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' RESPONSE TO PLAINTIFFS' OBJECTIONS TO EXHIBITS SUBMITTED IN SUPPORT OF DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Relying on Federal Rule of Civil Procedure 56(c)(2), Plaintiffs submit "objections" to and seek to "exclude" documents offered by Defendants in support of their motions for summary judgment. Plfs.' Objs. To Exs. Submitted in Supp. of Defs.' Mots. For Summ. J. ("Plfs.' Objs.") (Dkt. No. 295.) Plaintiffs' objections and requests to exclude are based on a misreading of Rule 56(c)(2), which states that "[a] party may object that the material cited [in summary judgment briefing] to support or dispute a fact ***cannot*** be presented ***in a form*** that would be admissible in evidence." (Emphases added.) In other words, the rule "simply provides that the evidence [in support of summary judgment] must be capable of presentation in admissible form ***at the time of trial***; it does ***not*** require that the materials be presented in an admissible form on summary judgment." *Gordon v. Kaleida Health*, 299 F.R.D. 380, 393 (W.D.N.Y. 2014) (emphases

added); *see also Celotex Corp. v. Catrett,* 477 U.S. 317 (1986) (on summary judgment, party need not produce evidence in a form that would be admissible at trial). Accordingly, unless Plaintiffs "contend that it would be impossible" for Defendants to establish admissibility of these documents, their call for the Court to "exclude" or otherwise disregard the evidence on summary judgment is unfounded. *See Gordon*, 299 F.R.D. at 393 (considering challenged evidence where party objecting under Rule 56(c)(2) did not credibly argue inadmissibility).

None of Plaintiffs' protests meet this bar. Plaintiffs have objected to several categories of documents that Defendants have cited in support of their motions for summary judgment, but all of these documents are "capable of presentation in admissible form."

Advice of Counsel/Reliance on Auditors Documents: Plaintiffs' sole basis for contending that these documents are inadmissible is that Plaintiffs have filed a Motion for Partial Summary Judgment on Defendants' Reliance on Advice of Counsel and Good Faith Defenses ("Plfs.' Mot.") (Dkt. No. 288), seeking to preclude Defendants from offering evidence that "refers to or is based on any input from counsel." Pls.' Objs. at 2. Plaintiffs insist, without support, that *if* their summary judgment motion is granted, documents reflecting consultation with counsel or KPMG will be inadmissible under Federal Rules of Evidence 402 and 403 and should therefore "not be considered" by the Court in connection with Defendants' summary judgment motions. *Id*.

As set forth in Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment ("Defs.' Opp."), Plaintiffs' arguments in support of partial summary judgment are wrong for multiple reasons, and their motion should be denied. But most relevant here is the fact that Plaintiffs may not seek summary judgment as a means of avoiding their burden to prove scienter by keeping the jury from considering certain facts—in this case, Defendants'

consultation of counsel and KPMG. Defs.' Opp. at 22 (citing *In re State Street Bank & Trust Co. Fixed Income Funds Inv. Litig.*, 772 F. Supp. 2d 519, n.18 (S.D.N.Y. 2011) and *Rasmussen v. City of New York*, 766 F. Supp. 2d 399, 404 (E.D.N.Y. 2011)). In other words, even if the Court were to grant Plaintiffs' motion, evidence related to Defendants' consultation with counsel would not become "inadmissible," as it could still be admitted to show Defendants' "good faith" and otherwise negate scienter. Defs.' Opp. at 21–22; *see also United States v. Gorski*, --- 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***.") (emphases added). Because evidence that "refers to or is based on any input from [Pfizer's] counsel" or accountants is admissible regardless of the outcome of Plaintiffs' Motion, Plaintiffs' request under Rule 56(c)(2) should be denied.

Newspaper Articles, Media Reports, and Analyst Reports: Plaintiffs contend that various articles and reports cited in Defendants' motions for summary judgment are inadmissible hearsay and therefore cannot be considered under Rule 56(c)(2). Plfs.' Objs. at 2–3. Plaintiffs are mistaken for two reasons.

First, at trial, Defendants will use these articles and reports through testimony from expert witnesses who have relied on the substance of the materials in forming their opinions. *See Linde v. Arab Bank, PLC*, 922 F. Supp. 2d 316, 323 (E.D.N.Y. 2013) (experts are permitted "to base an opinion on facts or data that would otherwise be inadmissible"). For example, Plaintiffs object to a 2009 *Barron's* article regarding Pfizer's historical dividend performance as hearsay.

Plfs.' Objs. at 2.[1] But as discussed in his report, Defendants' expert Kenneth Lehn relied on this article in forming his opinion that Pfizer's dividend cut surprised the investment community, and at trial he will be able to testify about the contents of the article and why it supports his opinion. Thus, even if the article itself is not admitted into evidence, its substance is admissible through testimony from Professor Lehn. Accordingly, as the substance of the article can be "presented in a form" that is admissible in evidence, Fed. R. Evid. 56(c)(2), Defendants are permitted to rely on it in moving for summary judgment.

Second, many of the articles and reports Defendants have cited in their summary judgment motions would not be offered for the truth of the matters asserted therein, but rather for other purposes—for example, to show that, contrary to Plaintiffs' contention, the market did not view Pfizer's January 2009 announcement of the government settlement as significant or having any effect on Pfizer's stock price, because it was not even mentioned by most stock analysts. *See* Pfizer's Motion for Summary Judgment at 27. Thus, many of the documents to which Plaintiffs object are not hearsay.[2]

Pfizer and PricewaterhouseCoopers Documents: Plaintiffs object to Defendants' use of "internal Pfizer e-mails, memoranda and other documents" and a handful of PricewaterhouseCoopers documents, claiming these materials are hearsay. Plfs.' Objs. at 3. Plaintiffs then state that these documents are likely admissible under the business records

[1] *See also* Petrosinelli Decl. Ex. U-3 (Barron's, "Where to Find High, Safe Stock Yields" (Mar. 16, 2009), at 1).

[2] *See, e.g.*, Petrosinelli Decl. Ex. D-3 (Leerink Swan, "Pfizer, Inc.—Perfect Storm of Uncertainty Taints Solid Strategic Acquisition" (Jan. 27, 2009), at 1) (responding to Pfizer guidance but failing to mention DOJ settlement); Petrosinelli Decl. Ex. I-3 (Bank of America/Merrill Lynch, "Maintaining Buy but lowering PO" (Jan. 28, 2009), at 1) (same); *see also* Def. Pfizer's Mem. in Supp. of its Mot. for Summ. J. ("Pfizer's Mem.") at 57 (referencing analyst reports as evidence of "the market's reaction" to Pfizer's January 26, 2009 announcement).

exception to the hearsay rule, Federal Rule of Evidence 803(6), but claim that "defendants made no attempt to lay a business record foundation" for these documents. *Id.* at 4. Again, Plaintiffs' objection is premised on a misapprehension of Rule 56(c)(2), which permits the Court to consider any evidence Defendants *can*, at trial, demonstrate is admissible. Here, Plaintiffs admit that these documents likely fall within the business records exception and therefore would be admissible with proper foundation under Fed. R. Evid. Rule 803(6); Defendants will be able to lay such a foundation, if necessary, through witness testimony at trial. Accordingly, Plaintiffs have no ground to object at the summary judgment stage under Rule 56(c)(2).

Additionally, in objecting to these materials, Plaintiffs assume, without support, that Defendants intend to offer the documents they cite for the truth of the matters asserted. That is not the case. For example, Plaintiffs cite a 2006 email from Larry Fox to Douglas Lankler and others, stating that "Carl [Wessel], Dennis [Block] and I had a conference call this afternoon to discuss government investigations. Dennis concluded that the only development that has to be reported in the third quarter 10-Q is the [REDACTED]."[3] Plaintiffs claim this email is "hearsay within hearsay." Plfs.' Objs. at 4. But Defendants would seek to admit Mr. Block's conclusion as stated in the email not for the truth of the matter asserted (*i.e.*, that the securities laws required Pfizer to report only the redacted material), but rather to establish that Mr. Block had, in fact, provided this advice and to thus show Defendants' resulting state of mind (*i.e.*, that they lacked scienter because they relied on advice of counsel that the law did not require what Plaintiffs claim). *See United States v. Dupree*, 706 F.3d 131, 136 (2d Cir. 2013) ("a statement offered to show its effect on the listener is not hearsay"). Thus, these documents are not hearsay at all, and Plaintiffs' objections to them are baseless.

[3] Petrosinelli Decl. Ex. W-5 (PFE-JONES 00047098) (Oct. 9, 2006 email from L. Fox to D. Lankler et al.).

Authentication: Plaintiffs' claim that Defendants have "failed to authenticate a number of exhibits" is similarly hollow. Even assuming Plaintiffs honestly will contest at trial the authenticity of obviously authentic documents—and, as the Court knows, most counsel do not waste the Court's and the parties' time with such ministerial matters—Defendants will be able to authenticate these materials at trial, rendering Plaintiffs' objection under Rule 56(c)(2) toothless. *Gordon*, 299 F.R.D. at 393 (considering evidence on summary judgment "[b]ecause Plaintiffs 'do not contend it would be impossible for [Defendants] to authenticate [it] at trial or that it would otherwise be inadmissible under the Federal Rules of Evidence'"); *see also United States v. Gagliardi,* 506 F.3d 140, 151 (2d Cir.2007) ("The bar for authentication of evidence is not particularly high . . . [T]he standard for authentication is one of 'reasonable likelihood' and is 'minimal.'").

For all of the above reasons, this Court should overrule Plaintiffs' Rule 56(c)(2) objections and consider all evidence presented by Defendants in support of their motions for summary judgment.

Date: December 8, 2014

Respectfully submitted,

WILLIAMS & CONNOLLY LLP

By: /s/ Joseph. G. Petrosinelli
Joseph G. Petrosinelli (admitted *pro hac vice*)
Steven M. Farina (admitted *pro hac vice*)
George A. Borden
Amanda M. MacDonald (admitted *pro hac vice*)

725 Twelfth Street, N.W.
Washington, D.C. 20005
Tel: (202) 434-5000
Fax: (202) 434-5029

Counsel for Defendant Pfizer Inc.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: /s/ Scott Musoff

Scott D. Musoff
Four Times Square
New York, New York 10036
Telephone: (212) 735-3000
Facsimile: (212) 735-2000
scott.musoff@skadden.com

Jennifer L. Spaziano (*pro hac vice* pending)
Michael S. Bailey (*pro hac vice* pending)
1440 New York Avenue NW
Washington, DC 20005
Telephone: (202) 371-7000
Facsimile: (202) 393-5760
Email: Jen.Spaziano@skadden.com
Email: Michael.Bailey@skadden.com

Counsel for Henry A. McKinnell

DAVIS POLK & WARDWELL LLP

By: /s/ James P. Rouhandeh

James P. Rouhandeh
Charles S. Duggan
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
james.rouhandeh@davispolk.com
charles.duggan@davispolk.com

Counsel for Defendant Jeffrey B. Kindler

GOODWIN PROCTER LLP

By: /s/ Richard M. Strassberg

Richard M. Strassberg
Daniel Roeser
The New York Times Building

620 Eighth Avenue
New York, NY 10018
Tel.: 212.813.8800
Fax: 212.355.3333
rstrassberg@goodwinprocter.com
droeser@goodwinprocter.com

Counsel for Defendant Frank D'Amelio

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: /s/ Jay B. Kasner
Jay B. Kasner
Gary J. Hacker
Alexander C. Drylewski
Four Times Square
New York, New York 10036
Telephone: (212) 735-3000
Facsimile: (212) 735-2000
jay.kasner@skadden.com
gary.hacker@skadden.com
alexander.drylewski@skadden.com

Counsel for Defendant Alan G. Levin

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By: /s/ Michael B. Carlinsky
Michael B. Carlinsky
Sheila Birnbaum
Brant Duncan Kuehn (*pro hac vice* pending)
51 Madison Avenue
New York, New York 10010
(212) 849-7000

Lori Alvino McGill
777 6th Street, NW
Washington, DC 20001
(202) 538-8000

Counsel for Defendant Ian C. Read

O'MELVENY & MYERS LLP

By: /s/ Ross B. Galin

Ross B. Galin
Stuart Sarnoff
Howard E. Heiss
7 Times Square
New York, New York 10036
Telephone: (212) 326-2000
Facsimile: (212) 326-2061
rgalin@omm.com
ssarnoff@omm.com
hheiss@omm.com

Counsel for Defendant Allen Waxman

CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of December, 2014, the foregoing Defendants' Response to Plaintiffs' Objections to Exhibits Submitted In Support of Defendants' Motions for Summary Judgment was filed with the Court through the CM/ECF system and thereby served on all counsel of record.

/s/ Lauren K. Collogan
Lauren K. Collogan
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029
lcollogan@wc.com

Regan Karstrand

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Henry A. McKinnell
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Ian C. Read
Allen Waxman
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1:10-cv-03864-AKH Notice has been electronically mailed to:

Alexander C Drylewski alexander.drylewski@skadden.com

Amanda M. MacDonald amacdonald@wc.com

Brant Duncan Kuehn brantkuehn@quinnemanuel.com

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

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

Daniel Prugh Roeser droeser@goodwinprocter.com

Danielle Suzanne Myers dmyers@rgrdlaw.com

Darren J. Robbins e_file_sd@rgrdlaw.com

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

Donald Alan Migliori dmigliori@motleyrice.com

Eugene Mikolajczyk genem@rgrdlaw.com

Gary John Hacker ghacker@skadden.com

George Anthony Borden gborden@wc.com

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

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

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

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

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

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

James R. Harper coljamesrharper@me.com

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

Jay B. Kasner jkasner@skadden.com

Jennifer Lynn Spaziano jen.spaziano@skadden.com

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

John K. Villa jvilla@wc.com

Joseph F. Rice jrice@motleyrice.com

Joseph G. Petrosinelli jpetrosinelli@wc.com

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

Keir Nicholas Dougall kdougall@dougallpc.com

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

Lauren Kristina Collogan lcollogan@wc.com

Leigh R. Lasky lasky@laskyrifkind.com

Lori McGill lorialvinomcgill@quinnemanuel.com

Matthew Melamed mmelamed@rgrdlaw.com

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

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

Michael Scott Bailey michael.bailey@skadden.com

Mitchell M.Z. Twersky mtwersky@aftlaw.com

Paul T. Hourihan phourihan@wc.com

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

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

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

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

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

Seema Mittal smittal@wc.com

Sheila L. Birnbaum sheilabirnbaum@quinnemanuel.com

Sidney Bashago sidney.bashago@dpw.com

Steven M.. Farina sfarina@wc.com

Stuart Michael Sarnoff ssarnoff@omm.com

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

William E. Schurmann wschurmann@wc.com

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

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

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

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

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

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

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

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