UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY K. JONES, Individually and on Behalf of All Others Similarly Situated, Plaintiff, – v. – PFIZER INC., et al., Defendants.	**Case No. 10-cv-03864 (AKH)** ECF Case

DEFENDANTS' RESPONSE TO PLAINTIFFS' "STATEMENT OF MATERIAL FACTS REQUIRING DENIAL OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT"

Plaintiffs have submitted a 152-page, 472-paragraph "Statement of Material Facts Requiring Denial of Defendants' Motions for Summary Judgment" ("Plaintiffs' Statement") that attaches over 500 exhibits, a significant number of which they do not actually cite in their briefing. (Dkt. No. 303.) Their apparent goal is to overwhelm the Court with supposedly material facts and other information, and to give the appearance that because of the large volume of paper, there must be some important facts in dispute. There are not. None of Plaintiffs' alleged "facts" are germane to the Court's analysis. The facts that matter are addressed in Defendants' motions and replies in support thereof. Those undisputed facts demonstrate that Defendants are entitled to summary judgment.

Plaintiffs' Statement plainly is not "short and concise" as required by Local Civil

Rule 56.1(b). Rather than succinctly identifying "genuine" factual issues for the Court, Plaintiffs have filed a bloated morass that includes numerous statements repeated verbatim multiple times throughout the document.[1] The Court can and should disregard Plaintiffs' Statement on this ground alone. *See Union Carbide Corp. v. Montell N.V.*, 179 F.R.D. 425, 428 (S.D.N.Y. 1998) (declining to consider statement of additional facts that included 459 exhibits because of its "outrageous length" and because it "set[] forth a detailed account of defendants' alleged conduct" rather than "a short and concise statement of *facts*").

Because none of Plaintiffs' alleged "facts" raise genuine disputed issues that are material to Defendants' summary judgment motions, Defendants do not intend to address Plaintiffs' 472 paragraphs one by one; no such response is required under Fed. R. Civ. P. 56 or Local Rule 56.1. This is not to say that Defendants agree with Plaintiffs' descriptions of documents or testimony; to the contrary, Plaintiffs' Statement is littered with mischaracterizations of the record.

To give just one example, Plaintiffs highlight in their Opposition seven times a March 2006 slide deck from Pfizer's Corporate Internal Audit group. *See* Opp. 5, 15, 26, 31, 42, 45, 111 (referencing Rosen Decl. Ex. 105). Citing their Statement, they suggest this document is somehow related to "the DOJ investigation," and that the document suggests that Pfizer "concluded that it was 'almost certain' that it would engage in unlawful off-label promotion" and "Pfizer acknowledged at the outset of the Class Period what impact its illegal off-label

[1] *Compare* Plaintiffs' Statement ¶ 67 ("The Government's repeated threat to charge Pfizer with off-label promotion was a 'powerful threat given the way the exclusion rules work' and that 'people who are wise and reasonably conservative, don't, you know, expose all of the constituents, the stakeholders of a company the size of Pfizer to ruin [from exclusion] if it can be avoided.'") *with* ¶ 143 (same); *compare id.* ¶ 127 ("In late fall 2004, Pfizer and its Investigation Counsel learned that the internal documents that Farina had instructed his subordinates to delete or alter included surgical protocols and instruction sheets as well as a Plan of Action ('POA') guide that included the following goals: '[g]et Bextra added to hospital formularies . . . for use in the acute, peri-operative setting with the overall goal of getting the patient to remain on Bextra long term,' and '[g]et Bextra added to pre-op briefing sheets in other surgical subspecialties – podiatry, general surgery, plastic surgery, ENT, etc.'") *with* ¶ 436 (same).

promotional activities would have on the Company," including "a greater than $1.0 billion impact on profitability." *Id.* at 31.

This document says nothing of the sort. For one thing, it has ***nothing*** to do with the Department of Justice investigation, or Bextra, or any of the other products at issue in this case. On its face, it is a general and proactive (not reactive) "Risk Inventory & Analysis" that Pfizer's Corporate Internal Audit group prepared in determining what areas of the company to audit in the coming year. It identifies a number of obvious risks areas for any large pharmaceutical company, including company employees "participating in off-label promotion, both intentionally ***and unintentionally***." *See* Rosen Decl. Ex. 105 at PFE DERIV 01002348 (emphasis added). Of course, unintentional off-label promotion is not "illegal."

Moreover, the "greater than $1.0 billion impact" language refers not to any particular product, but rather is a general statement that *if* off-label promotion occurs, on a large enough scale, it *could* have that type of large financial impact. *Id.* at PFE DERIV 01002341. This has ***nothing*** to do with the issue here, which is whether Pfizer believed in 2006 that the Department of Justice Bextra investigation in particular would result in such a large financial penalty, such that for FAS 5 purposes the loss could be deemed "reasonably estimable" and a reserve taken. The record is undisputed that Pfizer did not so believe, and that its independent auditors at KPMG agreed. Indeed, Plaintiffs did not ask a single witness who had anything to do with Pfizer's reserving judgments—including three partners from KPMG, two CFOs, the Controller, and outside counsel—about this document they rely upon to argue that Pfizer's FAS 5 judgments were wrong. Plaintiffs' mischaracterization of this document cannot create a genuine dispute of fact on that issue.

To the extent that any of Plaintiffs' alleged "facts" are actually relevant to the motions, Defendants have addressed them in their reply memoranda and Defendants' Counterstatement of Material Facts and Reply to Plaintiffs' Statement of Undisputed Facts. Defendants expressly reserve all rights to contest Plaintiffs' characterization of and/or the admissibility of documents and other material cited in Plaintiffs' Statement, and expressly reserve all rights to further contest any or all aspects of Plaintiffs' submissions in opposition to Defendants' motion for summary judgment.

Dated: Washington, DC
Date: December 8, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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