

**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' COUNTERSTATEMENT OF MATERIAL FACTS  
AND REPLY TO PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS**

Pursuant to Rule 56.1 of this Court's Local and Civil Rules, Defendants Pfizer Inc., Ian Read, Dr. Henry McKinnell, Jeffrey Kindler, Frank D'Amelio, Alan Levin, and Allen Waxman respectfully submit this response to Plaintiffs' Statement of Undisputed Facts, and Counterstatement of Undisputed Facts, regarding Plaintiffs' Motion for Partial Summary Judgment.

**TABLE OF CONTENTS**

DEFENDANTS’ RESPONSE TO PLAINTIFFS’ STATEMENT OF FACTS.....1

DEFENDANTS’ COUNTERSTATEMENT OF MATERIAL FACTS .....28

I. Pfizer’s Disclosures and the Role of Securities Disclosure Counsel.....28

II. Defendants Kept Messrs. Fox and Block Informed of All Material Facts So They  
Could Provide Informed Disclosure Advice to the Company. ....38

III. Defendants Also Kept Pfizer’s Outside Auditor, KPMG, Informed About the  
Status of the Government Investigations, So That KPMG Could Render Its  
Independent Opinion on the Company’s Reserves. ....44

IV. Defendants Put Plaintiffs on Notice of Their Defenses Relating to Advice from  
Disclosure Counsel and KPMG, and Provided Plaintiffs All Discovery To Which  
They Were Entitled Concerning These Subjects. ....46

**DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS**

1. Defendants do not dispute that Defendants' counsel informed the Court on July 8, 2013 that Dennis Block was the "only outside counsel that provided legal advice to Pfizer regarding the Waived Subjects." That statement was and is accurate.

2. Defendants do not dispute that Defendants' counsel informed the Court on July 19, 2013, that Lawrence Fox was Pfizer's in-house disclosure counsel. That statement was and is accurate. Mr. Fox and Mr. Block are the only counsel upon whom Pfizer relied for disclosure advice during the Class Period.

3. The assertions in paragraph 3 concern the content of a court filing and therefore do not require a response. Defendants do not dispute that Pfizer's Memorandum of Law in Support of Pfizer's Motion for Summary Judgment contains the quoted statements.

4. The assertions in paragraph 4 concern the content of court filings and therefore do not require a response. Defendants dispute Plaintiffs' assertion to the extent it implies that any reference to counsel other than Mr. Block or Mr. Fox states, or should be read to imply, that Defendants received legal advice regarding the Waived Subjects from counsel other than Mr. Block or Mr. Fox.

5. Defendants do not dispute that Pfizer warned investors that, with regard to the legal proceedings discussed in its Forms 10-K and 10-Q, "[a]lthough 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." Defendants do not dispute that Pfizer repeated this warning in every Form 10-K or 10-Q during the period January 19, 2006 to January 23, 2009 (the "Class Period").

6. Defendants do not dispute the facts contained in paragraph 6.

7. Disputed. Defendants do not dispute that Bextra was approved for OA/RA (10 mg per day) and for PD (20 mg twice per day). Bextra’s formal US launch occurred in April 2002. At that time, Karen Katen, a senior executive, directed the Pfizer and Pharmacia U.S. Sales Force that, “All detailing related to Bextra will be within the approved labeling,” and that, “Indications that are under investigation or which are not FDA-approved, such as acute pain, **must not** be discussed.”<sup>1</sup>

8. Disputed. The study described in the cited document did not study effects “at 40 mg doses” but at “40 mg bid,” i.e., 80 milligrams per day.<sup>2</sup> The document also states that the study referenced in paragraph 8 examined a “population . . . highly enriched with patients at high risk for cardiovascular thromboembolic events,” that “[t]herefore, interpretation of these findings cannot be conclusive,” and that “the dose used in the . . . trial was eightfold higher than the dose proposed for approval for the treatment of osteoarthritis and rheumatoid arthritis and twice the dose proposed for the treatment of dysmenorrhea.”<sup>3</sup>

9. Defendants do not dispute the facts contained in paragraph 9.

10. Disputed. Pfizer retained experienced government investigations counsel at Covington & Burling to conduct an internal investigation and to respond to the government’s requests for information.<sup>4</sup> Separate and apart from the company’s strategy in responding to the

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<sup>1</sup> Dec. 8, 2014 Declaration of Joseph G. Petrosinelli In Support of Pfizer’s Motion For Summary Judgment (“Dec. 8, 2014 Petrosinelli Decl.”) Ex. M-8 (BEX005670638) (Apr. 5, 2002 email from K. Katen to U.S. Pfizer and Pharmacia sales force).

<sup>2</sup> Pls.’ Ex. 16, at 2. See Dec. 8, 2014 Petrosinelli Decl. Ex. Y-7 (Kindler (Oct. 10, 2014) Dep. 95:24-95:11); Dec. 8, 2014 Petrosinelli Decl. Ex. Q-7 (Burch (Sept. 20, 2013) Dep. 184:14-17) (explaining that the term “bid” means twice a day).

<sup>3</sup> Pls.’ Ex. 16, at 2.

<sup>4</sup> Rule 56.1 Statement of Undisputed Facts in Support of Pfizer’s Motion for Summary Judgment ¶ 52, Rec. Doc. 248 (hereinafter “SUF”). For the sake of brevity, Pfizer will refer to paragraphs in its previously filed Statement of Undisputed Facts, and those references include the documents cited therein and filed as exhibits to the October 30, 2014 Declaration of Joseph G. Petrosinelli, Rec. Doc. 279.

government investigation, Defendants relied on the judgment of Pfizer's two veteran securities lawyers, in-house disclosure counsel Larry Fox, and outside disclosure counsel Dennis Block, to determine how to disclose this legal proceeding in its SEC filings.<sup>5</sup> As part of their responsibilities as disclosure counsel, Messrs. Fox and Block were informed of the "key findings" of the internal investigation.<sup>6</sup>

11. Disputed. Mr. Fox and Mr. Block, as inside and outside disclosure counsel, were involved in the process by which Pfizer determined how to disclose all of its legal proceedings—including the government investigation concerning Bextra and later other drugs.<sup>7</sup>

12. Disputed. Mr. Fox and Mr. Block, as inside and outside disclosure counsel, were involved in the process by which Pfizer determined how to disclose all of its legal proceedings—including the government investigation concerning Bextra and later other drugs.<sup>8</sup>

13. Disputed. Mr. Block and Mr. Fox were informed about the facts concerning the government investigation into Bextra—and later into other drugs—that were material to the advice they provided.<sup>9</sup> Mr. Block and Mr. Fox received this information through the frequent updates they obtained from government investigations counsel, who relayed information

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<sup>5</sup> SUF ¶¶ 1-4, 6-14, 16, 18, 20-25, 62-63, 70-71, 76-77, 90-91, 94-96, 99-100, 104, 108-09; Oct. 30, 2014 Declaration of Joseph G. Petrosinelli In Support of Pfizer's Motion For Summary Judgment ("Oct. 30, 2014 Petrosinelli Decl.") Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 31:18-32:2) ("My responsibilities were and are to act and serve as a securities and corporate governance lawyer for the company, which means that I review many of our public disclosure documents . . . and provide, together with outside counsel, disclosure advice to the company."); Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 60:17-22).

<sup>6</sup> SUF ¶ 9.

<sup>7</sup> SUF ¶¶ 1-4, 6-14, 16, 18, 20-25, 62-63, 70-71, 76-77, 90-91, 94-96, 99-100, 104, 108-09; Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 31:18-32:2); Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 60:17-22).

<sup>8</sup> SUF ¶¶ 1-4, 6-14, 16, 18, 20-25, 62-63, 70-71, 76-77, 90-91, 94-96, 99-100, 104, 108-09; Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 31:18-32:2); Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 60:17-22).

<sup>9</sup> SUF ¶¶ 7-10, 70, 76, 90, 94, 99, 108-109.

regarding “the major meetings” with the government, “the key findings of the internal investigation,” “the viewpoints that the government was giving us about their overall assessment of the case,” and “recommendations” from outside counsel such as “offer proposals.”<sup>10</sup>

14. Disputed. Mr. Block, though not engaged to represent Pfizer in a litigation capacity in its response to the government investigation, participated in many meetings and discussions and reviewed documents throughout the Class Period during which he learned the relevant facts concerning the government investigation, including the fact that Pfizer believed it had substantial defenses to the government’s allegations.<sup>11</sup> Both he and Mr. Fox professionally assessed this information in terms of whether and how it would affect Pfizer’s disclosures.<sup>12</sup>

15. Disputed. Mr. Fox, though not engaged to represent Pfizer in a litigation capacity in its response to the government investigation, participated in many meetings and discussions and reviewed documents throughout the Class Period during which he learned the relevant facts concerning the government investigation, including the fact that Pfizer believed it had substantial defenses to the government’s allegations.<sup>13</sup> Both he and Mr. Block professionally assessed this information in terms of whether and how it would affect Pfizer’s disclosures.<sup>14</sup>

16. Defendants do not dispute the facts articulated in paragraph 16. Though Messrs. Fox and Block were not engaged to represent Pfizer in a litigation capacity, both professionally

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<sup>10</sup> SUF ¶ 9 (quoting Oct. 30, 2014 Petrosinelli Decl. Ex. E-2 (Lankler (Jan. 22, 2014) Dep. at 260:16-261:9)).

<sup>11</sup> SUF ¶¶ 7-10, 70, 76, 90, 94, 99, 108; Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 46:21-47:19, 48:8-11, 55:23-56:1, 88:4-15, 198:1-199:14, 237:22-238:3); Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 93:18-25, 122:16-123:13, 153:21-154:10, 169:2-10).

<sup>12</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 11:23-12:5, 83:12-83:3, 87:1-10, 89:12-16); Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 45:17-46:7, 60:17-22).

<sup>13</sup> SUF ¶¶ 7-10, 70, 76, 90, 94, 109.

<sup>14</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 11:23-12:5, 83:12-83:3, 87:1-10, 89:12-16); Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 45:17-46:7, 60:17-22).

assessed information obtained from government investigations counsel from their perspective as disclosure counsel and advised Defendants as to whether and how it would affect Pfizer's disclosures.<sup>15</sup>

17. Disputed. Mr. Block participated in multiple discussions with Pfizer personnel and KPMG, Pfizer's outside auditor, regarding the company's FAS 5 reserving decisions.<sup>16</sup> Mr. Block personally edited two memoranda, one in October 2007 and one in January 2009, that discussed the reasons why Pfizer had concluded that any loss from the government investigation was not reasonably estimable and, therefore, a reserve was not required.<sup>17</sup> As Mr. Block testified, in discussions surrounding FAS 5, he gave "advice regarding how you make that determination" and "I expressed my view, based on the facts that they gave me, what they told me, that I didn't think it was either [probable or reasonably estimable], at least during that period."<sup>18</sup>

18. Disputed. Mr. Block and Mr. Fox relied upon government investigations counsel to relay to them the facts relating to the investigation that were material to the advice they provided.<sup>19</sup> However, as Mr. Fox testified, "I don't defer to anybody. It's their jobs. Our . . . GI

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<sup>15</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 11:23-12:5, 83:12-83:3, 87:1-10, 89:12-16); Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 45:17-46:7, 60:17-22).

<sup>16</sup> SUF ¶¶ 40, 43, 80; Dec. 8, 2014 Petrosinelli Decl. Ex. S-8 (PFE-JONES 00047116) (Oct. 16, 2007 email from P. Brockie to D. Lankler); Dec. 8, 2014 Petrosinelli Decl. Ex. R-8 (PFE-JONES 00038257) (Oct. 16, 2007 email from C. Wessel to D. Block); Dec. 8, 2014 Petrosinelli Decl. Ex. T-8 (PFE-JONES 00038218) (Oct. 16, 2007 email from C. Wessel to J. Chapman); Dec. 8, 2014 Petrosinelli Decl. Ex. V-8 (PFE-JONES 00038599) (Oct. 17, 2007 email invitation from B. Hurd to A. Waxman, J. Chapman, D. Block, et al.); Dec. 8, 2014 Petrosinelli Decl. Ex. U-8 (PFE-JONES 00033631) (July 16, 2008 email invitation from P. Brockie to L. Cangialosi, L. Bradley, D. Block, et al.).

<sup>17</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. S-6 (PFE-JONES 00046661) (Oct. 18, 2007 email from D. Townsend to C. Wessel and attached memorandum regarding Bextra); Oct. 30, 2014 Petrosinelli Decl. Ex. G-5 (PFE-JONES 00059201 at 00059202) (Jan. 12, 2009 email from D. Block to G. Giampetruzzi and attached memorandum).

<sup>18</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 37:18-24).

<sup>19</sup> SUF ¶¶ 7-10, 70, 76, 90, 94, 99, 108-109.

attorneys and outside counsel, of course, conduct the investigations or handle civil litigation . . . [O]ur internal lawyers then inform me and our outside disclosure counsel, Dennis, appropriately so we can make informed disclosure judgments.”<sup>20</sup>

19. Disputed. Mr. Block participated in multiple discussions with Pfizer personnel and KPMG, Pfizer’s outside auditor, regarding the company’s FAS 5 reserving decisions.<sup>21</sup> Mr. Block personally edited two memoranda, one in October 2007 and one in January 2009, that discussed the reasons why Pfizer had concluded that any loss from the government investigation was not reasonably estimable and, therefore, a reserve was not required.<sup>22</sup> As Mr. Block testified, in discussions surrounding FAS 5, he gave “advice regarding how you make that determination” and “I expressed my view, based on the facts that they gave me, what they told me, that I didn’t think it was either [probable or reasonably estimable], at least during that period.”<sup>23</sup>

20. Disputed. Prof. Coates testified that “[a] lawyer might have a role in . . . pointing out to a company that GAAP is . . . as a matter of law required to be used for a public company, might provide advice about the way in which the accounting judgment was generated, might

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<sup>20</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 11:23-12:8).

<sup>21</sup> SUF ¶¶ 40, 43, 80; Dec. 8, 2014 Petrosinelli Decl. Ex. S-8 (PFE-JONES 00047116) (Oct. 16, 2007 email from P. Brockie to D. Lankler); Dec. 8, 2014 Petrosinelli Decl. Ex. R-8 (PFE-JONES 00038257) (Oct. 16, 2007 email from C. Wessel to D. Block); Dec. 8, 2014 Petrosinelli Decl. Ex. T-8 (PFE-JONES 00038218) (Oct. 16, 2007 email from C. Wessel to J. Chapman); Dec. 8, 2014 Petrosinelli Decl. Ex. V-8 (PFE-JONES 00038599) (Oct. 17, 2007 email invitation from B. Hurd to A. Waxman, J. Chapman, D. Block, et al.); Dec. 8, 2014 Petrosinelli Decl. Ex. U-8 (PFE-JONES 00033631) (July 16, 2008 email invitation from P. Brockie to L. Cangialosi, L. Bradley, D. Block, et al.).

<sup>22</sup> SUF ¶¶ 40, 43; Oct. 30, 2014 Petrosinelli Decl. Ex. S-6 (PFE-JONES 00046661) (Oct. 18, 2007 email from D. Townsend to C. Wessel and attached memorandum regarding Bextra); Oct. 30, 2014 Petrosinelli Decl. Ex. G-5 (PFE-JONES 00059201 at 00059202) (Jan. 12, 2009 email from D. Block to G. Giampetruzzi and attached memorandum).

<sup>23</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 37:18-24).



provide advice about the disclosure that results from application of accounting principles.”<sup>24</sup> This description reflects Mr. Block’s role in Pfizer’s process for determining its reserves. As Mr. Block testified, he gave “advice regarding what the test is”<sup>25</sup> and “how you make that determination,”<sup>26</sup> and he advised on the related issue of how to properly and adequately disclose the government investigation.<sup>27</sup>

21. Defendants do not dispute the facts contained in paragraph 21. Defendants note that the document referenced, KPMG’s 2007 Audit Results and SAS 114 Report, attests not only to “Pfizer’s FAS-5 determination” but also KPMG’s independent assessment and concurrence with that determination: “Reserves related to legal and environmental exposures appear reasonable and disclosures complete.”<sup>28</sup>

22. Disputed. Plaintiffs do not dispute that Mr. Block gave the quoted testimony, as correctly stated in Plaintiffs’ Dec. 3, 2014 Notice of Errata. As multiple witnesses testified, the lawyers to whom Mr. Block was referring—i.e., Pfizer’s government investigations counsel—rendered advice regarding how to respond to the government investigation and conducted the company’s internal investigation.<sup>29</sup> Mr. Block and Mr. Fox advised the company as to its securities disclosure obligations: whether and how to disclose the government investigation in the company’s SEC filings, and whether and how to modify its existing disclosures.<sup>30</sup>

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<sup>24</sup> Pls.’ Ex. 25, at 152:16-152:7.

<sup>25</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 35:8-11).

<sup>26</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 37:18-24).

<sup>27</sup> SUF ¶¶ 3-4, 10-14, 16, 21-22, 62-63, 70-71, 76-77, 90-91, 94-96, 99-100, 104, 108-09.

<sup>28</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. J-4 (KPMG-PFIZ-DS 018638, at 018649) (2007 Audit Results and SAS 114 Report).

<sup>29</sup> SUF ¶ 52; *see also, e.g.*, Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 11:24-12:5); Dec. 8, 2014 Petrosinelli Decl. Ex. I-8 (Waxman (Nov. 14, 2013) Dep. 52:20-53:4).

<sup>30</sup> SUF ¶¶ 1-4, 6-14, 16, 18, 20-25, 62-63, 70-71, 76-77, 90-91, 94-96, 99-100, 104, 108-09.

23. Disputed. Defendants do not dispute that Mr. O'Connor made the statement, of which Plaintiffs have quoted an excerpt, but the context makes clear that Mr. O'Connor made the statement as to Pharmacia & Upjohn Company, Inc. ("Pharmacia"), not Pfizer. Pharmacia was the entity that pleaded guilty in the proceeding discussed in paragraph 23.<sup>31</sup> In addition, as multiple witnesses testified, the \$664 million figure referenced in paragraph 23 was a "stipulated" figure that was negotiated by Pfizer and the government for Sentencing Guidelines purposes in order to support the final settlement amount.<sup>32</sup>

24. Disputed. Mr. Fox and Mr. Block learned of the company's defense efforts through both their regular quarterly updates and *ad hoc* updates from government investigations counsel, and used that information to evaluate the accuracy of and potential need to supplement or modify the company's securities disclosures.<sup>33</sup> Mr. Fox and Mr. Block's review encompassed the "although we believe we have substantial disclosures" warning language; Mr. Fox testified that that statement was consistent with the "regular updates provided to me and to Dennis Block by our litigators and our [government investigations] attorneys,"<sup>34</sup> and that

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.<sup>35</sup>

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<sup>31</sup> Pls.' Ex. 26 at 51:10-52:9.

<sup>32</sup> SUF ¶ 132; *see also* Dec. 8, 2014 Petrosinelli Decl. Ex. Z-7 (Lankler (Jan. 22, 2014) Dep. 264:22-265:3).

<sup>33</sup> SUF ¶¶ 7-10.

<sup>34</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1(Fox (Sept. 26, 2013) Dep. 46:13-47:1).

<sup>35</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 87:1-6).

Both Mr. Fox and Mr. Block felt that this disclosure was appropriate and that it accurately “reflect[ed] the information that we received.”<sup>36</sup> Both disclosure counsel testified that the “although we believe we have substantial defenses” language 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,”<sup>37</sup> and that notwithstanding Pfizer’s belief that it had “very strong defenses to the case,” the investigation “could result in a substantial fine.”<sup>38</sup> Every witness questioned about this topic testified that Pfizer and the individual defendants relied upon Mr. Fox and Mr. Block for the adequacy of the entire Legal Proceedings disclosure, including the prefatory warning language.<sup>39</sup>

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<sup>36</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 46:13-47:1); *see also* Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 183:21-184:5) (calling the total disclosure “robust and transparent”).

<sup>37</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 61:18-63:1).

<sup>38</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. Y-1 (Block (Sept. 16, 2013) Dep. 183:21-184:5).

<sup>39</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. B-2 (Kindler (Dec. 6, 2013) Dep. 116:25-117:19, 178:12-18, 244:1-22); Dec. 8, 2014 Petrosinelli Decl. Ex. X-7 (Kindler (Dec. 6, 2013) Dep. 210:17-21, 228:11-14); Oct. 30, 2014 Petrosinelli Decl. Ex. I-2 (McKinnell (Sept. 19, 2014) Dep. 48:24-49:9, 91:2-7, 96:6-9); Dec. 8, 2014 Petrosinelli Decl. Ex. J-8 (Waxman (Oct. 16, 2014) Dep. 16:18-17:6, 18:15-22; Oct. 30, 2014 Petrosinelli Decl. Ex. G-2 (Levin (Sept. 23, 2014) Dep. 41:16-42:7, 111:10-21, 113:20-114:10); Dec. 8, 2014 Petrosinelli Decl. Ex. A-8 (Levin (Sept. 23, 2014) Dep. 55:13-25, 97:14-98:4; Oct. 30, 2014 Petrosinelli Decl. Ex. F-2 (Levin (Dec. 10, 2013) Dep. 299:14-300:4); *see also* Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 11:24-12:5 (“[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.”), 31:18-32:2); Oct. 30, 2014 Petrosinelli Decl. Ex. E-2 (Lankler (Jan. 22, 2014) Dep. 259:7-13) (purpose of updating Mr. Block and Mr. Fox was to “make sure that they were aware of the government investigations that were pending, what developments had occurred, and they could assess whatever disclosures they thought might need to be made . . . in our securities filings”); Oct. 30, 2014 Petrosinelli Decl. Ex. S-1 (Cangialosi (June 21, 2013) Dep. 228:6-10 (“There is a process by which the legal proceedings disclosures get reviewed. And so it is within that context that the Legal Department would provide advice, and that process is headed up by Larry Fox.”); Dec. 8, 2014 Petrosinelli Decl. Ex. S-7 (Cangialosi (June 21, 2013) Dep. 237:12-238:2 (noting discussions with Mr. Fox and Mr. Block regarding disclosure), 243:7-12 (clarifying that “Doug [Lankler] is not a securities lawyer” and the “primary people responsible for [disclosures advice] were Larry Fox and Dennis [Block]”), 365:3-15); Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 45:17-46:7 (describing it as “an interactive effort to try and come up with the appropriate description of the contingencies” with Mr. Fox); Oct. 30, 2014 Petrosinelli Decl. Ex. P-1 Bradley (Aug. 8, 2013) Dep. 61:13-23 (identifying Mr. Block as

In addition, disclosure counsel were informed of the facts material to the advice they provided.<sup>40</sup> For example, Pfizer's disclosure counsel knew that the company's internal investigation had found some instances of marketing conduct that violated Pfizer's policies.<sup>41</sup> As for call notes, 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."<sup>42</sup> Similarly, disclosure counsel was also aware that an employee had attempted to destroy documents and understood that Pfizer had self-reported that individual to the government.<sup>43</sup>

25. Disputed, for the reasons articulated in response to paragraph 24.

26. Disputed. Mr. Block had developed "some knowledge [him]self" of the criminal law and had learned "by osmosis a good deal" by attending meetings with government investigations counsel.<sup>44</sup> Mr. Kindler noted that Mr. Block "had participated in advising companies regarding the securities laws in the context of government investigations," and that Mr. Fox was also experienced at "providing securities law advice in connection with government investigations."<sup>45</sup> Mr. Waxman testified that since "disclosures could involve IP, antitrust, products liability, Government investigations," Mr. Fox "knew and familiarized himself with the

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"the company's external securities counsel" who "did advise the company or did have a role in the company's disclosures").

<sup>40</sup> SUF ¶¶ 7-10.

<sup>41</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 63:9-13, 65:5-13, 66:16-22, 69:3-22).

<sup>42</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 60:7-16).

<sup>43</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 49:9-15); Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 58:19-59:13).

<sup>44</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 48:8-11; *see also id.* at 199:7-14).

<sup>45</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. Y-7 (Kindler (Oct. 10, 2014) Dep. 35:2-24).

nature of those areas,” and he was “very much a generalist in that sense.”<sup>46</sup> In addition, Mr. Block testified that he “participated in discussions with criminal lawyers” regarding Sentencing Guideline calculations.<sup>47</sup>

27. Disputed. Mr. Block testified that he had “a working understanding” of the misbranding statute, that he had “asked a lot of people over the years to do research in that area” and had “reviewed and read the work product.”<sup>48</sup>

28. Disputed. Mr. Fox testified that he understood the concept of *respondeat superior* to be “that a corporate entity—a controlling entity can be responsible under certain circumstances—can be held liable in certain circumstances for the activities of people within the organization.”<sup>49</sup> Mr. Block testified that “Pfizer didn’t do anything,” but that “[p]eople employed by Pfizer, rogue employees who acted inconsistent with a policy that said you couldn’t do it, did certain things.”<sup>50</sup> Mr. Block elaborated that, “as somebody who did prosecutions at the SEC, . . . those are things they took into consideration and we didn’t prosecute people under those circumstances.”<sup>51</sup> Thus, disclosure counsel understood both the concept of *respondeat superior* and explained circumstances in which a prosecutor typically would not seek to apply such a theory.

29. Plaintiffs state a proposition of law that requires no response.

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<sup>46</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. I-8 (Waxman (Nov. 14, 2013) Dep. 136:4-16).

<sup>47</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 70:8-9).

<sup>48</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 16:9-17:1).

<sup>49</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 36:16-21).

<sup>50</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 231:17-22).

<sup>51</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 231:23-232:2; *see also id.* at 233:5-12 (“[T]hat’s a consideration where prosecutors use their discretion, and it’s usually a consideration where you do not take action under the circumstances I described.”), 228:8-24).

30. Disputed. Disclosure counsel were aware of the threat of exclusion. As Mr. Block testified, “everybody understands and the analysts were quick to point out that [exclusion] [i]s a remedy the government has. I mean, that’s the law.”<sup>52</sup> Plaintiffs mischaracterize Mr. Fox’s testimony. Mr. Fox stated, “There certainly was an awareness among all of us that debarment was a possible consequence of a criminal conviction,” but that the suggestion that “debarment follows automatically from a criminal conviction” was not consistent with his understanding, noting that, at the conclusion of the government investigation, “it didn’t happen.”<sup>53</sup> This summation accurately responded to Plaintiffs’ counsel’s question, which concerned “how there would be a felony plea related to the Bextra off-label marketing that would not result in Pfizer being debarred.”<sup>54</sup> Since Pfizer and the government agreed to a non-operating subsidiary entity entering the felony plea as part of the resolution of the government investigation,<sup>55</sup> there in fact was a felony plea related to Bextra off-label marketing that did not result in Pfizer being debarred. Pfizer had conditioned its willingness to accept any resolution from the government on such a non-operating subsidiary entering the plea.<sup>56</sup>

31. Defendants do not dispute that government investigations counsel acknowledged that the government had “enormous leverage . . . over a big entity that is so heavily regulated and makes a lot of its money from government programs,” though this statement does not on its face concern only the threat of exclusion. In addition, insofar as Plaintiffs suggest disclosure counsel were unaware of the same fact, that is incorrect. As Mr. Block testified, exclusion “clearly . . .

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<sup>52</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 183:14-20).

<sup>53</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 218:13-20).

<sup>54</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 218:6-9).

<sup>55</sup> SUF ¶ 113.

<sup>56</sup> SUF ¶ 110.

was a risk of fighting the case,” and the influence of the threat of exclusion on negotiations was “implicit” because “everybody understood that the government has enormous power.”<sup>57</sup>

32. Disputed. As Mr. Fox noted in his deposition, he understood that the issuance of a target letter was “something that the DOJ will issue after, internally within the DOJ, various levels of people have approved it.”<sup>58</sup> Insofar as Plaintiffs suggest disclosure counsel were inadequately informed about the import of the target letter in the government investigation, they are incorrect. Mr. Block testified that he knew what a target letter was.<sup>59</sup> Disclosure counsel were informed of the target letter and discussed its significance with government investigations counsel before advising that additional disclosure was unnecessary.<sup>60</sup> As Mr. Fox put it, “We had already told the world criminal charges were possible and that substantial criminal fines and/or civil penalties could result.”<sup>61</sup>

33. Defendants do not dispute that Mr. Theodorou gave the quoted testimony in paragraph 33, but dispute any suggestion that the testimony supports Plaintiffs’ motion.

34. Disputed. Plaintiffs misquote Mr. Waxman’s testimony cited in support of this paragraph, and attach documents for which there is no testimony to establish that Mr. Kindler, Mr. Levin, or Mr. Waxman saw them. As to Mr. Waxman, Plaintiffs quote his testimony that (a) he did not recall whether a sales representative had stated that he had deleted documents,<sup>62</sup> (b) he (Mr. Waxman) did not recall “there being a conclusion or finding or investigative finding that

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<sup>57</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 176:19-177:7).

<sup>58</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 105:25-106:2).

<sup>59</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 166:23-24).

<sup>60</sup> SUF ¶¶ 94-96.

<sup>61</sup> SUF ¶ 95 (quoting Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 138:15-17, 141:21-142:8)).

<sup>62</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. J-8 (Waxman (Oct. 16, 2014) Dep. 41:18-19).

there was off-label promotion”;<sup>63</sup> (c) he had “a general recollection” that “the government had reviewed call notes.”<sup>64</sup> None of these answers demonstrate that Mr. Waxman was “informed that certain Pfizer sales representatives may have, in fact, promoted Bextra for general acute and surgical pain.” In any event, disclosure counsel knew that Pfizer’s internal investigation had concluded that there were isolated instances of off-label promotion in the field force.<sup>65</sup> Notably, Mr. Fox testified that Pfizer self-reporting the actions of its “rogue employees” was “a far cry from saying that supports a government case” that “essentially was suggesting that this was pervasive and perhaps even run by senior executives at headquarters,” and “the fact that there were, that we self-reported and that I knew of isolated incidents of off-label promotion does not mean that we did not have substantial defenses to this matter. We did have substantial defenses.”<sup>66</sup>

35. Disputed. Plaintiffs mischaracterize what Mr. Block actually said at his deposition. As Mr. Block’s testimony indicates, “There were instances where I was aware that the government thought there was a possibility of misbranding” and “most Pfizer personnel that I talked to, particularly legal people, swore up and down. And the outside lawyers who participated believed strongly that there was no misbranding and that there was very, very strong defenses to the allegations.”<sup>67</sup> Mr. Block 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. The white

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<sup>63</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. J-8 (Waxman (Oct. 16, 2014) Dep. 52:14-18).

<sup>64</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. J-8 (Waxman (Oct. 16, 2014) Dep. 68:12-20).

<sup>65</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 63:9-13, 65:5-13, 66:16-22, 69:3-22).

<sup>66</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 69:9-22).

<sup>67</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 49:23-25, 50:15-20).



paper provided by Covington to the government in November 2007, which set forth Pfizer's defenses to a misbranding charge, argued 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.<sup>68</sup>

36. Disputed, for the reasons articulated in response to paragraph 35. In addition, as Pfizer's in-house government investigations counsel testified, he and other in-house lawyers kept disclosure counsel informed about the "key findings" of the internal investigation, as well as the government's positions and views of the facts.<sup>69</sup>

37. Disputed. Plaintiffs cite only the plea hearing transcript to support the statements in this paragraph. The relevant transcript portion states: "[W]e do agree that from February 2002 through April 2005 *Pharmacia* promoted Bextra for uses that were not within Bextra's approved label."<sup>70</sup> This document does not demonstrate that "*Pfizer* promoted Bextra for uses that were not within Bextra's FDA-approved label."

38. Disputed. Plaintiffs cite only the plea hearing transcript to support the statements in this paragraph. The relevant transcript portion states: "*Pharmacia* also promoted Bextra at dosages higher than the approved doses for certain indications."<sup>71</sup> This document does not demonstrate that "*Pfizer* promoted Bextra at dosages higher than the FDA-approved dosages."

39. Disputed. Plaintiffs cite only the plea hearing transcript to support the statements in this paragraph. The relevant transcript portion states: "[W]e agree that *Pharmacia* introduced a drug into interstate commerce that lacked adequate directions for these off-label uses and

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<sup>68</sup> See Oct. 30, 2014 Petrosinelli Decl. Ex. C-4 (KPMG-PFIZ-DS 033924 at 033938-64) (Nov. 28, 2007 Covington & Burling brief).

<sup>69</sup> SUF ¶ 9.

<sup>70</sup> Pls.' Ex. 26, at 51:10-17.

<sup>71</sup> Pls.' Ex. 26, at 51:17-18.

dosages.”<sup>72</sup> This document does not demonstrate that “*Pfizer* introduced Bextra into interstate commerce for the treatment of acute pain, surgical pain, other unapproved usages and at unapproved dosages even though it lacked adequate directions for such uses and dosages.”

40. Disputed. Plaintiffs cite only the plea hearing transcript to support the statements in this paragraph. The relevant transcript portion states: “We also agree that in certain ways *Pharmacia* promoted Bextra with an intent to defraud or mislead, not nearly as broadly as [the prosecutor] has said, but we do agree with that.”<sup>73</sup> This document does not demonstrate that “*Pfizer* promoted Bextra with an intent to defraud or mislead.” On the contrary, witness testimony establishes that Pfizer disputed the government’s allegations against it, and that Pharmacia agreed only that there was a sufficient factual basis for the plea and not to the government’s other allegations.<sup>74</sup>

41. Disputed. Plaintiffs cite only the plea hearing transcript to support the statements in this paragraph. The relevant transcript portion states: “[C]ertain members of the *Pharmacia* sales force promoted Bextra with false and misleading claims.”<sup>75</sup> This document does not demonstrate that “[c]ertain members of *Pfizer*’s sales force promoted Bextra with false and misleading claims.”

42. Disputed. Plaintiffs cite only the plea hearing transcript to support the statements in this paragraph. The relevant transcript portion states: “[C]ertain members of the *Pharmacia* sales force did submit to their own supervisors false, fake requests,” and “there was follow-

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<sup>72</sup> Pls.’ Ex. 26, at 51:18-22.

<sup>73</sup> Pls.’ Ex. 26, at 51:22-25.

<sup>74</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. X-7 (Kindler (Dec. 6, 2013) Dep. 269:9-15, 276:17-25, 278:2-279:3).

<sup>75</sup> Pls.’ Ex. 26, at 52:1-2.

through in providing medical information letters to those doctors.”<sup>76</sup> This document does not demonstrate that “[c]ertain members of *Pfizer*’s sales force submitted to their supervisors false, fake medical requests” resulting in medical information letters.

43. Disputed. Insofar as the information set forth in Plaintiffs’ paragraph 37 through 42 concerned the facts to which Pharmacia and the government stipulated as part of the plea agreement, Mr. Block testified that “at the time they pled guilty, one could say I learned that at least they pled guilty to misbranding.”<sup>77</sup> Prior to that time, government investigations counsel had kept disclosure counsel informed of the “key findings” of the internal investigation.<sup>78</sup> To the extent Plaintiffs suggest that the facts to which Pharmacia stipulated as part of its plea were known to Pfizer and beyond dispute, that is incorrect. Pfizer disputed throughout the Class Period whether the government could prove the facts to which Pharmacia stipulated as part of its negotiated resolution with the government.<sup>79</sup>

44. Disputed. It is unclear from the face of the statement to whom Mr. Block was referring. Ms. Holloway was a regional manager in the northeast region of Pfizer’s Powers Sales Division, while Mr. Block’s testimony refers to a case in Ohio.<sup>80</sup>

45. Disputed. To the extent Plaintiffs offer Mr. Kopchinski’s complaint for the truth of the allegations within it, Plaintiffs have failed to fulfill Local and Civil Rule 56.1’s requirement that facts be supported “by citation to evidence which would be admissible.” Court filings are inadmissible hearsay, *Gaffney v. Dep’t of Info. Tech.*, 579 F. Supp. 2d 455, 459 (S.D.N.Y. 2008), and, in any event, a complaint merely states allegations.

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<sup>76</sup> Pls.’ Ex. 26, at 52:1-2.

<sup>77</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 50:2-4).

<sup>78</sup> SUF ¶ 9.

<sup>79</sup> SUF ¶¶ 74, 75, 103, 107, 108, 112.

<sup>80</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 57:15-22).

46. Disputed. To the extent Plaintiffs offer the document to prove that a sales representative in fact obtained a protocol, Plaintiffs have failed to fulfill Local and Civil Rule 56.1's requirement that facts be supported "by citation to evidence which would be admissible." The document is inadmissible hearsay if used to establish the truth of the matter asserted in the document. Defendants note that evidence in the record indicates that surgery protocols recommending the usage of Bextra had an on-label purpose, since many surgery patients suffered from the arthritic conditions for which Bextra was intended.<sup>81</sup>

47. Disputed. Insofar as Plaintiffs suggest Defendants could have located the exhibits to Mr. Kopchinski's qui tam complaint to evaluate his allegations, the complaint was not unsealed and provided to Pfizer until April 2008.<sup>82</sup> Regardless of the availability of the materials cited by Mr. Kopchinski's complaint, there was no practical way for Defendants to identify those documents to evaluate Mr. Kopchinski's allegations prior to that time.

48. Defendants do not dispute the facts contained in paragraph 48.

49. Disputed. Plaintiffs cite to a portion of Mr. Block's testimony concerning whether "Pfizer had reached a conclusion that they would be likely to be forced to reach some sort of settlement concerning this Bextra qui tam case," which on its face does not speak to whether Mr. Block received a copy of the qui tam complaint. Plaintiffs further cite to testimony from Pfizer's two CEOs during the Class Period stating that they had not consulted with Mr. Block concerning the company's response to the qui tam complaint, which again does not establish whether Mr. Block received the complaint. In fact, upon receipt of the qui tam complaints in April 2008, Mr. Lankler directed Mr. Wessel in an email to "make sure that

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<sup>81</sup> See Oct. 30, 2014 Petrosinelli Decl. Ex. C-4 (KPMG-PFIZ-DS 033924 at 033971-78) (Nov. 28, 2007 Covington & Burling brief).

<sup>82</sup> Pls.' Ex. 38.

Dennis remains comfortable with our disclosures on these? Now that they are being unsealed, do we need to have more disclosure?”<sup>83</sup> Only days later, Mr. Block provided his customary handwritten edits of the Legal Proceedings disclosure to Mr. Fox, which contained no suggested addition to address the qui tam complaints but raised the question of whether it would be helpful to include a statement that the company’s efforts to resolve the investigation were ongoing.<sup>84</sup>

50. Disputed. The testimony quoted, which comes from Mr. Kindler and Mr. Fox, never refers to the qui tam complaint or addresses whether Mr. Fox received a copy of it. In any event, contemporaneous emails demonstrate that Pfizer consulted its outside disclosure counsel regarding whether additional disclosure was necessary.<sup>85</sup>

51. Defendants do not dispute the facts contained in paragraph 51.

52. Defendants do not dispute the facts contained in paragraph 52.

53. Defendants do not dispute the facts contained in paragraph 53. To the extent Plaintiffs suggest that these documents establish off-label promotion, however, this is incorrect. The POA 1 Playbook on its face discusses pre- and post-operative pain in patients “due to their arthritis” and states that Bextra “is the best agent for arthritic pain and inflammation.”<sup>86</sup> Other evidence in the record also indicates that surgery protocols recommending the usage of Bextra

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<sup>83</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. O-8 PFE-JONES 00047135) (Apr. 11, 2008 email from D. Lankler to C. Wessel).

<sup>84</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. N-8 (PFE-JONES 00045945) (Apr. 14, 2008 email from D. Block to L. Fox attaching handwritten comments by D. Block).

<sup>85</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. O-8 (PFE-JONES 00047135) (Apr. 11, 2008 email from D. Lankler to C. Wessel).

<sup>86</sup> Pls.’ Ex. 42, at BKLYN 000000064.

had an on-label purpose, since many surgery patients suffered from the arthritic conditions for which Bextra was intended.<sup>87</sup>

54. Defendants do not dispute the facts contained in paragraph 54.

55. Defendants do not dispute the facts contained in paragraph 55.

56. Defendants do not dispute the facts contained in paragraph 56. Not all of the employees interviewed were alleged participants in the attempted deletion or alteration of documents.<sup>88</sup>

57. Defendants do not dispute the facts contained in paragraph 57. Pfizer produced “six redacted witness interview memoranda,” and expressly limited its production to “factual information regarding the Document Deletion Issues.”<sup>89</sup>

58. Disputed. Mr. Block testified that he had seen “some” government investigations counsel work product, but that he could not recall whether he had seen these interview memoranda.<sup>90</sup> Mr. Fox also testified he could not recall seeing these interview memoranda, not that he had never seen them.<sup>91</sup>

59. Defendants do not dispute that the presentation cited in paragraph 59 made note of the quoted statements. The quoted statements do not demonstrate the fact of off-label promotion, and in fact tend to suggest the opposite.<sup>92</sup>

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<sup>87</sup> See Oct. 30, 2014 Petrosinelli Decl. Ex. C-4 (KPMG-PFIZ-DS 033924 at 033971-78) (Nov. 28, 2007 Covington & Burling brief).

<sup>88</sup> See Pls.’ Ex. 47 (Weathermon interview memorandum).

<sup>89</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. X-8 (Posner Decl. (May 13, 2014), ¶ 4-5).

<sup>90</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 54:8-11); Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 105:3-106:12).

<sup>91</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 50:13-16).

<sup>92</sup> The statement, for instance, that district managers found “specific reference” to the approved indications “needlessly restrictive” suggests that the district managers understood what was approved and obeyed the company’s directive to promote on-label, even if some may have found it “restrictive.”

60. Disputed. Mr. Lankler, then Pfizer’s Chief Compliance Officer and one of the in-house counsel responsible for overseeing the company’s government investigations, testified that he and other in-house counsel would have provided Mr. Block and Mr. Fox with the facts concerning the government investigation that were material to the securities advice they provided, including the “key findings of the internal investigation.”<sup>93</sup> Defendants note that the cited testimony of Mr. Fox states:

I am—as I’ve indicated many times, I am a securities lawyer. I am not a litigator. It is not my job, it is not the job of any securities lawyer in any company in the country to look at the evidence—the underlying evidence, make analyses, interview witnesses, look at interviews of witnesses in connection with making a securities law judgment. If we did that, we could not do our own jobs.

I am fully confident in the experience and the expertise of our in-house GI attorneys, Doug [Lankler] in particular, a former prosecutor. And I relied on them for that. And as I’ve indicated many times, we had scheduled and unscheduled calls with them, “we” meaning Dennis Block and I, to fully inform us of what we needed to know to make our securities law judgment. I’m not a litigator.<sup>94</sup>

61. Defendants do not dispute that Pfizer produced to the government millions of “call notes.” Defendants dispute Plaintiffs’ characterization of these documents as “summarizing” a sales call. Testimony indicates that “what was written in the call notes by the sales reps was sometimes very vague” and thus “it is very hard for an independent person to look at those call notes and . . . make a good conclusion on what’s going on here.”<sup>95</sup> Hugh Donnelly, the head of Pfizer’s internal audit department, explained that, “Sales reps are liable to use those

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<sup>93</sup> SUF ¶ 9.

<sup>94</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 211:16-212:11).

<sup>95</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. C-8 (Mooney (May 31, 2013) Dep. 158:11-16, 229:14-230:2); *see also* Dec. 8, 2014 Petrosinelli Decl. Ex. V-7 (Donnelly (Aug. 14, 2013) Dep. 144:1-10, 158:18-159:3, 278:21-279:2); Dec. 8, 2014 Petrosinelli Decl. Ex. Z-7 (Lankler (Jan. 22, 2014) Dep. 116:24-117:3).

call notes for any purpose . . . . but the way it gets characterized could be misinterpreted.”<sup>96</sup> Plaintiffs’ own proffered compliance expert, Kevin O’Brien, described call notes as “cryptic.”<sup>97</sup>

62. Disputed. To the extent Plaintiffs offer the document to prove that sales representatives actually “promot[ed] Bextra for the non-FDA approved indication of general acute pain,” the document is hearsay and at most establishes the government’s interpretation of selected call notes. Multiple witnesses attested to the unreliability of, and difficulties in interpreting, call notes.<sup>98</sup>

63. Disputed. To the extent Plaintiffs offer the document to prove that sales representatives actually “promot[ed] Bextra for the non-FDA approved indication of pre/post-peri operative pain,” the document is hearsay and at most establishes the government’s interpretation of selected call notes. Multiple witnesses attested to the unreliability of, and difficulties in interpreting, call notes.<sup>99</sup>

64. Disputed. To the extent Plaintiffs offer the document to prove that sales representatives actually “had given out 20 mg Bextra samples in over 1.3 million sales calls,” the document is hearsay and at most establishes the government’s interpretation of selected call notes. Multiple witnesses attested to the unreliability of, and difficulties in interpreting, call notes.<sup>100</sup>

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<sup>96</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. V-7 (Donnelly (Aug. 14, 2013) Dep. 158:18-159:3).

<sup>97</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. D-8 (O’Brien (July 25, 2014) Dep. 20:24-21:2).

<sup>98</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. C-8 (Mooney (May 31, 2013) Dep. 158:11-16, 229:14-230:2); *see also* Dec. 8, 2014 Petrosinelli Decl. Ex. V-7 (Donnelly (Aug. 14, 2013) Dep. 144:1-10, 158:18-159:3, 278:21-279:2); Dec. 8, 2014 Petrosinelli Decl. Ex. Z-7 (Lankler (Jan. 22, 2014) Dep. 116:24-117:3).

<sup>99</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. C-8 (Mooney (May 31, 2013) Dep. 158:11-16, 229:14-230:2); *see also* Dec. 8, 2014 Petrosinelli Decl. Ex. V-7 (Donnelly (Aug. 14, 2013) Dep. 144:1-10, 158:18-159:3, 278:21-279:2); Dec. 8, 2014 Petrosinelli Decl. Ex. Z-7 (Lankler (Jan. 22, 2014) Dep. 116:24-117:3).

<sup>100</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. C-8 (Mooney (May 31, 2013) Dep. 158:11-16, 229:14-230:2); *see also* Dec. 8, 2014 Petrosinelli Decl. Ex. V-7 (Donnelly (Aug. 14, 2013) Dep. 144:1-10, 158:18-159:3, 278:21-279:2); Dec. 8, 2014 Petrosinelli Decl. Ex. Z-7 (Lankler (Jan. 22, 2014) Dep. 116:24-117:3).



65. Disputed. To the extent Plaintiffs offer the document to prove that sales representatives actually “promot[ed] Bextra with the false claim that Bextra had no dose-related increases in hypertension and edema,” the document is hearsay and at most establishes the government’s interpretation of selected call notes. Multiple witnesses attested to the unreliability of, and difficulties in interpreting, call notes.<sup>101</sup>

66. Defendants do not dispute the facts contained in paragraph 66.

67. Disputed. The document cited in Plaintiffs’ Dec. 3, 2014 Notice of Errata says, “Both Celebrex and Bextra, there is no dose proportional response to hypertension and edema.”<sup>102</sup> Plaintiffs quote from a different document, the government’s criminal Information against Pharmacia. To the extent Plaintiffs rely upon that document for the truth of the matters asserted therein, Plaintiffs have failed to fulfill Local and Civil Rule 56.1’s requirement that facts be supported “by citation to evidence which would be admissible.” The cited document is hearsay because it is a court filing, *see Gaffney v. Dep’t of Info. Tech.*, 579 F. Supp. 2d 455, 459 (S.D.N.Y. 2008), and, in any event, is a criminal Information that merely contains the government’s allegations. As noted above, Pharmacia did not admit to the allegations contained in the government’s Information but acknowledged only that there was a factual basis for its plea.<sup>103</sup> To the extent Plaintiffs rely upon either document to prove that this message was actually disseminated by sales representatives, the documents are insufficient to prove that assertion.

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<sup>101</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. C-8 (Mooney (May 31, 2013) Dep. 158:11-16, 229:14-230:2); *see also* Dec. 8, 2014 Petrosinelli Decl. Ex. V-7 (Donnelly (Aug. 14, 2013) Dep. 144:1-10, 158:18-159:3, 278:21-279:2); Dec. 8, 2014 Petrosinelli Decl. Ex. Z-7 (Lankler (Jan. 22, 2014) Dep. 116:24-117:3).

<sup>102</sup> Pls.’ Ex. 61, at TF000347.

68. Disputed. Plaintiffs mischaracterize the cited testimony. Mr. Theodorou testified expressly that Pharmacia's stipulation to those facts was "the basis for the felony that the company admitted to," but clarified, "These are the facts *not to which there was no defense*. It's what the company—as I said, counsel admitted only that these are the fraudulent activities."<sup>104</sup> Mr. Theodorou explained further, in testimony that Plaintiffs cut off in their excerpts, that, "It is what the company has decided to plead to. You give up your defenses" in pleading; nonetheless, those factual assertions could "still be vulnerable to defenses."<sup>105</sup>

69. Disputed. To the extent Plaintiffs offer the document to prove that "references to off-label indications during sales calls with physicians had occurred 'in at least the same order of magnitude as on-label indications,'" the document is hearsay and at most establishes the government's interpretation of selected call notes. Multiple witnesses attested to the unreliability of, and difficulties in interpreting, call notes.<sup>106</sup> Moreover, as Pfizer's government investigations counsel made clear in its white paper, it had concluded that less than 0.1% (that is, one out of every thousand) of the call notes "could even potentially be understood to have explicitly positioned Bextra for the treatment of acute pain,"<sup>107</sup> and that figure likely overstated the number of call notes with which the government reasonably could take issue, since it "failed to account

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<sup>104</sup> Pls.' Ex. 30, at 63:4-11 (emphasis added).

<sup>105</sup> Pls.' Ex. 30, at 64:21-65:1.

<sup>106</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. C-8 (Mooney (May 31, 2013) Dep. 158:11-16, 229:14-230:2); *see also* Dec. 8, 2014 Petrosinelli Decl. Ex. V-7 (Donnelly (Aug. 14, 2013) Dep. 144:1-10, 158:18-159:3, 278:21-279:2); Dec. 8, 2014 Petrosinelli Decl. Ex. Z-7 (Lankler (Jan. 22, 2014) Dep. 116:24-117:3).

<sup>107</sup> *See* Oct. 30, 2014 Petrosinelli Decl. Ex. C-4 (KPMG-PFIZ-DS 033924 at 033956) (Nov. 28, 2007 Covington & Burling brief).

for entirely innocuous call notes” that were flagged simply for having a term like “acute” somewhere in the note.<sup>108</sup>

70. Disputed. Mr. Fox testified that he and Mr. Block would have received a summary of 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.”<sup>109</sup> Moreover, both Mr. Fox and Mr. Block testified that government investigations counsel updated them on the company’s meetings with the government, and government investigations counsel concurred.<sup>110</sup>

71. Disputed. The document cited does not state that Pfizer’s government investigations counsel “generated interview memoranda for most or all of” the interviews of Pfizer employees. Defendants do not dispute that government investigations counsel interviewed hundreds of employees as part of its comprehensive internal investigation.

72. Disputed. Mr. Block and Mr. Fox both testified they could not recall receiving interview memoranda, not that they certainly had never received any of the memoranda.<sup>111</sup> Mr. Fox also stated, “To the extent the—that such interviews were a matter of any consequence in the view of our GI attorneys, that is the sort of information that would have been conveyed to me and Dennis Block in our updates from our GI attorneys.”<sup>112</sup>

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<sup>108</sup> See Oct. 30, 2014 Petrosinelli Decl. Ex. C-4 (KPMG-PFIZ-DS 033924 at 033957-58) (Nov. 28, 2007 Covington & Burling brief).

<sup>109</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 60:7-16).

<sup>110</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 80:6-11, 83:25-84:10); Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 144:21-145:4); Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 204:13-205:16); SUF ¶ 9.

<sup>111</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. P-7 105:15-17); Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 11:14-20); Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 50:13-16).

<sup>112</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 54:19-25).

73. Disputed. Mr. Block expressly stated that he was privy to “some” of government investigations counsel’s work product.<sup>113</sup> Mr. Fox testified that he did not recall reviewing Covington & Burling work product, not that he had been denied access to it.<sup>114</sup> The record is undisputed that disclosure counsel had free rein to ask for whatever they needed in order to render informed disclosure advice. As multiple witnesses testified, Pfizer’s directive to its government investigations counsel was “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.”<sup>115</sup> 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.”<sup>116</sup> As Mr. Waxman explained, his “general approach . . . was if Larry Fox wants information, you provide 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.”<sup>117</sup>

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<sup>113</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 54:8-11).

<sup>114</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 97:15-18).

<sup>115</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. C-2 (Kindler (Oct. 10, 2014) Dep. 43:16-21).

<sup>116</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. I-8 (Waxman (Nov. 14, 2013) Dep. 195:16-21).

<sup>117</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. R-2 (Waxman (Nov. 14, 2013) Dep. 137:12-20); *see also id.* at 136:4-16 (“[Mr. Fox] asked any questions he wanted . . . . If he wanted to talk to our outside counsel, talk to our outside counsel.”); Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 186:12-17) (noting Ethan Posner “was on some of those calls” with Mr. Fox and Mr. Block); *see also* Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 163:6-14 (purpose of calls was “to make sure that Dennis and I were provided with the information that we need to make informed disclosure decisions, . . . to ask [government investigations counsel] questions, have a back and forth and, at the end of the day, be comfortable that we were in a position to make an informed judgment on disclosure implications”), 164:4-9 (Fox and Block asked questions “to make sure that [government investigations counsel] were giving us the information that we, as securities lawyers, felt that we needed to make an informed judgment with respect to disclosure implications”), 164:10-15 (“Q. Did you always feel . . . that you had the information

74. Disputed. Government investigations counsel informed Messrs. Block and Fox that, in the company’s estimation and in the estimation of government investigations counsel, the government “couldn’t prove a dollar’s worth of . . . sales related to . . . off-label marketing.”<sup>118</sup> Disclosure counsel were both aware of the fact that the government had proposed a novel damages theory, which no court had then or has since accepted in similar cases, and that Pfizer had responded in a letter explaining that the theory was, in Mr. Block’s words, “absurd.”<sup>119</sup> Indeed, disclosure counsel both received a copy of that letter.<sup>120</sup> To the extent Plaintiffs imply that the stipulated gain figure of \$664 million was known or knowable to Pfizer prior to reaching an agreement in principle with the government, this is incorrect. As multiple witnesses testified, the \$664 million figure referenced in paragraph 23 and alluded to in paragraph 74 was a “stipulated” figure that was negotiated by Pfizer and the government for Sentencing Guidelines purposes in order to support the final settlement amount.<sup>121</sup>

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that you needed to provide advice regarding the securities disclosures? . . . A. Yes.”); Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 198:21-199:14) (“Where there was an open issue or they had a question, they would drag in one of the outside people who could fill in the gap. So we had a pretty good understanding from those chaps as to what was transpiring.”); Oct. 30, 2014 Petrosinelli Decl. Ex. B-2 (Kindler (Dec. 6, 2013) Dep. 118:5-6) (“[Disclosure counsel] had access to any and all information that they required to make their judgments.”); Oct. 30, 2014 Petrosinelli Decl. Ex. G-2 Levin (Sept. 23, 2014) Dep. 37:1-3.

<sup>118</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 68:12-18); *see also id.* at 226:18-24, 227:8-21; Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 88:9-15 (“[T]hey didn’t believe damages—to the extent there was a case or to the extent they wanted to resolve it, that the damages were very significant.”).

<sup>119</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 122:16-123:13); Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 199:23-200:7).

<sup>120</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. P-8 (PFE-JONES 00059184) (Apr. 9, 2008 email from C. Wessel to D. Block and L. Fox attaching Oct. 1, 2007 letter from Covington & Burling to AUSA S. Bloom); Petrosinelli Decl. Ex. B-6 (PFE-JONES 00059186) (Oct. 1, 2007 letter from Covington & Burling to AUSA S. Bloom).

<sup>121</sup> SUF ¶ 132; *see also* Lankler (Jan. 22, 2014) Dep. 264:22-265:3.

## DEFENDANTS' COUNTERSTATEMENT OF MATERIAL FACTS

### I. Pfizer's Disclosures and the Role of Securities Disclosure Counsel

75. Pfizer's introductory language to the "Legal Proceedings and Contingencies" section of its Class Period Financial Reports included the following warning:

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.<sup>122</sup>

On its face, this warning applied to all of the company's pending legal proceedings and was not limited to, nor was written in response to, the Bextra investigation.

76. In 2004, when Pfizer learned of the Bextra investigation, it hired government investigations counsel at Covington & Burling to conduct an internal investigation and to respond to the government's requests for information.<sup>123</sup> Pfizer relied upon Covington, the company's own in-house government investigations lawyers, such as Douglas Lankler and Carl Wessel, and other law firms retained by Pfizer as the government investigation expanded, to advise on how to respond to the government's requests and positions in the Bextra investigation, whether and what defenses Pfizer might have if the government decided to file a lawsuit, and other litigation-related issues.<sup>124</sup>

77. To determine whether and how to disclose the Bextra investigation in its SEC filings, Defendants relied on advice from Pfizer's two veteran securities lawyers, in-house

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<sup>122</sup> *E.g.*, Oct. 30, 2014 Petrosinelli Decl. Ex. B-1 (Pfizer, 2005 Annual Report (Form 10-K), 2005 Financial Report at 62-63 (Feb. 28, 2006)); Oct. 30, 2014 Petrosinelli Decl. Ex. D-1 (Pfizer, 2006 Annual Report (Form 10-K), 2006 Financial Report at 67 (Feb. 27, 2007)); Oct. 30, 2014 Petrosinelli Decl. Ex. F-1 (Pfizer, 2007 Annual Report (Form 10-K), 2007 Financial Report at 69 (Feb. 27, 2007)).

<sup>123</sup> SUF ¶ 52.

<sup>124</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. Y-7 (Kindler (Oct. 10, 2014) Dep. 20:19-21:4); Dec. 8, 2014 Petrosinelli Decl. Ex. J-8 (Waxman (Oct. 16, 2014) Dep. 14:23-16:14).

disclosure counsel Lawrence Fox and outside disclosure counsel Dennis Block, then of the law firm Cadwalader Wickersham & Taft LLP.<sup>125</sup>

78. Mr. Block, though not engaged to represent Pfizer in a litigation capacity in its response to the government investigation, participated in many meetings throughout the Class Period during which he learned the relevant facts concerning the government investigation, including the fact that Pfizer believed it had substantial defenses to the government's allegations.<sup>126</sup> Both he and Mr. Fox professionally assessed this information in terms of whether and how it would affect Pfizer's disclosures.<sup>127</sup>

79. Mr. Fox, though not engaged to represent Pfizer in a litigation capacity in its response to the government investigation, participated in many meetings throughout the Class Period during which he learned the relevant facts concerning the government investigation,

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<sup>125</sup> SUF ¶¶ 1-4, 6-14, 16, 18, 20-25, 62-63, 70-71, 76-77, 90-91, 94-96, 99-100, 104, 108-09; Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 31:18-32:2) (“My responsibilities were and are to act and serve as a securities and corporate governance lawyer for the company, which means that I review many of our public disclosure documents . . . and provide, together with outside counsel, disclosure advice to the company.”); Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 60:17-22); Oct. 30, 2014 Petrosinelli Decl. Ex. E-2 (Lankler (Jan. 22, 2014) Dep. 259:7-13) (purpose of updating Messrs. Block and Fox was to “make sure that they were aware of the government investigations that were pending, what developments had occurred, and they could assess whatever disclosures they thought might need to be made . . . in our securities filings”); Oct. 30, 2014 Petrosinelli Decl. Ex. S-1 (Cangialosi (June 21, 2013) Dep. 228:6-10 (“There is a process by which the legal proceedings disclosures get reviewed. And so it is within that context that the Legal Department would provide advice, and that process is headed up by Larry Fox.”), 365:3-9; Dec. 8, 2014 Petrosinelli Decl. Ex. S-7 (Cangialosi (June 21, 2013) Dep. 237:12-238:2 (noting discussions with Mr. Fox and Mr. Block regarding disclosure), 243:7-12 (clarifying that “Doug [Lankler] is not a securities lawyer” and the “primary people responsible for [disclosures advice] were Larry Fox and Dennis [Block]”); Oct. 30, 2014 Petrosinelli Decl. Ex. P-1 Bradley (Aug. 8, 2013) Dep. 61:13-23 (identifying Mr. Block as “the company’s external securities counsel” who “did advise the company or did have a role in the company’s disclosures”).

<sup>126</sup> SUF ¶¶ 7-10, 70, 76, 90, 94, 99, 108; Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 46:21-47:19, 48:8-11, 55:23-56:1, 88:4-15; 237:22-238:3; Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 93:18-25, 122:16-123:13, 153:21-154:10, 169:2-10, 198:1-199:14).

<sup>127</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 11:23-12:5, 31:18-32:2, 83:12-83:3, 87:1-10, 89:12-16); Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 45:17-46:7, 60:17-22).

including the fact that Pfizer believed it had substantial defenses to the government's allegations.<sup>128</sup> Both he and Mr. Block professionally assessed this information in terms of whether and how it would affect Pfizer's disclosures.<sup>129</sup>

80. Both of Pfizer's Chief Executive Officers during the Class Period testified that they relied on Messrs. Fox and Block's advice as to all aspects of Pfizer's Legal Proceedings disclosure, including the warning language within the "although we believe we have substantial defenses" section. Dr. Henry McKinnell, Pfizer's CEO from 2001 to July 2006, testified, "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."<sup>130</sup> Dr. McKinnell further testified 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."<sup>131</sup> Dr. McKinnell expressly drew a distinction between government investigations counsel—upon whom he relied for litigation advice—and disclosure counsel—upon whom he relied for disclosure advice—while making clear that disclosure counsel received information from the company's litigators in order to give informed disclosure advice.<sup>132</sup>

81. Jeffrey Kindler, Pfizer's CEO after Dr. McKinnell, testified that he "rel[ie]d in good faith on the advice of Mr. Block and Mr. Fox" and that these "extremely experienced and

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<sup>128</sup> SUF ¶¶ 7-10, 70, 76, 90, 94, 109.

<sup>129</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 11:23-12:5, 31:18-32:2, 83:12-83:3, 87:1-10, 89:12-16); Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 45:17-46:7, 60:17-22).

<sup>130</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. I-2 (McKinnell (Sept. 19, 2014) Dep. 48:24-49:9).

<sup>131</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. I-2 (McKinnell (Sept. 19, 2014) Dep. 91:2-7).

<sup>132</sup> See Oct. 30, 2014 Petrosinelli Decl. Ex. I-2 (McKinnell (Sept. 19, 2014) Dep. 96:6-9) ("I'm trying to draw a distinction between litigation and disclosure, because your disclosure is based on what you know and what you know comes from the litigation side of the house.").



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.”<sup>133</sup> As to the “although we believe we have substantial defenses” language, Mr. Kindler 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.”<sup>134</sup> Mr. Kindler also distinguished between litigation advice and disclosures advice, noting that Messrs. Fox and 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.”<sup>135</sup>

82. The company’s Chief Financial Officer early in the Class Period, Alan Levin, testified that the “although we believe we have substantial defenses” language 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 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.<sup>136</sup>

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<sup>133</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. B-2 (Kindler (Dec. 6, 2013) Dep. 116:25-117:19); *see also id.* at 178:12-18 (describing Mr. Lankler’s “responsibility . . . to provide information to disclosure counsel, namely Mr. Fox and Mr. Block, . . . so that Mr. Fox and Mr. Block could give us advice on the nature of disclosures that we would make with regard to government investigations”), 244:1-22; Dec. 8, 2014 Petrosinelli Decl. Ex. X-7 (Kindler (Dec. 6, 2013) Dep. 210:17-21, 228:11-14).

<sup>134</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. C-2 (Kindler (Oct. 10, 2014) Dep. 47:2-11).

<sup>135</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. C-2 (Kindler (Oct. 10, 2014) Dep. 42:22-43:2); *see also* Dec. 8, 2014 Petrosinelli Decl. Ex. Y-7 (Kindler (Oct. 10, 2014) Dep. 20:2-18, 36:8-10 (Mr. Fox “had expertise in securities law, and that’s what we were looking to him for advice on”).

<sup>136</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. G-2 (Levin (Sept. 23, 2014) Dep. 41:16-42:7); *see also id.* at 97:14-98:4, 111:10-21, 113:20-114:10 (“[O]ur process is robust, and I believe that Dennis and Larry, in their capacities as disclosure counsel for us, would have consulted with Doug Lankler and Covington &

Mr. Levin also stated, “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”; disclosure counsel, “based on their conversations with investigations or other legal counsel . . . , would have formed a view on the appropriate disclosure.”<sup>137</sup>

83. Mr. Levin identified Messrs. Fox and Block as the securities disclosure counsel upon whom he and the company relied in making disclosure decisions.<sup>138</sup> Mr. Levin stated, when questioned by Plaintiffs’ counsel again on this issue, that Mr. Block was the “securities lawyer whom we relied on with respect to disclosure,”<sup>139</sup> 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.”<sup>140</sup>

84. The company’s general counsel, following Mr. Kindler’s assumption of the CEO position, Allen Waxman, stated 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.<sup>141</sup>

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Burling . . . in understanding substantial defenses. . . . They would have incorporated that into disclosure as part of their role as disclosure counsel.”)

<sup>137</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. G-2 (Levin (Sept. 23, 2014) Dep. 55:13-25).

<sup>138</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. F-2 (Levin (Dec. 10, 2013) Dep. 299:14-300:4); *see also* Oct. 30, 2014 Petrosinelli Decl. Ex. G-2 (Levin (Sept. 23, 2014) Dep. 41:16-42:7, 111:10-21, 113:20-114:10); Dec. 8, 2014 Petrosinelli Decl. Ex. A-8 (Levin (Sept. 23, 2014) Dep. 97:14-98:4).

<sup>139</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. G-2 (Levin (Sept. 23, 2014) Dep. 112:12-14).

<sup>140</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. G-2 (Levin (Sept. 23, 2014) Dep. 115:10-14).

<sup>141</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. J-8 (Waxman (Oct. 16, 2014) Dep. 16:18-17:6).

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. . . . And we would have relied upon him . . . for the accuracy and validity of this disclosure.”<sup>142</sup>

85. Messrs. Fox and Block themselves testified that they served as the company’s disclosure counsel, with responsibility for advising the company on how to adequately disclose its legal proceedings in its SEC filings. Mr. Fox, for instance, stated

[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.<sup>143</sup>

Mr. Block testified:

[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.<sup>144</sup>

86. Mr. Block and Mr. Fox were experienced disclosure counsel and had provided the company with advice concerning how to disclose government investigations in the past. Mr. Kindler testified that Mr. Block “had participated in advising companies regarding the securities laws in the context of government investigations,” and that Mr. Fox was also experienced at “providing securities law advice in connection with government investigations.”<sup>145</sup> Mr. Waxman testified that since “disclosures could involve IP, antitrust, products liability, Government

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<sup>142</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. J-8 (Waxman (Oct. 16, 2014) Dep. 18:15-22).

<sup>143</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 11:24-12:5).

<sup>144</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 44:6-14).

<sup>145</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. Y-7 (Kindler (Oct. 10, 2014) Dep. 35:2-24).

investigations,” Mr. Fox “knew and familiarized himself with the nature of those areas,” and he was “very much a generalist in that sense.”<sup>146</sup>

87. Mr. Block had developed “some knowledge [him]self” of the criminal law and had learned “by osmosis a good deal” by attending meetings with government investigations counsel.<sup>147</sup> Mr. Block testified that he had “a working understanding” of the misbranding statute, that he had “asked a lot of people over the years to do research in that area” and had “reviewed and read the work product.”<sup>148</sup> Mr. Block testified that he “participated in discussions with criminal lawyers” regarding Sentencing Guideline calculations.<sup>149</sup>

88. Disclosure counsel understood both the concept of *respondeat superior* and explained circumstances in which a prosecutor typically would not seek to apply such a theory. Mr. Fox testified that he understood the concept of *respondeat superior* to be “that a corporate entity—a controlling entity can be responsible under certain circumstances—can be held liable in certain circumstances for the activities of people within the organization.”<sup>150</sup> Mr. Block testified that “Pfizer didn’t do anything,” but that “people employed by Pfizer, rogue employees who acted inconsistent with a policy that said you couldn’t do it, did certain things.”<sup>151</sup> Mr. Block elaborated that, “as somebody who did prosecutions at the SEC, . . . those are things they took into consideration and we didn’t prosecute people under those circumstances.”<sup>152</sup>

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<sup>146</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. R-2 (Waxman (Nov. 14, 2013) Dep. 136:4-16).

<sup>147</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. C-2 (Kindler (Oct. 10, 2014) Dep. 48:8-11, 199:7-14).

<sup>148</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 16:9-17:1).

<sup>149</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 70:8-9).

<sup>150</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 36:16-21).

<sup>151</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 231:17-22).

<sup>152</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 231:23-232:2); *see also id.* at 233:5-12 (“[T]hat’s a consideration where prosecutors use their discretion, and it’s usually a consideration where you do not take action under the circumstances I described.”), 228:8-24.

89. As to the “although we believe we have substantial defenses” statement, Mr. Fox testified that that statement was consistent with the “regular updates provided to me and to Dennis Block by our litigators and our [government investigations] attorneys.”<sup>153</sup> 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.<sup>154</sup>

90. Both Mr. Fox and Mr. Block concluded that this disclosure was appropriate and that it accurately “reflect[ed] the information that we received.”<sup>155</sup> As part of their conversations with government investigations counsel, Messrs. Block and Fox 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.<sup>156</sup> Mr. Fox described the “although we believe we have substantial defenses” language as 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.”<sup>157</sup> Mr. Block described Pfizer as providing a “robust and transparent” disclosure that informed

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<sup>153</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 46:13-47:1). Mr. Fox also recalled that Pfizer’s self-reporting of this matter was “a far cry from saying that supports a government case that . . . essentially was suggesting that this was pervasive and perhaps even run by senior executives at headquarters,” and “the fact that there were, that we self-reported and that I knew of isolated incidents of off-label promotion does not mean that we did not have substantial defenses to this matter. We did have substantial defenses.” *Id.* at 69:9-22.

<sup>154</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y1 (Fox (Sept. 26, 2013) Dep. 87:1-6) (emphasis added).

<sup>155</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 46:13-47:1); *see also* Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 183:21-184:5) (calling the total disclosure “robust and transparent”).

<sup>156</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 46:9-47:1, 61:23-62:7, 71:21-74:8, 86:21-87:10); Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 224:22-225:6); Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 50:17-20, 88:4-15); Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 169:2-10).

<sup>157</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 61:18-63:1).

investors that, notwithstanding Pfizer's belief that it had "very strong defenses to the case," the investigation "could result in a substantial fine."<sup>158</sup>

91. Pfizer did not rely on Messrs. Fox and Block to conduct the investigations or respond to the government's requests for information, a task for which the company had retained government investigations counsel; Pfizer relied on Messrs. Fox and Block for securities disclosure advice.<sup>159</sup> As Mr. Kindler testified, "[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."<sup>160</sup>

92. In their role as disclosure counsel, Messrs. Fox and Block advised Pfizer on a number of changes to its disclosure of the Department of Justice investigation. For example, 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.<sup>161</sup>

93. Plaintiff's proffered securities disclosures expert, Edward Buthusiem, testified that his former employer, GlaxoSmithKline ("GSK"), followed a virtually identical process, in which government investigations counsel advised GSK on its investigations from a litigation

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<sup>158</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 183:21-184:5).

<sup>159</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 11:23-12:8, 31:18-32:2, 61:25-62:7, 87:1-10); Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 211:16-212:11); Oct. 30, 2014 Petrosinelli Decl. Ex. C-2 (Kindler (Oct. 10, 2014) Dep. 42:22-43:2); Dec. 8, 2014 Petrosinelli Decl. Ex. Y-7 (Kindler (Oct. 10, 2014) Dep. 20:2-18, 36:8-10).

Oct. 30, 2014 Petrosinelli Decl. Ex. I-2 (McKinnell (Sept. 19, 2014) Dep. 91:2-7, 96:6-9).

<sup>160</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. C-2 (Kindler (Oct. 10, 2014) Dep. 42:22-43:2); Dec. 8, 2014 Petrosinelli Decl. Ex. Y-7 (Kindler (Oct. 10, 2014) Dep. 20:2-18).

<sup>161</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. O-5 (PFE-JONES 00042203) (Feb. 15, 2006 email from L. Fox to J. Kindler); Dec. 8, 2014 Petrosinelli Decl. Ex. Q-8 (PFE-JONES 00047104) (Feb. 16, 2006 email from L. Fox to J. Kindler); Oct. 30, 2014 Petrosinelli Decl. Ex. I-5 (PFE-JONES 00032806) (Feb. 17, 2006 email from L. Fox to E. Riso at KPMG NYHQ).

perspective while securities lawyers—Mr. Buthusiem and Sebastian Sperber of Clearly Gottlieb Steen & Hamilton LLP, neither of whom had any criminal law experience—advised GSK on how to adequately disclose its legal proceedings in its public filings.<sup>162</sup>

94. GSK retained some of the same lawyers who advised and defended Pfizer in the Bextra investigation, such as Ethan Posner at Covington & Burling and Brien O'Connor at Ropes & Gray, to conduct internal investigations and respond to the government.<sup>163</sup>

95. As Mr. Buthusiem explained, GSK relied on inside and outside disclosure counsel for securities disclosure advice.<sup>164</sup> Mr. Buthusiem acknowledged that he is “not a criminal lawyer,”<sup>165</sup> and that his company’s outside disclosure counsel was a securities lawyer—not a specialist in criminal law, antitrust, intellectual property, products liability, or environmental matters.<sup>166</sup> Mr. Buthusiem explained that, to provide informed disclosure advice, disclosure counsel received the relevant information from “the internal and external counsels handling the matter.”<sup>167</sup> Mr. Buthusiem, in advising on GSK’s disclosures of its legal proceedings, did not review trial transcripts or exhibits,<sup>168</sup> patent office filings or challenges,<sup>169</sup> or letter requests from the government.<sup>170</sup>

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<sup>162</sup> See Dec. 8, 2014 Petrosinelli Decl. Ex. R-7 (Buthusiem (Aug. 1, 2014) Dep. 84:16-86:3, 355:22-358:24).

<sup>163</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. R-7 (Buthusiem (Aug. 1, 2014) Dep. 84:16-86:3).

<sup>164</sup> See Dec. 8, 2014 Petrosinelli Decl. Ex. R-7 (Buthusiem (Aug. 1, 2014) Dep. 340:8-14, 357:25-358:24, 360:20-361:18).

<sup>165</sup> See Dec. 8, 2014 Petrosinelli Decl. Ex. R-7 (Buthusiem (Aug. 1, 2014) Dep. 231:22-25).

<sup>166</sup> See Dec. 8, 2014 Petrosinelli Decl. Ex. R-7 (Buthusiem (Aug. 1, 2014) Dep. 356:19-359:18).

<sup>167</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. R-7 (Buthusiem (Aug. 1, 2014) Dep. 72:18-21).

<sup>168</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. R-7 (Buthusiem (Aug. 1, 2014) Dep. 70:2-8, 79:4-6, 81:9-12).

<sup>169</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. R-7 (Buthusiem (Aug. 1, 2014) Dep. 74:13-15).

<sup>170</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. R-7 (Buthusiem (Aug. 1, 2014) Dep. 82:24-83:3).

96. Mr. Buthusiem agreed, notwithstanding the fact that he relied upon other counsel to keep him informed about GSK's legal proceedings, 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 in the fact that a lawyer such as [him]self" and "outside disclosure counsel" both reviewed and approved the disclosures.<sup>171</sup>

**II. Defendants Kept Messrs. Fox and Block Informed of All Material Facts So They Could Provide Informed Disclosure Advice to the Company.**

97. To render their advice on the company's disclosures, Messrs. Fox and Block obtained information on all of the company's pending legal proceedings from the in-house litigation counsel responsible for overseeing those matters.<sup>172</sup> With regard to government investigations in particular, Messrs. Fox and Block participated in quarterly and *ad hoc* update meetings or calls with Pfizer's in-house government investigations counsel and occasionally communicated with outside government investigations counsel.<sup>173</sup>

98. Mr. Fox confirmed that he and Mr. Block were provided all information they needed to give informed disclosure advice:

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.<sup>174</sup>

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<sup>171</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. R-7 (Buthusiem (Aug. 1, 2014) Dep. 63:21-64:16).

<sup>172</sup> SUF ¶¶ 7-10, 70, 76, 90, 94, 99, 108-109.

<sup>173</sup> SUF ¶¶ 7-10, 70, 76, 90, 94, 99, 108-109; Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 94:8-13, 186:10-17); Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 47:2-19, 54:23-55:10, 58:14-59:13, 138:9-21, 198:1-199:14).

<sup>174</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 168:19-25).



Mr. Fox also testified that he “certainly believed, and it was an informed belief, that our disclosures were complete and accurate to the extent required by the securities laws.”<sup>175</sup>

99. Pfizer leadership directed all counsel, both in-house and outside, to provide disclosure counsel with all relevant information.<sup>176</sup> 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.”<sup>177</sup> Mr. Waxman “direct[ed] the team to provide Mr. Fox, Mr. Block with materials they needed to do their jobs.”<sup>178</sup> Mr. Waxman testified that 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.”<sup>179</sup>

100. Disclosure counsel confirmed that they received access to all of the information they requested in order to be able to render informed disclosure advice.<sup>180</sup>

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<sup>175</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 89:12-16).

<sup>176</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. B-2 (Kindler (Dec. 6, 2013) Dep. 118:4-6); Oct. 30, 2014 Petrosinelli Decl. Ex. G-2 (Levin (Sept. 23, 2014) Dep. 37:1-3).

<sup>177</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. C-2 (Kindler (Oct. 10, 2014) Dep. 43:16-21).

<sup>178</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. I-8 (Waxman (Nov. 14, 2013) Dep. 195:16-21).

<sup>179</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. R-2 (Waxman (Nov. 14, 2013) Dep. 137:12-20); *see also id.* at 136:4-16 (“[Mr. Fox] asked any questions he wanted . . . . If he wanted to talk to our outside counsel, talk to our outside counsel.”); Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 Fox (Sept. 26, 2013) Dep. 186:12-17) (noting Ethan Posner “was on some of those calls” with Mr. Fox and Mr. Block).

<sup>180</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 163:6-14) (purpose of calls was “to make sure that Dennis and I were provided with the information that we need to make informed disclosure decisions, . . . to ask [government investigations counsel] questions, have a back and forth and, at the end of the day, be comfortable that we were in a position to make an informed judgment on disclosure implications”); *see also id.* at 164:4-9 (Messrs. Fox and Block asked questions “to make sure that [government investigations counsel] were giving us the information that we, as securities lawyers,

101. Throughout the course of the Bextra investigation, Messrs. Block and Fox were kept abreast of its status, including the government's theories and core allegations against Pfizer.<sup>181</sup>

102. Disclosure counsel learned that the company's internal investigation had found some instances of Bextra marketing conduct that violated Pfizer's policies.<sup>182</sup> Mr. Fox testified that Pfizer self-reporting the actions of its "rogue employees" was "a far cry from saying that supports a government case" that "essentially was suggesting that this was pervasive and perhaps even run by senior executives at headquarters," and "the fact that there were, that we self-reported and that I knew of isolated incidents of off-label promotion does not mean that we did not have substantial defenses to this matter. We did have substantial defenses."<sup>183</sup>

103. As for call notes, 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."<sup>184</sup>

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felt that we needed to make an informed judgment with respect to disclosure implications"), 164:10-15 ("Q. Did you always feel . . . that you had the information that you needed to provide advice regarding the securities disclosures? . . . A. Yes."); Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 198:21-199:14) ("Where there was an open issue or they had a question, they would drag in one of the outside people who could fill in the gap. So we had a pretty good understanding from those chaps as to what was transpiring.").

<sup>181</sup> SUF ¶ 9; Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 74:1-8, 110:7-18).

<sup>182</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 63:9-13, 65:5-13, 66:16-22, 69:3-22).

<sup>183</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 69:9-22).

<sup>184</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 60:7-16).

104. Multiple witnesses testified that “what was written in the call notes by the sales reps was sometimes very vague” and thus “it is very hard for an independent person to look at those call notes and . . . make a good conclusion on what’s going on here.”<sup>185</sup>

105. Defendant’s own proffered compliance expert, Kevin O’Brien, described call notes as “cryptic version[s]” of “what took place in conjunction with the detailing.”<sup>186</sup>

106. In the November 2007 white paper, Pfizer’s government investigations counsel concluded that less than 0.1% (that is, one out of every thousand) of the call notes “could even potentially be understood to have explicitly positioned Bextra for the treatment of acute pain,”<sup>187</sup> and that figure likely overstated the number of call notes with which the government reasonably could take issue, since it “failed to account for entirely innocuous call notes” that were flagged simply for having a term like “acute” somewhere in the note.<sup>188</sup>

107. Messrs. Block and Fox were also aware that a Pfizer sales employee had attempted to destroy documents relating to Bextra and that Pfizer had self-reported that individual to the government.<sup>189</sup>

108. Disclosure counsel were aware of the threat of exclusion from federal government programs upon a conviction. As Mr. Block testified, “everybody understands and the analysts were quick to point out that [exclusion] [i]s a remedy the government has. I mean, that’s the

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<sup>185</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. C-8 (Mooney (May 31, 2013) Dep. 158:11-16, 229:14-230:2); *see also* Dec. 8, 2014 Petrosinelli Decl. Ex. V-7 (Donnelly (Aug. 14, 2013) Dep. 144:1-10, 158:18-159:3, 278:21-279:2); Dec. 8, 2014 Petrosinelli Decl. Ex. Z-7 (Lankler (Jan. 22, 2014) Dep. 116:24-117:3).

<sup>186</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. D-8 (O’Brien (July 25, 2014) Dep. 20:24-21:2).

<sup>187</sup> *See* Oct. 30, 2014 Petrosinelli Decl. Ex. C-4 (KPMG-PFIZ-DS 033924 at 033956) (Nov. 28, 2007 Covington & Burling brief).

<sup>188</sup> *See* Oct. 30, 2014 Petrosinelli Decl. Ex. C-4 (KPMG-PFIZ-DS 033924 at 033957-58) (Nov. 28, 2007 Covington & Burling brief).

<sup>189</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 49:9-15); Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 58:14-60:1); Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 228:8-24).

law.”<sup>190</sup> Mr. Block further testified that exclusion “clearly . . . was a risk of fighting the case,” and the influence of the threat of exclusion on negotiations was “implicit” because “everybody understood that the government has enormous power.”<sup>191</sup>

109. Upon receipt of a number of unsealed qui tam complaints in April 2008, Mr. Lankler directed Mr. Wessel to “make sure that Dennis remains comfortable with our disclosures on these? Now that they are being unsealed, do we need to have more disclosure?”<sup>192</sup> Only days later, Mr. Block provided his customary handwritten edits of the Legal Proceedings disclosure to Mr. Fox, which contained no suggested addition to address the qui tam complaints but raised the question of whether it would be helpful to include a statement that the company’s efforts to resolve the investigation were ongoing.<sup>193</sup>

110. As to the purported gain alleged by the government, government investigations counsel informed Messrs. Block and Fox that, in the company’s and their estimation, the government “couldn’t prove a dollar’s worth of . . . sales related to . . . off-label marketing.”<sup>194</sup> Disclosure counsel were both aware of the fact that the government had proposed a novel damages theory, which no court had then or has since accepted in similar cases, and that Pfizer

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<sup>190</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 183:14-20).

<sup>191</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 176:19-177:7).

<sup>192</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. O-8 (PFE-JONES 00047135) (Apr. 11, 2008 email from D. Lankler to C. Wessel).

<sup>193</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. N-8 (PFE-JONES 00045945) (Apr. 14, 2008 email from D. Block to L. Fox attaching handwritten comments by D. Block).

<sup>194</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 68:12-18); *see also id.* at 88:9-15 (“[T]hey didn’t believe damages—to the extent there was a case or to the extent they wanted to resolve it, that the damages were very significant.”); Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 226:18-24, 227:8-21).

had responded in a letter explaining that the theory was, in Mr. Block's words, "absurd."<sup>195</sup> Disclosure counsel both received a copy of that October 2007 letter.<sup>196</sup>

111. Certain of the individual Defendants had no direct involvement in the process of updating disclosure counsel and relied on the process the company had put in place to produce its disclosures to ensure that disclosure counsel were kept adequately informed.<sup>197</sup> Even the individual Defendants with legal backgrounds were executives within the company and delegated to others the task of meeting with and updating disclosure counsel.<sup>198</sup> The individual Defendants understood that disclosure counsel "had access to any and all information that they required to make their judgments," even if certain individual defendants were not always "a participant in those meetings" between disclosure counsel and government investigations counsel.<sup>199</sup>

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<sup>195</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 122:16-123:13); Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Fox (Sept. 26, 2013) Dep. 199:23-200:7).

<sup>196</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. P-8 (PFE-JONES 00059184) (Apr. 9, 2008 email from C. Wessel to D. Block and L. Fox attaching Oct. 1, 2007 letter from Covington & Burling to AUSA S. Bloom); Oct. 30, 2014 Petrosinelli Decl. Ex. B-6 (PFE-JONES 00059186) (Oct. 1, 2007 letter from Covington & Burling to AUSA S. Bloom).

<sup>197</sup> See Oct. 30, 2014 Petrosinelli Decl. Ex. G-2 (Levin (Sept. 23, 2014) Dep., 36:17-37:3); Dec. 8, 2014 Petrosinelli Decl. Ex. A-8 (Levin (Sept. 23, 2014) Dep. 24:21-25:3); Oct. 30, 2014 Petrosinelli Decl. Ex. U-1 (D'Amelio (Dec. 4, 2013) Dep. 184:13-25, 208:8-16); Dec. 8, 2014 Petrosinelli Decl. Ex. U-7 (D'Amelio (Dec. 4, 2013) Dep. 257:4-12); Oct. 30, 2014 Petrosinelli Decl. Ex. N-2 (Read (Nov. 20, 2013) Dep. 328:25-331:6); Dec. 8, 2014 Petrosinelli Decl. Ex. B-8 (McKinnell (Nov. 11, 2013) Dep. 100:24-101:17); Oct. 30, 2014 Petrosinelli Decl. Ex. I-2 (McKinnell (Sept. 19, 2014) Dep. 28:20-29:24).

<sup>198</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. B-2 (Kindler (Dec. 6, 2013) Dep. 117:24-118:6); Oct. 30, 2014 Petrosinelli Decl. Ex. C-2 (Kindler (Oct. 10, 2014) Dep. 52:1-22); Oct. 30, 2014 Petrosinelli Decl. Ex. R-2 (Waxman (Nov. 14, 2013) Dep. 30:6-18).

<sup>199</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. B-2 (Kindler (Dec. 6, 2013) Dep. 117:24-118:6); *see also* Oct. 30, 2014 Petrosinelli Decl. Ex. C-2 (Kindler (Oct. 10, 2014) Dep. 52:1-22).

**III. Defendants Also Kept Pfizer’s Outside Auditor, KPMG, Informed About the Status of the Government Investigations, So That KPMG Could Render Its Independent Opinion on the Company’s Reserves.**

112. All relevant witnesses testified to Defendants’ reliance on KPMG to independently assess the company’s reserves.<sup>200</sup>

113. KPMG received information on the Bextra 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;<sup>201</sup> Covington & Burling’s internal investigation workplan;<sup>202</sup> the 75-page white paper Covington presented to the government detailing the company’s substantial defenses, along with another defense memorandum;<sup>203</sup> and the audit response letters Covington sent to KPMG concluding that a loss from the Bextra investigation was not “probable.”<sup>204</sup> KPMG, like disclosure counsel, participated in quarterly and *ad hoc* conference calls or meetings with government investigations counsel in order to receive updates on the status of the investigation.<sup>205</sup>

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<sup>200</sup> SUF ¶ 83; *see also* Oct. 30, 2014 Petrosinelli Decl. Ex. H-2 (McKinnell (Nov. 11, 2013) Dep. 238:10-19) (identifying the “Controller’s department,” the company’s CFO, “and the external accountants at KPMG, our independent auditors,” along with legal staff as the parties evaluating the reserves); Dec. 8, 2014 Petrosinelli Decl. Ex. X-7 (Kindler (Dec. 6, 2013) Dep. 222:25-226:11) (“[T]he internal accounting function, the controller, Loretta Cangialosi, and the external accountants, KPMG, . . . together with Mr. Block, would evaluate that question based on the facts and circumstances obtaining at that moment in time . . . and would make their best judgment.”).

<sup>201</sup> *See, e.g.*, SUF ¶¶ 51, 53, 70, 71, 73, 76.

<sup>202</sup> Pls’ Ex. 59.

<sup>203</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. B-5 (KPMG-PFIZ-DS 033897 at 033913) (Nov. 28, 2007 letter from E. Posner to S. Bloom); Oct. 30, 2014 Petrosinelli Decl. Ex. C-4 (KPMG-PFIZ-DS 033924) (Nov. 28, 2007 Covington & Burling brief).

<sup>204</sup> SUF ¶¶ 42, 79.

<sup>205</sup> SUF ¶¶ 7, 32-33.

114. As Dr. McKinnell testified, “KPMG was told that there were possible violations of law, that we had defenses, that we had done what good companies do, which is we investigated, we remediated and reported our findings to the Government.”<sup>206</sup>

115. Mr. Block provided Pfizer with advice regarding the FAS 5 standard and how it applied to the Bextra investigation,<sup>207</sup> and he participated in a number of discussions with Pfizer Finance personnel and KPMG on this subject.<sup>208</sup>

116. 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 appropriate.<sup>209</sup> 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.”<sup>210</sup> Subsequent settlement negotiations failed to produce an agreement for some time and, as late as January 2009, Mr. Block was drafting a memorandum intended for KPMG that summarized Pfizer’s conclusions regarding the reserve: “[T]he uncertainty over whether the matter can be settled and at what amount,” coupled with the fact

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<sup>206</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. H-2 (McKinnell (Nov. 11, 2013) Dep. 232:19-24).

<sup>207</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 35:4-11, 37:18-24).

<sup>208</sup> SUF ¶¶ 40, 43, 80; Dec. 8, 2014 Petrosinelli Decl. Ex. S-8 (PFE-JONES 00047116) (Oct. 16, 2007 email from P. Brockie to D. Lankler); Dec. 8, 2014 Petrosinelli Decl. Ex. R-8 (PFE-JONES 00038257) (Oct. 16, 2007 email from C. Wessel to D. Block); Dec. 8, 2014 Petrosinelli Decl. Ex. T-8 (PFE-JONES 00038218) (Oct. 16, 2007 email from C. Wessel to J. Chapman); Dec. 8, 2014 Petrosinelli Decl. Ex. V-8 (PFE-JONES 00038599) (Oct. 17, 2007 email invitation from B. Hurd to A. Waxman, J. Chapman, D. Block, et al.); Dec. 8, 2014 Petrosinelli Decl. Ex. U-8 (PFE-JONES 00033631) (July 16, 2008 email invitation from P. Brockie to L. Cangialosi, L. Bradley, D. Block, et al.).

<sup>209</sup> SUF ¶¶ 40, 43.

<sup>210</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. S-6 (PFE-JONES 00046661) (Oct. 18, 2007 email from D. Townsend to C. Wessel and attached memorandum regarding Bextra).

that the government had not indicted 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.<sup>211</sup>

**IV. Defendants Put Plaintiffs on Notice of Their Defenses Relating to Advice from Disclosure Counsel and KPMG, and Provided Plaintiffs All Discovery To Which They Were Entitled Concerning These Subjects.**

117. During the discovery process, Defendants and Plaintiffs negotiated (at Plaintiffs’ request) a limited waiver of Pfizer’s attorney-client privilege as to the legal advice it received regarding its legal proceedings disclosures concerning the government investigations. Consistent with the parties’ agreement, the Court entered an order that stated, in relevant part:

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.<sup>212</sup>

118. Pfizer produced more than 7,000 pages of documents pursuant to this Order.<sup>213</sup>

119. Pfizer permitted deposition questioning of its lawyers on the otherwise-privileged topic of communications between the government investigations lawyers and disclosure counsel.<sup>214</sup>

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<sup>211</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. G-5 (PFE-JONES 00059201 at 00059202) (Jan. 12, 2009 email from D. Block to G. Giampetruzzi and attached memorandum).

<sup>212</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. Y-8 (Rec. Doc. 150) (emphasis added).

<sup>213</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. Z-8 (July 19, 2013 Hr’g Tr. 6:5-8).



120. In September 2011, Plaintiffs subpoenaed documents concerning, *inter alia*, KPMG's advice and assessment of Pfizer's "litigation reserve or accrual for litigation."<sup>215</sup>

121. Plaintiffs have received documents that both Pfizer lawyers and Pfizer's government investigations counsel provided to KPMG, including:

(a) letters Pfizer provided summarizing its significant legal matters;<sup>216</sup>

(b) Covington & Burling's workplan, which summarized key findings of its internal investigation, including the fact that "HQ directive and training is to promote only on-label";<sup>217</sup>

(c) Covington & Burling's two November 2007 submissions to the government, one a 75-page white paper detailing the company's legal and factual defenses, and the other a memorandum explaining why prosecution of Pfizer was unwarranted under the Department of Justice's "McNulty" guidelines;<sup>218</sup>

(d) Covington & Burling's audit response letters from the Class Period, in which Covington stated that it did not believe that a loss from the Bextra investigation was "probable."<sup>219</sup>

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<sup>214</sup> See Oct. 30, 2014 Petrosinelli Decl. Ex. Y-1 (Fox (Sept. 26, 2013) Dep. 11:21-12:18, 66:25-68:14, 82:10-18, 144:1-12, 204:8-205:16); Dec. 8, 2014 Petrosinelli Decl. Ex. W-7 (Fox (Sept. 26, 2013) Dep. 94:2-13, 186:10-187:4); Oct. 30, 2014 Petrosinelli Decl. Ex. O-1 (Block (Sept. 16, 2013) Dep. 46:8-48:11, 58:14-59:13, , 137:25-138:21); Dec. 8, 2014 Petrosinelli Decl. Ex. P-7 (Block (Sept. 16, 2013) Dep. 66:11-67:10, 74:17-75:12, 195:9-199:14, 202:18-205:3).

<sup>215</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. A-9 (Plaintiffs' Sept. 6, 2011 subpoena to KPMG).

<sup>216</sup> E.g., SUF ¶¶ 51, 53, 70, 71, 73, 76 (citing significant litigation letters).

<sup>217</sup> Pls' Ex. 59, at KPMG-PFIZ-DS 053293.

<sup>218</sup> Oct. 30, 2014 Petrosinelli Decl. Ex. B-5 (KPMG-PFIZ-DS 033897 at 033913) (Nov. 28, 2007 letter from E. Posner to S. Bloom); Oct. 30, 2014 Petrosinelli Decl. Ex. C-4 (KPMG-PFIZ-DS 033924) (Nov. 28, 2007 Covington & Burling brief).

<sup>219</sup> SUF ¶¶ 42, 79.

122. In a December 6, 2012 letter, Plaintiffs noted that “defendants will be asserting reliance on the advice of professionals in this action, including attorneys and accountants,” and identified the advice as concerning, *inter alia*, “disclosure of . . . legal proceedings” and “the adequacy of internal controls and FAS 5 reserves.”<sup>220</sup>

123. On March 8, 2013, Plaintiffs’ counsel 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.”<sup>221</sup>

124. In a March 22, 2013 cover letter accompanying Defendants’ Amended Answer, Defendants’ counsel reiterated to Plaintiffs’ counsel 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.”<sup>222</sup>

125. Plaintiffs have had a full opportunity to question, and have questioned, witnesses on the topic of their reliance upon KPMG.<sup>223</sup>

Date: December 8, 2014

Respectfully submitted,

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<sup>220</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. K-8 (Dec. 6, 2012 letter from W. Radcliffe to S. Farina).

<sup>221</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. B-9 (Mar. 8, 2013 Hr’g Tr. 19:20-23). 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.” Dec. 8, 2014 Petrosinelli Decl. Ex. C-9 (July 7, 2014 Hr’g Tr. 3:23-25).

<sup>222</sup> Dec. 8, 2014 Petrosinelli Decl. Ex. L-8 (March 22, 2013 letter from S. Farina to H. Rosen).

<sup>223</sup> *E.g.*, Oct. 30, 2014 Petrosinelli Decl. Ex. U-1 (D’Amelio (Dec. 4, 2013) Dep. 30:17-20); Dec. 8, 2014 Petrosinelli Decl. Ex. Y-7 (Kindler (Oct. 10, 2014) Dep. 22:23-23:22); Oct. 30, 2014 Petrosinelli Decl. Ex. H-2 (McKinnell (Nov. 11, 2013) Dep. 234:19-238:19); Oct. 30, 2014 Petrosinelli Decl. Ex. F-2 (Levin (Dec. 10, 2013) Dep. 42:24-43:23, 169:18-170:18); Dec. 8, 2014 Petrosinelli Decl. Ex. E-8 (Read (Nov. 20, 2013) Dep. 25:22-27:2).

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**CERTIFICATE OF SERVICE**

I hereby certify that, on this 8th day of December, 2014, the foregoing Defendants' Counterstatement of Material Facts and Reply to Plaintiffs' Statement of Undisputed Facts was filed with the Court through the CM/ECF system and thereby served on all counsel of record.

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**Filer:** Frank D'Amelio  
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