's determinations were the audit response letters Covington provided, which expressed the view that a loss from the Bextra investigation was not "probable."[161] It was the accountants, not Pfizer's government investigations counsel, who then evaluated and determined whether a reserve was required under FAS 5.[162]

There can be no dispute—and Plaintiffs do not even attempt to create one—that Defendants relied in good faith on KPMG's independent assessment regarding whether a reserve was required for the Department of Justice investigation. Just as with reliance on disclosure counsel, all relevant witnesses testified to their reliance on KPMG to independently assess the company's reserves. Mr. D'Amelio, Pfizer's CFO beginning in September 2007, "took comfort" from the fact that KPMG agreed with Pfizer's conclusion that no loss reserve was appropriate.[163] His predecessors agreed, describing KPMG as "an independent set of eyes that had fiduciary responsibility to evaluate the same kinds of things that we were evaluating within the

[158] CS ¶ 114.

[159] CS ¶ 114.

[160] SUF ¶¶ 41, 81, 82; CS ¶ 114.

[161] SUF ¶¶ 42, 79.

[162] SUF ¶¶ 7, 32, 33, 37-41, 44-46, 49, 68, 70, 80-82, 101, 105; CS ¶ 112.

[163] SUF ¶ 83.

management group,"[164] and confirming that Defendants had relied upon "KPMG's representation that FAS-5 had been followed."[165]

VII. NEITHER MR. BLOCK NOR MR. FOX WILL OFFER IMPROPER "CONDUIT" TESTIMONY.

Plaintiffs close their memorandum by invoking the uncontroversial but inapposite proposition that one expert witness may not testify as to an opinion held or analysis performed by another expert who has different expertise and who has not appeared in the case. *See* Pls.' Br. at 38-39. Mr. Block and Mr. Fox are fact witnesses. The same is true of Mr. Lankler and Pfizer's other government investigations counsel. Each will testify based on his own personal knowledge, concerning events that he was involved in at the time. The cases cited by Plaintiffs have no possible application to their testimony.

CONCLUSION

For all of the above reasons, this Court should deny Plaintiffs' Motion for Partial Summary Judgment.

Date: December 8, 2014

Respectfully submitted,

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[164] SUF ¶ 83.

[165] SUF ¶ 83; *see also* CS ¶ 112.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of December, 2014, the foregoing Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment was filed with the Court through the CM/ECF system and thereby served to all parties of record.

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